

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Brionté McCorkle, et al.,

Plaintiffs,

vs.

Brad Raffensperger, in his
official capacity as Secretary of
State of the State of Georgia,

Defendant.

Case No. 1:24-cv-3137-WMR

**Plaintiffs' Reply in
Support of Their Motion
for a Preliminary
Injunction**

Plaintiffs Brionté McCorkle, the Georgia Conservation Voters Education Fund, Inc., and the Georgia WAND Education Fund, Inc., (collectively, "McCorkle") respectfully submit this reply in support of their motion for a preliminary injunction. (ECF 2.) The main thrust of the Secretary's opposition is that House Bill 1312 is good policy. He contends that House Bill 1312 fixes "the disruption" caused by litigation over the Public Service Commission and would provide "cost savings" for the state. (*Id.* at 11, 16.) As a result, he argues that "substantial state

interests' require this Court to uphold [House Bill 1312]" even if it violates the state constitution. (*Id.* at 16 (quoting *Curry v. Baker*, 802 F.2d 1302, 1317 (11th Cir. 1986))). But good policy doesn't authorize the Secretary to violate the Georgia Constitution, and none of the Secretary's other arguments have any merit.

I. McCorkle has standing.

The Secretary first argues that this Court should deny a preliminary injunction because McCorkle lacks standing. (ECF 13 at 12-13.) He "incorporate[s] by reference" the arguments contained on pages 7 through 14 of his brief in support of his motion to dismiss. (ECF 12-1 at 7-14.) Doing so is improper, however, because those seven pages would make his 25-page response here exceed the page limits. *See Davis v. DeKalb Cnty., Georgia*, 2005 WL 8154356, at *2 n.3 (N.D. Ga. May 31, 2005) ("[I]ncorporation by reference of arguments made in other briefs ... circumvents the page limitations imposed by the Local Rules of this district."). The Court should therefore ignore the Secretary's standing argument.

If the Court nonetheless wants to consider the Secretary's argument, McCorkle incorporates her response to that argument here. (ECF 14 at 2-6.)

II. *Gonzalez* and *Duncan* are dispositive on the merits.

The Secretary next argues that the Court should deny an injunction because McCorkle is unlikely to succeed on the merits of her claim. (ECF 13 at 13-20.) His argument has three parts. First, he argues that House Bill 1312 is a constitutional exercise of the General Assembly's constitutional power to provide for the "manner and time" of elections for the PSC. (ECF 13 at 13-16.) Second, he argues that House Bill 1312 is constitutional because it only delays elections and doesn't deny them. (*Id.* at 16-18.) Third, he argues that *Duncan* and *Gonzalez* don't apply to House Bill 1312 because both cases involved vacancies for the offices at issue. (*Id.* at 19-20.) All these arguments are inconsistent with *Gonzalez* and *Duncan*.

A. House Bill 1312 is not a valid "manner and time" statute.

The Secretary concedes that the Georgia Constitution mandates six-year terms for members of the PSC. (ECF 13 at 14.) He doesn't dispute that House Bill 1312 extends those terms for all members by at

least one year and shortens the subsequent term of the next commissioners elected from District 2 and District 3. (*Id.* at 7.) But he argues that House Bill 1312 is a constitutional exercise of the General Assembly’s power to provide for the “time and manner” of elections for the PSC because of the “unusual circumstances” present here. (*Id.* at 14.)

Not so. Unusual circumstances don’t give the General Assembly more power than the Constitution gives it. Article IV, Section I, Paragraph 1(a) of the Georgia Constitution limits the term of PSC members to six years. Construing the power to set the “manner and time” of PSC elections in Article IV, Section I, Paragraph 1(c) to include the power to lengthen and shorten PSC terms would render Paragraph 1(c) in conflict with Paragraph 1(a) and violate the canon that legal texts should be construed in harmony. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012) (discussing the “harmonious-reading canon,” according to which “[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory”); *see also State v. Hudson*, 303 Ga. 348, 354 n.7 (2020) (discussing the harmonious-reading canon).

Nor are there any circumstances here that could not have been addressed by existing Georgia law. When Judge Grimberg enjoined the Secretary from conducting PSC elections using the at-large method of election in August 2022, the General Assembly could have adopted an alternative method of election that would have allowed elections to go forward while the State appealed. But it chose not to do so. After the Eleventh Circuit reversed Judge Grimberg in November 2023, the Secretary could have asked the court to stay the injunction while the plaintiffs sought a writ of certiorari. But he chose not to do so. When the Eleventh Circuit stayed Judge Grimberg's injunction on its own motion on April 16, 2024, there was nothing stopping the Secretary calling a special election for three commissioners under O.C.G.A. § 21-2-504(a) because the 2022 and 2024 elections had "fail[ed] to fill" them as required by Georgia law. Then the Governor signed House Bill 1312 two days later, and it became effective immediately.

