

In the
Supreme Court of the United States

RICHARD ROSE, BRIONTÉ MCCORKLE, WANDA MOSLEY,
and JAMES WOODALL,
Plaintiffs-Applicants,
v.

BRAD RAFFENSPERGER,
in his official capacity as Secretary of State of Georgia,
Defendant-Respondent.

**RESPONDENT'S OPPOSITION TO EMERGENCY
APPLICATION TO VACATE AND FOR IMMEDIATE
ADMINISTRATIVE STAY**

Christopher M. Carr
Attorney General
Bryan K. Webb
Deputy Attorney General
Russell D. Willard
Senior Assistant Attorney General
State Law Department
Atlanta, Georgia 30334

Bryan P. Tyson*
Bryan F. Jacoutot
Diane F. LaRoss
Taylor English Duma LLP
1600 Parkwood Cir., Suite 200
Atlanta, GA 30339
Telephone: 678-336-7249

**Counsel of Record*

Counsel for Defendant-Respondent Brad Raffensperger

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Introduction	1
Statement.....	5
A. Statutory framework.....	5
B. Relevant proceedings below.....	5
1. Applicants' claims.....	5
2. Preliminary-injunction hearing.	6
3. Evidence at trial.	7
4. Appeal and motion to stay.....	9
C. Election processes in Georgia.	10
D. Applicants' arguments in their emergency application.	11
Argument	12
I. Applicants are not seriously and irreparably injured by the Eleventh Circuit's stay.	13
II. This Court is unlikely to review a merits decision from the Eleventh Circuit.....	17
III. The Eleventh Circuit correctly stayed the decision pending appellate review by applying accepted standards.	18
A. The Secretary did not waive every appellate argument that touches <i>Purcell</i>	18
B. The Secretary is likely to prevail on the merits of his appeal.....	19

TABLE OF CONTENTS
(continued)

	Page
1. The district court erred in weighing evidence of partisan voter behavior.....	19
2. The district court erred by not certifying an issue of unsettled state law.....	22
3. The Eleventh Circuit did not err in when it applied <i>Purcell</i>	26
4. The remaining <i>Nken</i> factors support the stay.....	26
Conclusion.....	27

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

Cases

<i>California v. Am. Stores Co.</i> , 492 U.S. 1301 (1989).....	14
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997).....	21
<i>Coleman v. PACCAR, Inc.</i> , 424 U.S. 1301 (1976).....	12, 13, 16
<i>Cooper v. Harris</i> , 137 S. Ct. 1455 (2017).....	22
<i>Cox v. Barber</i> , 275 Ga. 415 (2002)	24
<i>Davis v. Chiles</i> , 139 F. 3d 1414 (11th Cir. 1998).....	23
<i>Edge v. Sumter Cty. Sch. Dist.</i> , 775 F. 2d 1509 (11 th Cir. 1985)	14
<i>Greater Birmingham Ministries v. Sec’y of Ala.</i> , 992 F. 3d 1299 (11th Cir. 2021).....	21
<i>Holder v. Hall</i> , 512 U.S. 874 (1994).....	21, 23
<i>Jones v. Dillard’s, Inc.</i> , 331 F. 3d 1259 (11th Cir. 2003).....	25
<i>League of United Latin Am. Citizens v. Clements</i> , 999 F. 2d 831 (5th Cir. 1993).....	21
<i>Merrill v. Milligan</i> , 142 S. Ct. 879 (2020).....	26

<i>Miller v. Johnson</i> , 515 U.S. 900 (1995).....	22
<i>Moore v. Brown</i> , 448 U.S. 1335 (1980).....	12
<i>Moreno v. Nationwide Insur. Co.</i> , 105 F. 3d 1358 (11th Cir. 1997).....	25
<i>New Ga. Project v. Raffensperger</i> , 976 F. 3d 1278 (11th Cir. 2020).....	27
<i>Nipper v. Smith</i> , 39 F. 3d 1494 (11th Cir. 1994).....	19, 21, 23
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	9, 18
<i>NW Austin Mun. Util. Dist. No. One v. Holder</i> , 557 U.S. 193 (2009).....	22
<i>Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott</i> , 571 U.S. 1061 (2013).....	13
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006).....	9
<i>Republican Nat’l Committee v. Democratic Nat’l Committee</i> , 140 S. Ct. 1205 (2020).....	9
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	14
<i>Solomon v. Liberty County</i> , 221 F. 3d 1218 (11th Cir. 2000).....	21, 22
<i>Southern Christian Leadership Conference v. Sessions</i> , 56 F. 3d 1281 (11th Cir. 1995).....	23
<i>Tamimi Trail Tours, Inc. v. Ga. Pub. Serv. Comm’n</i> , 213 Ga. 418 (1957).....	5

<i>United States v. Dall. Cty. Com.</i> , 904 F. 2d 26 (11th Cir. 1990).....	14
<i>Western Airlines, Inc. v. Teamsters</i> , 480 U. S. 1301 (1987).....	13

