No. 22-12593

In the

# United States Court of Appeals

## for the Eleventh Circuit

RICHARD ROSE, BRIONTÉ MCCORKLE, WANDA MOSLEY, and JAMES WOODALL,

*Plaintiffs-Appellees*,

v.

BRAD RAFFENSPERGER,
in his official capacity as Secretary of State of Georgia,

*Defendant-Appellant*.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.
No. 1:20-cv-02921-SDG — Steven D. Grimberg, *Judge*



**REPLY IN SUPPORT OF EMERGENCY MOTION TO STAY INJUNCTION PENDING APPEAL**

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## CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-2(c), counsel for Defendant-Appellant hereby certifies that the Certificate of Interested Persons contained in his August 8, 2022 Motion and supplemented by the individuals contained in the Appellees' August 10, 2022 Response is complete.

Respectfully submitted this 11th day of August, 2022.

*/s/ Bryan P. Tyson*
Bryan P. Tyson

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## REPLY IN SUPPORT OF EMERGENCY MOTION TO STAY INJUNCTION PENDING APPEAL

## INTRODUCTION

In their Response to the Secretary's motion, Plaintiffs do not dispute the sweeping nature of the relief ordered by the district court or its impact on the Public Service Commission. Instead, they focus on procedural arguments and claim that the Secretary cannot prevail on the merits.

As discussed below, the Secretary was not required to first seek relief at the district court, has not moved for relief based on the *Purcell*

doctrine but on the merits, and is likely to prevail on the appeal given the issues involved. This Court should grant the Secretary's motion.

## STATEMENT

### A. Response to Background.

The Secretary does not dispute the facts as stated by Plaintiffs with two caveats. First, the Secretary has not alleged here or in any other context that *Purcell* bars the relief the district court ordered because of the impossibility or difficulty of making changes to the ballots for November. That is exactly why the Secretary sought the relief from this Court on the timeline he did—because the Secretary must know what information to include on the November ballots on August 12, 2022, just as he has consistently represented to the district court. Removing elections from the ballot is far easier than other tasks related to the administration of elections. As a result, this appeal is based on the merits of the district court's ruling, not the impossibility of implementing the district court's relief, and the Secretary has consistently said he would appeal on the merits if unsuccessful, as Plaintiffs acknowledge in their quote from the preliminary-injunction hearing. Response, p. 19.



Second, the district court did not grant the preliminary injunction Plaintiffs sought because they failed to show they were likely to succeed on the merits and because of the lack of irreparable harm. Ex. A, Order

on Preliminary Injunction Motion. Thus, to say the district court relied only on assurances about the nature of an appeal in denying the motion for preliminary injunction is incorrect.

## ARGUMENT

### I. The Secretary's Motion is not procedurally barred.

Plaintiffs criticize the Secretary for not first filing in the district court, citing non-precedential and readily distinguishable cases. Indeed, the Secretary filed the next business day following the district court's ruling and seeks an order from this Court within four business days after a full trial on the merits.



The cases cited by Plaintiffs do not demonstrate that it was practical or possible to seek relief from the district court first. Each of the cases Plaintiffs cite involved much longer periods of time than the timeframe the parties face here. Judge Rosenbaum's concurrence in an unpublished opinion involved a month between the ruling and the relevant election. *People First of Ala. V. Sec'y of State for Ala.*, 815 F. App'x 505, 508 (11th Cir. 2020) (Rosenbaum, J., concurring). Likewise, *Ruiz v. Estelle*, 650 F.2d 555, 566 (5th Cir. 1981) involved a four-month lag and *Whole Woman's Health v. Paxton*, 972 F.3d 649, 653 (5th Cir. 2020) involved a delay of "nearly 1,000 days" from the time of the ruling to the filing of the motion. None of those cases, even if binding, support requiring the Secretary to file in the district court first on this timeline.

Moreover, even if the cases cited by Plaintiffs were on similar timelines to this action, they still cannot help their efforts to avoid review from this Court. Plaintiffs base their procedural argument on the erroneous premise that the Secretary failed to adequately argue that it is impractical to first seek a stay in the district court, but there is simply no basis for Plaintiffs' position on this point. First, the vanishingly small timeline noted by the Secretary in his motion makes the impracticability of moving for a stay in the district all but self-evident. Indeed, if a total of five business days from the ruling to the deadline for implementation is not an impractical period under Fed. R. App. P. 8, then it is hard to envision what the rule would even be referring to. The Secretary has not unduly delayed and moving in the district court after that court had ruled on motions to dismiss, motions for preliminary injunction, motions for summary judgment, and after a full trial would not be practical for such emergency relief sought here.