The General Assembly may believe that it isn't a good idea for three PSC seats to be on the ballot during a presidential election right after the largest electricity rate increase in United States history. Perhaps cost savings are also an issue. But these considerations are

irrelevant because the General Assembly's power to set the "manner and time" of PSC elections didn't give it the power to lengthen and shorten the terms set out in the Constitution.

B. A vote delayed is a vote denied.

The Secretary concedes, as he must, that *Duncan* held that "the disenfranchisement of a state electorate in violation of state election law" violates the Due Process Clause. (ECF 13 at 16-17 (quoting *Duncan*, 657 F.2d at 699).) Even so, he argues that House Bill 1312 doesn't violate the Due Process Clause "because it involves *when* elections will be held for *particular* seats on the PSC after an injunction canceled elections—not whether those elections will be held at all." (ECF 13 at 18.) In other words, the Secretary is trying to distinguish *Duncan* on the ground that House Bill 1312 delays elections but doesn't disenfranchise voters.

But this is a distinction without a difference. Both *Duncan* and *Gonzalez* involved delayed elections. In *Duncan*, the Secretary of State's refusal to call a special election to fill a position on the Georgia Supreme Court did not mean that no election would be held. It meant only that the election to fill the position would be delayed from 1981 to 1982. 657

F.2d at 707 n.7. In *Gonzalez*, the Secretary of State's cancellation of the 2020 election for the district attorney of the Western Judicial Circuit meant only that the election would be delayed until 2022. 978 F.3d at 1269. And in both cases, the courts held that delaying the elections disenfranchised the voters in violation of the Due Process Clause.

So too here. Delaying elections for three seats on the PSC from 2024 until 2025 and 2026, as House Bill 1312 does, denies Georgia voters their right under Georgia law to vote for those seats in 2024. Under *Duncan* and *Gonzalez*, that violates Due Process.

C. A vacancy isn't the only event that can trigger the need for a special election under Georgia law.

Lastly, the Secretary tries to distinguish *Duncan* and *Gonzalez* on the ground that those cases involved vacancies in the offices at issue. (ECF 13 at 19-20.) But that, too, is a distinction without a difference.

Duncan and *Gonzalez* are cases about the failure to hold elections when required by state law. While McCorkle agrees with the Secretary that there are no vacancies on the Public Service Commission, a vacancy isn't the only event that can trigger the Secretary's obligation under state law to call a special election. Another such event is a failed election:

Whenever any primary or election shall fail to fill a particular nomination or office and such failure cannot be cured by a run-off primary or election, . . . the authority with whom the candidates for such nomination or office file notice of candidacy shall call a special primary or election to fill such position.

O.C.G.A. § 21-2-504(a).¹ An election might fail to fill a nomination or office because of a natural disaster or similar event. *See, e.g.*, Richard H. Pildes, *State Legislatures Threaten Fair Elections*, N.Y. Times, Dec. 11, 2020, at A27 (discussing the failed-elections provision in the now-repealed version of the Electoral Count Act). Or an election might fail to fill a nomination or office because the Secretary of State removed the office from the ballot in compliance with a federal injunction.

Here, the Secretary's obligation to call a special election for PSC commissioners from Districts 2, 3, and 5 arises because the 2022 and 2024 elections "fail[ed] to fill" those offices as required by Georgia law. O.C.G.A. § 21-2-504(a). No vacancy is required. As in *Duncan* and

¹ The Secretary suggests in a footnote that Section 504(a) "only requires special primaries or elections when there are vacancies in offices or candidates die or withdraw before taking office." (ECF 13 at 15 n.3.) But he offers no authority for that interpretation, which is at odds with the plain text of the subsection's first clause pertaining to failed elections.

Gonzalez, the Secretary's failure to hold elections when required by Georgia law violates Due Process.

III. The remaining factors favor an injunction.

The Secretary next argues that the Court should deny an injunction because McCorkle can't establish irreparable harm and because the balance of equities and public interest don't weigh in her favor. (ECF 13 at 20-23.) But these arguments also lack merit.

Gonzalez forecloses the Secretary's argument that "having to vote on different races than you wish" is not irreparable injury. (*Id.* at 21.) There, as here, the State argued that failing to call a special election deprived no one of the right to vote. 978 F.3d at 1272. But the Eleventh Circuit rejected that argument, holding that "missing the opportunity to vote in an election is an irreparable harm for purposes of a preliminary injunction." *Id.* (quoting *Jones v. Governor of Fla.*, 950 F.3d 795, 828 (11th Cir. 2020)). And because the law at issue there deprived Gonzalez of her right to vote for district attorney in the 2020 election, the court held that she had established irreparable harm.

The same is true here. House Bill 1312 has deprived McCorkle of the right to vote for commissioners from Districts 2, 3, and 5 in elections

to be held in 2024 or 2025. It deprives her of the opportunity to vote for commissioners from Districts 1 and 4 in 2026. And it compounds those injuries in perpetuity by re-staggering every PSC election that follows according to a cycle that doesn't follow the term set out in the Constitution. *See Kemp v. Gonzalez*, 310 Ga. 104, 108-09 (2020) (holding that “the timing of the election for a successor to an office is tied to the specific term for the office as measured by the Constitution.”). That constitutes irreparable harm.