RETRIEVED FROM DEMOCRACYDOCKET.COM

INTRODUCTION

According to the district court's decision in this case, Section 2 of the Voting Rights Act prohibits Georgia from ever conducting statewide elections for the officials who regulate utilities for the entire state. That determination was wrong, but the key point for this Court is that the district court's chosen remedy—*cancelling a statewide election*—is irreversible. If this Court were to lift the Eleventh Circuit's stay, Respondent and the public would necessarily be irreparably harmed, but Applicants will *not* be irreparably harmed by leaving the stay in place. With or without the stay, Applicants will be in essentially identical positions: if they ultimately prevail on appeal, the district court's order will operate to fill the relevant seats under some new electoral scheme. The *sole* difference in Applicants' position would be whether the members replaced will be newly elected or holdover occupants whose six-year term had long passed its originally scheduled end. But lifting the stay now would ensure that no one is able to vote for Public Service Commissioner in November 2022.

The district court held that the members of Georgia's Public Service Commission must be elected via single-member districts rather than statewide, as they have been for more than 100 years. The district court then enjoined the upcoming election for two Commissioners in November and found that it could provide an opportunity to develop a

new electoral scheme because the two members of the Commission whose terms were to have expired at the end of this year could continue to hold over in office for months into the new year. The result of the order is that these Commissioners will remain in office, unelected, well past the expiration of their current terms. But if the Secretary ultimately prevails on appeal, the only option is a special election—the same option the district court necessarily endorsed as the remedy in its order.

Applicants face no such problem. If they were to prevail on appeal, the district court order would require, either through legislative or judicial action, replacement of the Commissioners elected statewide with Commissioners elected from single-member districts. But that is *exactly* the same position Applicants would be in if their application to this Court were granted and the district court's cancellation of the election went into effect. The only difference would be that, instead of that new electoral scheme replacing, among others, *newly elected* Commissioners, the single-member-district elections would replace *holdover* Commissioners. Applicants argue that the statewide system for elections is illegal, so the district court's remedy of extending the terms of previously elected members is necessarily an extension of what, in their own view, is a supposedly illegal framework.

Simply put, should the district court's decision be upheld, the Eleventh Circuit's stay would mean that a legislatively or judicially created electoral framework putting into place single-member districts, rather than the current statewide framework, would be displacing Commissioners recently elected or re-elected to their seats rather than an individual well into the seventh, and conceivably the eighth, year of a six-year term. Conversely, if this Court were to undo the stay and reinstate the district court's injunction—and then it was ultimately determined that the district court was incorrect—the State and the public writ large would be immensely harmed because the already-commenced elections for those two Commission seats would have been cancelled and the electorate disenfranchised.

That basic comparison of harms should be enough to dispose of this application, but to the extent further analysis is needed, vacating the stay is also inappropriate because the district court was wrong on the merits. The district court determined that evidence showing polarized voting was caused by partisan politics rather than “on account of race or color” is not relevant to analyzing claims under Section 2 of the Voting Rights Act. That cannot be squared with the text of the statute, this Court's cases, or Eleventh Circuit precedent. Additionally, the district court refused to certify to the Supreme Court of Georgia the question of an interpretation of a state constitutional clause, uniformly

interpreted and applied for over a century by at least the legislative branch to compel statewide election of the members of the Commission. The district court instead determined, based on its own reading of the state constitution and without any state judicial determinations, that the state legislature had the clear authority to modify the scope of the electorate for the Commission members—rather than recognizing the reality that it was not only encroaching but running roughshod over the state sovereignty principles inherent in the Georgia citizenry's choice of the state's constitutional structure and chosen form of government.

The Eleventh Circuit stayed the district court's order cancelling the November 2022 elections for two Public Service Commission seats until the Secretary's appeal could be fully heard. Applicants now seek to vacate that stay by claiming that the deadline for changes to ballot designs is malleable, despite the Secretary's consistent representation of the election timeline and the importance of adhering to it closely. And they ask this Court to ignore the clear asymmetry in irreparable harm, the merits issues implicated by the district court's order, and the extraordinary fact that the district court ordered an election to be cancelled before the Secretary could obtain appellate review. By now proposing further changes in election administration past the August 12 date, Applicants invite this Court to needlessly introduce error into the election process. This Court should decline the effort to vacate the stay.

STATEMENT

A. Statutory framework.

In Georgia, the Public Service Commission (PSC) ensures the safety, reliability, and affordability of utilities. App. 53a. In so doing, it sets rates for residential, commercial, and industrial customers. *Id.* The PSC also holds hearings, receives and weighs testimony from witnesses, makes evidentiary rulings, and considers testimony about the impact of its decisions—which ultimately affect all ratepayers in Georgia. *Id.* at 54a. It functions as both a quasi-legislative and a quasi-judicial body. *Id.* (citing *Tamimi Trail Tours, Inc. v. Ga. Pub. Serv. Comm’n*, 213 Ga. 418, 428 (1957)).