But even more telling are the district court's own words during a hearing on Plaintiffs' motion for preliminary injunction, which is part of the record on appeal. There, the district court stated in no uncertain terms that "unless the Supreme Court or the Eleventh Circuit enters an opinion between now and then stating otherwise -- for me, if there's a violation of the Voting Rights Act **then I'm going to enjoin the election until someone tells me I can't**." Ex. B, Tr. Doc. 108 at

123:12-15 (emphasis added). Thus, the district court made clear that moving for a stay of its post-trial judgment would be futile. To borrow directly from language cited by Plaintiffs, "it clearly appears that further arguments in support of the stay would be pointless in the district court." *Ruiz*, 650 F.2d at 567.

Further, the Secretary has not waived an argument in an emergency motion because he made the showing required by the rule in a footnote. Nothing in *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) discusses footnotes and only addresses waiver in briefs, not motions. The Secretary's motion is not procedurally barred and is properly before this Court.



## II. The Secretary has shown a stay is appropriate in this appeal.

### A. The Secretary is likely to succeed on the merits.

#### 1. The Secretary has not waived his certification argument.

Plaintiffs begin by brushing past the significant state sovereignty issues raised when a federal court prohibits a state from electing its utility regulators on a statewide basis. Instead, they argue the question of certification to the Georgia Supreme Court was waived because it was not in the Secretary's proposed findings of fact and conclusions of law post-trial. Setting aside that no such finding or conclusion would be

necessary if the Secretary prevailed in the district court, this exact issue was raised during trial—specifically at closing argument, when counsel for the Secretary explained:

> But assuming you disagree with us on that point and we get to the question there, we're now back to our state sovereignty question again. We have the Georgia Constitutional provision about there shall be a Public Service Commission, shall be elected by the people. Mr. Sells laid out, I think, a great case he could make to the Georgia Supreme Court about why he believes that "elected by the people" means that.

Ex. C, Trial Tr. (July 1, 2022) at 858:16-22. Thus, the Secretary clearly raised this issue with the district court in earlier proceedings *and* at trial, which did not happen in *Helton v. AT&T Inc.*, 709 F.3d 343, 360 (4th Cir. 2013), on which Plaintiffs rely.



While Plaintiffs correctly quote *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 n.7 (2018) about the discretion to certify questions, they ignore the context of that footnote, where the state had never raised certification previously and the Supreme Court adopted the state's reading, making certification unnecessary—something that has not happened here. And Plaintiffs do not even attempt to respond to precedent from this court cited by the Secretary, which directs that novel questions about state law should be certified to the appropriate state supreme court. *Jones v. Dillard's, Inc.*, 331 F. 3d 1259, 1268 (11th Cir. 2003).

Plaintiffs then claim that the particular interpretation raised in the Secretary's motion was not raised in the district court. First, Plaintiffs are right that the provision of the Georgia Constitution cited in the Motion is not correct. In the effort to get the motion prepared, the undersigned inadvertently attributed language from an older version of the Georgia constitution quoted in *Stephens v. Reid*, 189 Ga. 372, 378, 6 S.E.2d 728, 732 (1939), to the current constitution and apologizes for the error. Plaintiffs are correct that the phrase "elected by the people" does not appear elsewhere regarding officials, but the phrase "by the people" appears several times. But in any case, the phrase "elected by the people" has not been interpreted by the Georgia Supreme Court.

Second, the question of what the phrase "elected by the people" means is critically important to the state sovereignty issues—whether the district court's ruling alters the form of Georgia's government or not. That is a key reason why this Court treats judicial elections differently, *see* Motion, pp. 18-19, and thus is not merely an "esoteric legal question" as Plaintiffs phrase it. Response, p. 16.

Thus, the stay should be granted to allow time to certify the question to the Georgia Supreme Court.[1]

**2. The Secretary has not waived his *Purcell* argument and has not acted inconsistently.**

Plaintiffs acknowledge that the Secretary has not raised any issue about the Secretary's ability to enter the relief entered by the district court. The Secretary has been completely consistent about *when* he needs to know what races go on the November ballot—in fact, the entire basis for the emergency nature of this Motion is predicated on the specific timeline that the Secretary provided to the district court earlier this year. This Motion and this appeal are not based on timing and the administration of elections, which the Secretary can implement, but rather on the merits—specifically the failure to certify a significant question related to state sovereignty before ruling and the improper weighing of evidence of partisanship.



