

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*

**RESPONSE IN OPPOSITION TO APPELLEES’
EMERGENCY MOTION FOR AN ADMINISTRATIVE
STAY**

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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 Plaintiffs' Emergency Motion is complete.

Respectfully submitted this 12th day of August, 2022.

/s/ Bryan P. Tyson
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**RESPONSE IN OPPOSITION TO APPELLEES’
EMERGENCY MOTION FOR AN ADMINISTRATIVE STAY**

INTRODUCTION

The Secretary opposes Plaintiffs’ emergency motion. After this Court carefully and thoughtfully considered the issues raised by the merits and the timing of this appeal, it issued a detailed order this morning, including a significant dissent. Instead of spending time drafting a petition to the United States Supreme Court, Plaintiffs instead spent time preparing this emergency motion for an administrative stay. This Court should deny the motion.

STATEMENT

A. Election processes in Georgia.

The Secretary's office builds ballots for all counties in Georgia. Trial Tr. June, 29, 2022 (attached as Ex. A) at 447:10-22. While the ballot-building process continues through early September, ballot proofs are sent to counties after August 12, 2022. Ex. A at 454:20-455:15. Changing the ballot-building process in early September would result in making changes during a phase of election administration where there was less time to "double-check and proof" the draft ballots. Ex. A at 443:17-444:9.

While candidates can be deleted from the ballot databases prior to the election, making changes in the ballot databases can result in unintended errors, including a recent situation in DeKalb County that resulted in a full hand recount because of programming problems. Ex. A at 452:7-453:12. As a result of that experience, the Secretary's office views August 12 as the deadline for knowing whether PSC races will be on the November ballot because ballot proofing is happening in various stages after that point. Ex. A at 454:2-19.

On August 10, 2022, counties must notify the Secretary's office if they plan to hold special elections in conjunction with the general election. Ex. A at 454:20-455:15. Thus, the Secretary's office told counties to have all necessary information to it by today, August 12, so

it can begin distributing the ballot-proofing packets to all 159 counties. *Id.* So while changes can be made up until the date of the election, that could require action by each county instead of action by the Secretary's office in building the database. Ex. A at 455:16-456:6. This leads to the concern about introducing errors into the process when more changes are introduced later into the election process. Ex. A at 456:7-13. While this does happen on occasion, such as when a candidate withdraws, it introduces the possibility of error. Ex. A at 452:7-453:12.

Having heard this testimony, the district court specifically found that "there would be little disruption to the State's preparation for or conduct of the November 2022 general election if the Court directed that the PSC races be removed from the ballots for that election before August 12, 2022." Order, Doc. 151 at 61.

B. Plaintiffs' arguments in their emergency motion.

Despite not raising earlier with the Court the possibility of elongating the election schedule in their response to the Secretary's motion for stay, Plaintiffs now claim that a "delay of only a few days in adding the Public Service Commission races to the ballots would still leave the Secretary with plenty of time to update the ballots if the Supreme Court denies relief." Motion, p. 7. While Mr. Barnes indicated changes could be made after August 12, the context of his entire testimony (which Plaintiffs ignore) shows that delays past August 12

introduce the possibility of errors in the election system. *See* Sec. A, above. Plaintiffs did not provide any other witnesses regarding the ballot-building schedule for the state of Georgia at trial.

While Plaintiffs now claim the Secretary's actions in proceeding with the administration of the election will "change the facts on the ground," Motion, p. 7, the entire reason for the emergency nature of the Secretary's motion was the timeline the Secretary has consistently represented to Plaintiffs and the district court governs the election process in Georgia. Despite never raising timing issues on their ability to seek review if the Secretary's motion was granted, Plaintiffs now ask this Court to give them time to prepare yet another motion in another court seeking relief.

ARGUMENT

This Court should deny Plaintiffs' motion. While the Secretary has been unable to locate binding authority on the standard of review governing a request for an administrative stay, it appears to be the same standard announced in *Nken v. Holder*, 556 U.S. 418, 434 (2009). *See, e.g., CFTC v. Atkinson*, Nos. 18-14338-GG, 18-14783-GG, 2019 U.S. App. LEXIS 3892, at *1 (11th Cir. Feb. 7, 2019) (denying emergency motion for administrative stay for failing to meet the *Nken* factors). Plaintiffs do not address any of these factors in their motion.

In granting the motion for stay earlier today, this Court already considered the *Nken* factors in the Secretary's motion in both the *per curiam* order and Judge Rosenbaum's dissent. Order Granting Stay, pp. 4-6. And the Secretary has been consistent that August 12, 2022 is the deadline after which the possibility for error is introduced into the election process. If this Court directs the Secretary to hold off on sending ballot proofs to counties, he will do so. But all of the concerns about *Purcell* on the details of election administration that the Secretary has consistently indicated would not exist if there was a ruling by August 12, 2022 would then come roaring to the surface.

The Secretary certainly understands this Court's statement about possible review by the United States Supreme Court. But at this point in the process, Plaintiffs do not explain how their arguments to that Court for a stay will be any different than their arguments to this one. Plaintiffs never asked this Court for an earlier ruling on the Secretary's motion if it was going to stay the district court order. And the reality remains that this Court carefully considered Plaintiffs' arguments in opposition to the motion before reaching its conclusion.

At the end of the day, the Secretary needs to know what to do: Does he include PSC races on the ballot proofs being sent to counties after today or not? Or wait for further direction? Those are the questions this Court answered with its order earlier today. If this Court

now reverses course and says maybe PSC races should be removed from the ballot, the Secretary will comply and treat later changes similar to a candidate withdrawal. But the undisputed testimony of Mr. Barnes is that this approach not only raises, but practically invites an ever-increasing likelihood of error into the election process.

CONCLUSION

For the reasons above, Plaintiffs have not shown any reason why this Court stay its own order administratively while they prepare a petition to the U.S. Supreme Court.

Respectfully submitted this 12th 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 1,080 words as counted by the word-processing system used to prepare the document.

Respectfully submitted this 12th day of August, 2022.

/s/Bryan P. Tyson
Bryan P. Tyson

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2022, I served this Response 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 12th day of August, 2022.

/s/Bryan P. Tyson
Bryan P. Tyson

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