The Commission is created by the Georgia Constitution, which provides that Commissioners “shall be elected by the people.” GA. CONST., Art. IV, Sec. IV, Par. III. Commissioners have been elected on a statewide basis since 1906. App. 50a.

B. Relevant proceedings below.

1. Applicants’ claims.

Applicants filed this case on July 14, 2020, asserting that the statewide method of electing the five Commissioners was an “at-large” method of election that illegally diluted minority voting strength on account of race. Application, p. 3. After discovery, the district court granted summary judgment to Applicants on the *Gingles* factors,

including polarized voting, but specifically found it would hear evidence regarding the impact of partisanship on polarization during the trial. Supp.App.031a–032a. The district court also noted that inextricably intertwined with the first *Gingles* factor was the need to demonstrate that the reviewing court possessed the authority and means to fashion an appropriate remedy. Supp.App.019a–026a.

2. Preliminary-injunction hearing.

In February 2022, the district court heard Applicants’ preliminary-injunction motion seeking to stay qualifying for the 2022 elections for PSC based on the upcoming trial. During that hearing, testimony indicated that mid-August would be the timeline for building election project files for the 2022 elections. Supp.App.067a. The focus of the hearing, according to the Applicants and the district court, was whether the district court could “hit the stop button” on the election after the trial. Supp.App.141a–142a. As counsel for the Secretary explained, there would not be time after the end of the trial to craft a remedial plan, but there would be time to administratively remove these races from the ballot without significant disruption—as long as that occurred by mid-August.¹ Supp.App.160a. Counsel for the Secretary also made clear that the Secretary would appeal based on the

¹ At trial, this date was narrowed to August 12, 2022. Supp.App.188a, 200a–202a.

merits, even if the Secretary would not appeal based on the inability to implement a remedy. Supp.App.167a.

The district court later denied the motion for preliminary injunction, concluding that Applicants had both failed to show a likelihood of success on the merits based on the evidence they presented at the hearing and failed to show an irreparable harm. Supp.App.170a–179a.

3. Evidence at trial.

The district court held a five-day bench trial before ruling in favor of Applicants on August 5, 2022. During the trial, all parties agreed that voting in Georgia is polarized, but differed over the causes of that polarization. App. 78a. Applicants presented statistical evidence that the polarization was racial in nature, but their experts did not consider any causal factors. The Secretary presented evidence that the polarization was better explained by partisanship, given that the behavior of Black and white voters remained consistent even when the race of the candidates varied.

The district court found that the other Senate factors were mixed. It addressed Georgia’s history of discrimination (Factor 1) in a single paragraph, finding it was satisfied based on decades-old discrimination in Georgia without considering whether more recent examples of discrimination were required. App. 87a–88a. It found that Georgia uses

election practices that enhance opportunities for discrimination (Factor 3) and that Black Georgians bear the effects of discrimination based on Census data (Factor 5). App. 90a, 94a. It also found that the State's interest weighed in favor of Applicants despite evidence from the Secretary on the importance of linkage between jurisdiction of an elected official's decisions (rate decisions affect all ratepayers) and the electorate (Factor 9). App. 99a-100a.

The district court found other factors weighed in favor of the Secretary. Specifically, Georgia does not use a candidate-slating process (Factor 4), racial appeals are not present in PSC elections (Factor 6), and Applicants did not provide sufficient evidence of a lack of responsiveness of Commissioners to the needs of Black Georgians (Factor 8). App. 90a, 95a, 97a.

The district court, relying on the nature of the polarization (Factor 2) and extent of election of Black officials (Factor 7), which it determined were the "most important" Senate factors, found that Georgia's statewide method of electing utility regulators diluted Black voting strength in violation of Section 2. App. 100a. As discussed below, the district court reached this conclusion despite evidence showing voter behavior in Georgia remained consistent—and highly partisan—irrespective of the racial makeup of the candidates. Indeed, the record is replete with both expert and lay testimony indicating that what

mattered to Black voters was that the candidate for office they support belonged to a particular political party.

Finally, the court interpreted the provisions of the Georgia Constitution for the first time, determining that statewide elections were required only by statute and not any constitutional provision. App. 105a-106a.

4. Appeal and motion to stay.

After the district court's ruling, the Secretary appealed and requested a stay based on the merits of the district court's ruling. The Secretary argued that the district court erred by (1) deciding a question of state law without certification to the Supreme Court of Georgia and (2) improperly weighing evidence of partisan voter behavior. As part of the argument, the Secretary explained that, given the nature of these errors, there should be time for appellate review, and that the remaining factors from *Nken v. Holder*, 556 U.S. 418, 426 (2009) supported the Secretary's motion.