As to the balance of equities and public interest, the Secretary relies on “the state’s interest in ensuring that members of the commission are elected in staggered elections and serve staggered terms” as set out in the text of House Bill 1312. O.C.G.A. § 46-2-1.1(a). He claims that the requested injunction would undermine this interest, which outweighs McCorkle’s right to vote. (ECF 13 at 22-23.).

The problems with the Secretary’s argument are three. First, an injunction against House Bill 1312 would not un-stagger PSC elections. They would remain staggered as required by preexisting Georgia law. Second, the Secretary has identified no authority for his assertion that the State’s asserted interest in a particular stagger carries substantial

weight. It's a policy choice, to be sure, but nothing suggests that it's a policy choice entitled to any significant weight. And third, *Gonzalez* recognizes a "significant interest" on the other side of the ledger: the right to vote. 978 F.3d at 1272-73 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country" than the right to vote)). Just as in *Gonzalez*, the balance of equities favors McCorkle here.

IV. The *Purcell* principle has no application here.

Finally, the Secretary argues that the Court should "decline to enter the requested injunction because it does not comply with the *Purcell* Principle." (ECF 13 at 23.) That principle, which takes its name from the Supreme Court's decision in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), holds that "lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Committee v. Democratic Nat'l Committee*, 589 U.S. 423, 424 (2020) (per curiam). But that principle has no application here for at least two reasons.

First, under House Bill 1312, the next PSC elections aren't scheduled until May 2025. That date is still many months away, and the

Secretary offers no evidence that it is already too late to alter the rules of that election without creating the kind of voter confusion that the *Purcell* principle aims to avoid. He doesn't even suggest that it is.

Second, the Secretary mischaracterizes the "requested injunction." (ECF 13 at 23.) McCorkle has asked the Court to enter an injunction "prohibiting the Georgia Secretary of State from enforcing House Bill 1312 . . . and requiring him to call a special primary and general election to fill the seats of Commissioners from Districts 2, 3, and 5 as soon as practicable." (ECF 2 at 1-2.) She has not asked this Court to alter the rules of the 2024 general election.

The Secretary points to the written testimony of Blake Evans that it is no longer feasible to have "a special election for PSC positions to be held in conjunction with the general election or general election runoff in 2024." (ECF 13-1 ¶ 5.) But this untested testimony is largely beside the point, because it doesn't help explain the practicability of holding PSC elections before May 2025 or of holding elections for three seats in May

2025 rather than the two that would be on the ballot under House Bill 1312.²

There is also reason to doubt Mr. Evans' testimony here. He claims, for instance, that a special election for the PSC in conjunction with the general election or general runoff is infeasible because it would require "different check-in equipment, different voting machines, and different poll workers." (ECF 13-1 ¶ 8.) But that would violate state law, which authorizes special primaries and special elections to be held at the time of a general election and requires that any such election be conducted using "the same" equipment and poll workers. O.C.G.A. § 21-2-540(a)(1); *see also* O.C.G.A. § 21-2-541 ("A special primary or election may be held at the time of a general primary or election."). And Mr. Evans identifies no other reason why holding a special PSC election in

² The Secretary assured the district court in earlier litigation over the PSC that a ruling by August 12 would pose no *Purcell* problem for the 2022 elections. *See Rose v. Raffensperger*, No. 1:20-cv-2921-SDG, ECF 144 ¶ 266. Here, McCorkle filed her motion for a preliminary injunction and sought expedited consideration well before August 12. In ongoing litigation over the qualifications of several independent presidential candidates this year, the Secretary has assured the Office of State Administrative Hearings that it needs to resolve the status of those candidates by September 12.

conjunction with the general election or general runoff would be infeasible.

State law requires only 29 days between the call of a special election and the holding of the same. *See* O.C.G.A. § 21-2-540(b). There remain 71 days before the general election and 99 days before the general runoff. If it is infeasible to hold a special primary or special election for the PSC in conjunction with one or both of those elections, that isn't apparent from Mr. Evans' testimony. Nor is there anything else in the record to suggest that it would be infeasible to hold PSC elections at all before May 2025.³ All McCorkle asks is for PSC elections to resume under Georgia law as soon as practicable.

³ A recent example illustrates the normal timing of special elections in Georgia. *See* <https://sos.ga.gov/news/call-special-election-hd-125>. Georgia Representative Barry Fleming was appointed to the Superior Court on December 28, 2023. Seven days later, on January 4, the Secretary called a special election to fill the vacancy. The election was to be held on February 13, forty days after the call. A runoff, if necessary, was called for March 12.

Respectfully submitted this 26th day of August, 2024.

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