As the Motion stated, the only relevance of *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) to this appeal relates to the Secretary's ability to obtain appellate review of the merits issues. Motion, p. 25. The Secretary typically raises *Purcell* issues related to the administration of

[1] During argument on the motion for preliminary injunction, the Secretary's counsel advocated certification before the trial to avoid this scenario.

elections and the attendant difficulties making last-minute changes. *See, e.g., New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020); *Curling v. Raffensperger*, Appeal Nos. 20-13730, 20-14067 (11th Cir.) (currently pending); *Alpha Phi Alpha Fraternity v. Raffensperger*, No. 1:21-CV-5337-SCJ, 2022 U.S. Dist. LEXIS 40166, at *209 (N.D. Ga. Feb. 28, 2022). That is not the case here, where the only administrative issue is cancelling an election, which the Secretary's witness testified is a relatively simple action as long as the timeline is met.

The Secretary has not engaged in gamesmanship or tricked the district court into a schedule to later jump up and yell "*Purcell*!" as Plaintiffs imply. The Secretary has agreed he can implement the relief ordered by the date which was provided to the district court months ago. The issue on appeal here is the district court's errors on the merits that the Secretary has consistently maintained he would raise if unsuccessful in the district court. And if Plaintiffs are saying instead that the Secretary is barred from seeking emergency relief on significant merits issues because he does not seek relief based on difficulties with election administration, that would be gamesmanship on the part of Plaintiffs.

### 3. The district court's failure to credit the impact of partisanship on voter behavior is clearly erroneous.

In discussing the impact of partisan and racial polarization, Plaintiffs do not attempt to distinguish or address the causal language in Section 2 ("on account of race or color") or this Court's holdings in *Greater Birmingham Ministries v. Sec'y of Ala.*, 992 F. 3d 1299, 1330-31 (11th Cir. 2021) or other cases cited by the Secretary. Plaintiffs also do not address the specific language from the district court finding that partisanship actually supports its findings or the failure to look at causation.

In short, Plaintiffs essentially say there truly is a "single statistic" that tells district courts what they need to know about Section 2 claims. *Johnson v. De Grandy*, 512 U.S. 997, 1020-21 (1994). Also, by effectively ensuring only one political party can ever raise Section 2 claims, the district court sets a questionable precedent for the future constitutionality of the Voting Rights Act.



## B. The Secretary has shown irreparable harm.

While Plaintiffs are correct that the Secretary could hold special elections if he ultimately prevails on appeal, that would only occur after the cancellation of already-planned statewide elections. Courts in Section 2 cases have broad remedial powers and under Plaintiffs' approach, special elections have to be held no matter what—either sometime next year in districts if they prevail or statewide if the

Secretary prevails. In the meantime, voters lose the opportunity to vote for Public Service Commissioners at all.

### C. Voters are not harmed if there is no vote dilution.

The right to vote is sacred and if Plaintiffs are correct that vote dilution is occurring in violation of Section 2, they are harmed. But the arguments advanced by the Secretary are that no such illegal vote dilution is occurring—instead, Plaintiffs' preferred candidates lose for political reasons. Thus, if the Secretary is correct on the merits, then Plaintiffs are not injured and cannot demonstrate this prong weighs in their favor.



### D. The public interest favors a stay pending appeal.

In discussing the public interest, Plaintiffs raise the possibility of voter confusion—a *Purcell*-like argument of their own—based on media coverage of the ruling. But voters have voted in primary elections for candidates that will not appear on the November ballot based on the district court's ruling. The Secretary seeks to maintain the status quo prior to the district court's ruling to allow time for the significant merits issues to be addressed before altering the method of electing utility regulators in Georgia. The district court can utilize is broad remedial powers if the Secretary is unsuccessful in this appeal.

## CONCLUSION

For the reasons above, Plaintiffs have not shown any reason why this Court should not stay the district court's permanent injunction pending appeal.

Respectfully submitted this 11th day of August, 2022.

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## CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 2,323 words as counted by the word-processing system used to prepare the document.

Respectfully submitted this 11th day of August, 2022.

*/s/Bryan P. Tyson*
Bryan P. Tyson

**CERTIFICATE OF SERVICE**

I hereby certify that on August 11, 2022, I served this Motion by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

Respectfully submitted this 11th day of August, 2022.

*/s/Bryan P. Tyson*
Bryan P. Tyson