The Eleventh Circuit granted the motion. It concluded that *Republican Nat'l Committee v. Democratic Nat'l Committee*, 140 S. Ct. 1205, 1207 (2020) required a stay, also relying on *Purcell v. Gonzalez*, 549 U.S. 1 (2006). The same panel later denied an effort by Applicants to lift the stay pending an application to this Court.

C. Election processes in Georgia.

While Applicants now claim that there is sufficient time to review their claims before ballots are built, the trial testimony indicates further delaying the ballot-building process at this point invites error. The Secretary's office builds ballots for all counties in Georgia. Supp.App.194a. While the ballot-building process continues through early September, ballot proofs are sent to counties after August 12, 2022. Supp.App.201a–202a. Changing the ballot-building process after August 12—and especially in early September—would result in making changes during a phase of election administration where there is less time to “double-check and proof” the draft ballots. Supp.App.190a–191a.

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 a Georgia county that led to a full hand recount because of programming problems due to late changes in a database. Supp.App.199a–200a. As a result of that experience, the Secretary's office saw 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. Supp.App.201a.

By August 10, 2022, counties had to notify the Secretary's office if they plan to hold special elections in conjunction with the general

election. Supp.App.201a–202a. Thus, the Secretary’s office told counties to have all necessary information to it by 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. Supp.App.202a–203a. And while this does happen on occasion, such as when a candidate withdraws, it introduces the possibility of error, particularly when changes are introduced later in the election process. Supp.App.199a–200a, 203a.

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.” App. 107a. It did not make further findings that additional time, such as that sought by Applicants in seeking relief from this Court, would similarly avoid disruption.

D. Applicants’ arguments in their emergency application.

Applicants go to great lengths to claim a waiver by the Secretary of every possible *Purcell*-related issue. But the facts demonstrate the Secretary has been completely consistent in his position: there is no

barrier to implementing relief ordered by August 12, 2022.² The Secretary has never argued that he would be unable to implement the relief ordered by the district court. And the Secretary has always reserved the right to appeal on the merits. In its stay order, the Eleventh Circuit preserved its ability to hear the merits on appeal before cancelling a statewide election.

ARGUMENT

This Court should deny Applicants' motion. Vacating a lower court's stay is a drastic step: "when a court of appeals has not yet ruled on the merits of a controversy, the vacation of an interim order invades the normal responsibility of that court to provide for orderly disposition of cases on its docket." *Moore v. Brown*, 448 U.S. 1335, 1341 n.9 (1980) (Powell, J., in chambers).

This Court generally requires an applicant to make three showings to vacate a stay. First, the applicant must demonstrate that the "case could and very likely would be reviewed here upon final disposition in the court of appeals." *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). Second, the applicant must demonstrate that the Court of Appeals "clearly and 'demonstrably'

² Indeed, the Application has taken the Secretary beyond the point at which he agreed he would not raise voter disruption and election mechanics because now those interests are directly implicated.

erred in its application of ‘accepted standards.’” *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. 1061, 1061 (2013) (Scalia, J., concurring) (quoting *Western Airlines, Inc. v. Teamsters*, 480 U. S. 1301, 1305 (1987) (O’Connor, J., in chambers)). Finally, the applicant must show that his or her rights “may be seriously and irreparably injured by the stay.” *Coleman*, 424 U.S. at 1304. Applicants have not carried that heavy burden with respect to the relief they seek here.

I. Applicants are not seriously and irreparably injured by the Eleventh Circuit’s stay.

Applicants’ only argument that they are “seriously and irreparably injured,” *Coleman*, 424 U.S. at 1304, is that their votes would be diluted if the election went forward. Application, pp. 19–20. But Applicants are in the same position regardless of whether the stay remains in place. That alone demonstrates that there is no irreparable injury.

The district court enjoined the November elections for PSC Districts 2 and 3, explaining that the incumbents would hold over in office. App. 108a–109a. It then noted that the General Assembly meets in four months and could fashion an election method at that point. App. 109a. Under the district court’s order, that method of election would necessarily include special elections for incumbents who have held over

beyond the end of their terms, likely in the spring or summer of 2023. Supp.App. 186a–187a (Plaintiffs eliciting testimony about using March special election date). Thus, even if the stay is lifted, Applicants will still only be entitled to vote in special elections—the only difference is whether all Georgians get to vote on members of the PSC during this November’s election.

Unlike situations where it is difficult to undo a transaction, which can be irreparable harm, *California v. Am. Stores Co.*, 492 U.S. 1301, 1307 (1989) (O’Connor, J., in chambers), the Eleventh Circuit has shortened terms and required special elections as part of remedies in past Voting Rights Act cases. *United States v. Dall. Cty. Com.*, 904 F. 2d 26, 28 (11th Cir. 1990); *Edge v. Sumter Cty. Sch. Dist.*, 775 F. 2d 1509, 1512 (11th Cir. 1985); *see also Reynolds v. Sims*, 377 U.S. 533, 585 (1964). As a result, the only difference if this Court lifts the stay imposed by the Eleventh Circuit is the status of incumbents after the appeal is heard. If the stay remains in place and the Secretary prevails on appeal, Georgia’s existing electoral system continues and there is no need for statewide special elections. If the stay remains in place and the Secretary does not prevail on appeal, then Georgia will hold district-based special elections as part of the new electoral scheme imposed by the General Assembly or the district court. This has been the Secretary’s consistent position—that the district court had broad

remedial powers to cancel or shorten terms of office in crafting a remedy. Supp.App.161a–162a.

If this Court lifts the stay issued by the Eleventh Circuit, Applicants are in the same position but the Secretary and Georgia voters face great harm. If the stay is lifted and the Secretary prevails on appeal, Georgia will then have to incur the cost and expense of holding statewide special elections for Districts 2 and 3. That is no small feat. But if the stay is lifted and the Secretary does not prevail on appeal, then Georgia will hold district-based special elections as part of the new electoral scheme imposed by the General Assembly or the district court—and thus Applicants would be in exactly the same position as if the stay remained in place.

Ironically, Applicants allege (and the district court found) that a statewide method of election is illegal. But the relief they request in their application would extend the terms of individuals elected under what Applicants claim is an illegal system. The district court even acknowledged that its order would “regrettably cause disruption to the candidates currently running” for PSC but enjoined the elections anyway. App. 108a.

Further, even if vote dilution were a sufficient injury for purposes of the application, whether *illegal* vote dilution is occurring is bound up with the merits of the district court’s ruling. The Eleventh Circuit’s stay

maintained the status quo: Applicants will still be able to vote for Commissioners for Districts 2 and 3. In contrast, the district court's decision ensures that every voter in Georgia will be unable to vote for members of the Commission and the incumbent commissioners will hold over until such time as a new election system is implemented.

Moreover, it involves a remedy in which a single federal court directs a state legislature to pass an unconstitutional law. Because if the Georgia Constitution requires that Public Service Commission members be elected statewide, any action undertaken by the legislature that complies with the terms of the district court's order necessarily conflicts with the Georgia Constitution.

Further, as discussed below, if the merits demonstrate that the alleged vote dilution is taking place on account of politics—and not on account of race or color—then there is no illegal vote dilution, and Applicants are not injured. Likewise, if the district court exceeded its authority by altering Georgia's system of government by requiring only district-based elections, then there is no injury that this Court can remedy. In either case, if the Secretary prevails on the merits, there is no injury even under Applicants' formulation of a potential injury.

Thus, Plaintiffs have failed to demonstrate that their rights “may be seriously and irreparably injured by the stay.” *Coleman*, 424 U.S. at 1304. They are in the same position regardless of the outcome of the

appeal, while the Secretary and Georgia voters face great potential harm. That alone is reason to deny their application.

II. This Court is unlikely to review a merits decision from the Eleventh Circuit.

While it is likely that the Eleventh Circuit will reverse the district court, given this Court's cases and Eleventh Circuit precedent on the impact of partisanship on Section 2 claims, a ruling from the Eleventh Circuit in favor of the Secretary will likely not give rise to further review by this Court because of the straightforward application of the law and text of Section 2. To the contrary, a ruling by the Eleventh Circuit in favor of Applicants would prompt the Secretary to petition for review in this Court because of the significant departure from the text of Section 2 that would be required.³ But even assuming that this Court would ultimately review the merits of a final Eleventh Circuit decision, this factor should carry very little weight when determining whether to upend Georgia's ongoing electoral process by cancelling currently underway Commission elections.

³ Many of the issues related to partisanship and racially polarized voting also mirror claims raised in *Merrill v. Milligan*, Dockets 21-1086, 21-1087, which are pending before this Court and which resulted in the stay of the district court orders applying the Voting Rights Act. It is likely that the decision in those actions will put to rest any underlying dispute about the scope of Section 2 that might cause the parties to seek review of this matter in this Court.

III. The Eleventh Circuit correctly stayed the decision pending appellate review by applying accepted standards.

Applicants also cannot demonstrate that the Eleventh Circuit was wrong in its application of accepted standards. *Planned Parenthood*, 571 U.S. at 1061. The Secretary made a strong showing of likelihood of success on the merits, even the dissent agreed that the Secretary would be injured absent a stay, and the public interest supports a stay. *Nken*, 556 U.S. at 426.

A. The Secretary did not waive every appellate argument that touches *Purcell*!

Applicants first attempt to wave away the entirety of the merits by claiming the Secretary waived his right to appeal the district court decision. Application, pp. 11–14. But the Eleventh Circuit correctly concluded that the Secretary’s waiver extended only to the argument that cancelling elections for PSC Districts 2 and 3 would cause disruption or voter confusion. App. 8a. As Applicants acknowledge, the Secretary specifically indicated “we may appeal based on the merits” and the district court acknowledged there was “[n]o waiver taken by that.” Supp.App.167a.

Cancelling a statewide election, while *mechanically* feasible without introducing the possibility of error in the election-administration process, so long as that decision was made by August 12, is a drastic step to take without appellate review. It was the

combination of the specific issues on which the district court ruled and the timeline for resolving the merits that created the problem the Eleventh Circuit relied on in granting the stay.

B. The Secretary is likely to prevail on the merits of his appeal.

In ruling for the Applicants, the district court made at least two mistakes, each of which demonstrates the Secretary is likely to prevail on the merits of his appeal. First, it improperly determined that evidence of partisan behavior of voters was not relevant to a Section 2 claim. Second, it interpreted the Georgia Constitution without certifying the question of state law to the Supreme Court of Georgia in the process of second-guessing Georgia's chosen method of utility regulation.

1. The district court erred in weighing evidence of partisan voter behavior.

The first merits error of the district court relates to the impact of polarized voting on its analysis. Everyone agrees that voting in Georgia is polarized—that is, Black voters strongly prefer Democratic candidates and white voters generally prefer Republican candidates. App. 65a. The question is whether this is *racial* bloc voting or *partisan* voting. See *Nipper v. Smith*, 39 F. 3d 1494, 1525–26 (11th Cir. 1994). A reviewing court must review the evidence to determine whether the

alleged vote dilution is “on account of race or color,” 52 U.S.C.

§ 10301(a). If the alleged vote dilution is on account of partisanship—as opposed to race—then there is no claim under Section 2.

That is the case here. The evidence presented at trial included the testimony of a political scientist, whom the district court credited, which demonstrated that Black voters consistently prefer Democratic candidates regardless of the race of the candidate. App. 65a–66a. At the very least, this would provide strong evidence that partisanship, as opposed to race, explains the voting behavior of Black and white voters.

Rather than attempt to determine whether race or party was the causal factor, the district court threw up its hands and declared that “the interplay between race and partisanship is difficult if not impossible to disentangle.” App. 67a. The district court then concluded that it was unnecessary to address the impact of partisanship on voter behavior and focused solely on the “disproportionate” effect on Black voters, bizarrely holding that a “high correlation between race and partisanship does not *undermine* a Section 2 claim, it is *necessary* to it.” App. 79a–80a (emphasis in original). It further determined that Black voters “are not selecting Democratic candidates because they are Democrats; they are selecting Democratic candidates because they perceive, rightly or wrongly, that those candidates will be more responsive to issues that concern Black voters.” App. 79a. But this

holding has the effect of enshrining one political party as the favored party under federal law—this is not only wrong, it would raise constitutional questions about the validity of Section 2 if it were correct. *See City of Boerne v. Flores*, 521 U.S. 507, 530 (1997); *Solomon v. Liberty Cty.*, 221 F. 3d 1218, 1225 (11th Cir. 2000) (en banc).

In sharp contrast to the approach taken by the district court, the Eleventh Circuit, relying on the text of Section 2, has held it necessary to demonstrate a “causal connection between racial bias and disparate effect” in the vote-denial context. *Greater Birmingham Ministries v. Sec’y of Ala.*, 992 F. 3d 1299, 1330-31 (11th Cir. 2021); *see also Solomon*, 221 F. 3d at 1225; *League of United Latin Am. Citizens v. Clements*, 999 F. 2d 831, 854 (5th Cir. 1993) (en banc) (“failures of a minority group to elect representatives of its choice that are attributable to ‘partisan politics’ provide no grounds for relief”). This matters because “in a majoritarian system, numerical minorities lose elections.” *Holder v. Hall*, 512 U.S. 874, 901 (1994) (Thomas, J., concurring). While racially polarized voting might “create a sufficient inference that racial bias is at work,” “a defendant [is allowed] to rebut proof of vote dilution by showing that losses by minority candidates are attributable to non-racial causes.” *Nipper*, 39 F. 3d at 1525–26. The district court did not even address these settled standards.

Courts face a real danger when evaluating voting behavior because “what appears to be bloc voting on account of race may, instead, be the result of political or personal affiliation of different racial groups with different candidates.” *Solomon*, 221 F. 3d at 1225. “Unless courts ‘exercise extraordinary caution’ in distinguishing race-based redistricting from politics-based redistricting, they will invite the losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena.” *Cooper v. Harris*, 137 S. Ct. 1455, 1490 (2017) (Alito, J., concurring in part) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

The district court’s failure to grapple with the impact of partisanship is fatal to its decision and demonstrates why the Secretary is likely to prevail on the merits.

2. The district court erred by not certifying an issue of unsettled state law.

The second merits error has two parts, both related to state sovereignty. Evidence at trial indicated that at least 12 states elect their utility regulators. Under the district court’s ruling, only the State of Georgia is prohibited from electing its utility regulators on a statewide basis—interfering with the state’s chosen form of government. *See NW Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (discussing equal sovereignty of states). While the

district court believed Section 2 permits such an interference, this Court has indicated the need for courts to be more circumspect, noting that “[i]nterfering with the form of government, therefore, might appear to involve a greater intrusion on state sovereignty [than the size of a government body].” *Hall*, 512 U.S. at 916. And the Eleventh Circuit has echoed this sentiment, acknowledging that “[i]mplicit in th[e] first *Gingles* requirement is a limitation on the ability of a federal court to abolish a particular form of government and to use its imagination to fashion a new system.” *Nipper*, 39 F. 3d at 1531 (Tjoflat, J.).

While many of the decisions from the Eleventh Circuit involving the interplay of federal courts deciding governmental structure for states in Section 2 cases involved judicial elections,⁴ similar concerns existed with the quasi-judicial utility regulator of the Public Service Commission. Unlike legislators, Commissioners have wide enforcement authority and act akin to judges at crucial moments, using specialized knowledge in utility regulation to make decisions that affect every ratepayer in the state. App. 67a–69a.

The district court dismissed these concerns by determining that it had authority over the political processes in the state and did not

⁴ See, e.g., *Nipper*, 39 F. 3d at 1531; *Southern Christian Leadership Conference v. Sessions*, 56 F. 3d 1281, 1296 (11th Cir. 1995); *Davis v. Chiles*, 139 F. 3d 1414, 1419-20 (11th Cir. 1998).

sufficiently credit the linkage interests of connecting the officials' jurisdiction (statewide decisions affect all ratepayers) with their electoral base (statewide elections). App. 99a–101a. This decision places a federal court as the sole arbiter of how Georgia may elect utility regulators in the state, despite evidence regarding the impact of abandoning statewide elections. App. 98a–99a.

The district court compounded this error when it interpreted the provision of the Georgia Constitution that election of Commissioners is “by the people.” App. 104a–106a.⁵ Earlier in the case, the district court refused to take that step, noting that “[w]hether the at-large election of members of the Commission is required by the Georgia Constitution or only by statute bears on the totality-of-the-circumstances analysis the Court must undertake” and could possibly lead to certifying that question to the Supreme Court of Georgia. Supp.App.025a–026a.

But in its order after trial, the district court held that the statewide method of election is required only by statute, not by the Georgia Constitution. App. 104a–106a. In so doing, it ignored other provisions of the Georgia Constitution that use “by the people” to refer to all eligible electors in other contexts. Instead, the district court only reviewed language about other appointed and elected constitutional

⁵ The district court’s reliance on *Cox v. Barber*, 275 Ga. 415, 415 (2002) for its conclusion only cites to *dicta* about the election process.

boards and relied on a history of legislative enactments about the creation and operation of the Commission. App. 104a–105a. In the district court’s inconsonant analysis, somehow the utter consistency of one hundred-nineteen years of a *statewide* method of election of commissioners after the shift away from an appointed board supported the necessary proposition that Georgia law allowed the legislature to shift to single-member districts, notwithstanding the utter lack of state judicial authority for the district court’s interpretation of the state constitutional provision. App. 49a–52a.

By enjoining statewide elections for its utility regulators while not certifying the question of how to interpret this language in the Georgia Constitution to the Supreme Court of Georgia, the district court erred by not applying Eleventh Circuit precedent: “Substantial doubt about a question of state law upon which a particular case turns should be resolved by certifying the question to the state supreme court.” *Jones v. Dillard’s, Inc.*, 331 F. 3d 1259, 1268 (11th Cir. 2003) (quoting *Moreno v. Nationwide Insur. Co.*, 105 F. 3d 1358, 1360 (11th Cir. 1997)). The district court did not cite any case interpreting the “by the people” language of the Georgia Constitution because it is an unresolved question of state law, as the Eleventh Circuit agreed. The Supreme Court of Georgia should have the opportunity to interpret the Georgia Constitution, especially when the district court relied on that

interpretation to alter a method of election that has been in place for more than 115 years, and which is in place in several other states.

3. The Eleventh Circuit did not err in when it applied *Purcell*.

The Eleventh Circuit also did not demonstrably err by applying *Purcell* to a district-court ruling that resulted in the cancellation of a statewide election where the injury only flows one way. Applicants do not even attempt to demonstrate that their ultimate success would be “entirely clearcut.” *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2020) (Kavanaugh, J., concurring). They continue to ignore that issue now, simply claiming that they can clear that bar on process grounds (having filed the underlying action two years before the election and obtaining a ruling after a full trial on the merits). Application, p. 18.

4. The remaining *Nken* factors support the stay.

Finally, as noted above, there is clear, irrefutable, and irreparable injury to the Secretary and the public were this Court to dissolve the Eleventh Circuit’s stay, while there is no meaningful injury to Applicants. Despite the heavy burden of proving the *Nken* factors support their position, Applicants do not even address the harm to the state or the public interest. Even the dissent in the Eleventh Circuit agreed that it is irreparable harm to a state when elections cannot be held according to the state’s laws. App. 44a. And the public interest

does not support cancelling the primary elections and eliminating the ability of every Georgia voter to vote on members of the Commission in the November general election, especially when the remedy for Applicants after the appeal is the same whether the election is held in November or not. Given the unique nature of utility regulators and the interplay of race and politics discussed above, the public interest supports granting a stay pending appeal and granting the stay will promote confidence and stability in the election system by ensuring effective appellate review before making significant and structural changes to the Georgia election system. *New Ga. Project v. Raffensperger*, 976 F. 3d 1278, 1284 (11th Cir. 2020).

CONCLUSION

This Court should deny the emergency application to vacate the Eleventh Circuit's stay pending appeal.

Respectfully submitted this 17th day of August, 2022.

Christopher M. Carr

Attorney General

Bryan K. Webb

Deputy Attorney General

Russell D. Willard

Senior Assistant Attorney General

State Law Department

Atlanta, Georgia 30334

Bryan P. Tyson*

Bryan F. Jacoutot

Diane F. LaRoss

Taylor English Duma LLP

1600 Parkwood Cir., Suite 200

Atlanta, GA 30339

Telephone: 678-336-7249

**Counsel of Record*

Counsel for Defendant-Appellant Brad Raffensperger

RETRIEVED FROM DEMOCRACYDOCKET.COM

In the
Supreme Court of the United States

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

Plaintiffs-Applicants,

v.

BRAD RAFFENSPERGER,
in his official capacity as Secretary of State of Georgia,
Defendant-Respondent.

RESPONDENT'S SUPPLEMENTAL APPENDIX

Christopher M. Carr
Attorney General
Bryan K. Webb
Deputy Attorney General
Russell D. Willard
Senior Assistant Attorney General
State Law Department
Atlanta, Georgia 30334

Bryan P. Tyson*
Diane F. LaRoss
Taylor English Duma LLP
1600 Parkwood Cir., Suite 200
Atlanta, GA 30339
Telephone: 678-336-7249

**Counsel of Record*

Counsel for Defendant-Respondent Brad Raffensperger

INDEX OF SUPPLEMENTAL APPENDIX

Supp. Appendix A: Doc. 97, District Court Order on Motions for Summary Judgment	Supp.App.004a
Supp. Appendix B: Doc. 108, Transcript of Hearing on Motion for Preliminary Injunction	Supp.App.043a
Supp. Appendix C: Doc. 112, District Court Order on Motion for Preliminary Injunction	Supp.App.170a
Supp. Appendix D: Doc. 141, Trial Transcript Vol. 3-A (June 29, 2022 Morning).....	Supp.App.181a

SUPP. APPENDIX A

RETRIEVED FROM DEMOCRACYDOCKET.COM

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

RICHARD ROSE, *et al.*,
Plaintiffs,

v.

BRAD RAFFENSPERGER, in his capacity as
Secretary of State of the State of Georgia,
Defendant.

Civil Action No.
1:20-cv-02921-SDG

OPINION AND ORDER

This case presents the novel question of whether there can be vote dilution in violation of Section 2 of the Voting Rights Act (VRA) when the challenged election is held on a statewide basis. On the parties' cross-motions for summary judgment, the Court concludes that certain disputes of material issues of fact require a trial and preclude complete resolution at this stage. After careful consideration of the parties' briefing, and with the benefit of oral argument, the Court **DENIES** Defendant's motion for summary judgment [ECF 80] and **GRANTS in part** and **DENIES in part** Plaintiffs' partial motions for summary judgment [ECF 56; ECF 79]. Plaintiffs' Motion for Judicial Notice of Census Data [ECF 57] is **GRANTED**.

I. Background

The Georgia Public Service Commission (the Commission) exists by virtue of the State Constitution:

There shall be a Public Service Commission for the regulation of utilities which shall consist of five members who shall be elected by the people.

GA. CONST. ART. IV, § 1, ¶ I(a) (2021). The commissioners serve terms of six years.

Id. The Georgia Constitution also dictates that “[t]he filling of vacancies and manner and time of election of members of the [Commission] shall be as provided by law.” GA. CONST. ART. IV, § 1, ¶ I(c). The method of election is therefore prescribed by statute. O.C.G.A. § 46-2-1. Commissioners’ terms are staggered, and general elections take place every two years. *Id.* § 46-2-1(d). Each commissioner is required to live in one of five residence districts, but “each member of the commission shall be elected state wide by the qualified voters of this state who are entitled to vote for members of the General Assembly.” O.C.G.A. § 46-2-1(a). A commissioner must continue to live in that particular district throughout the term. *Id.* § 46-2-1(b).

Plaintiffs are residents of and registered voters in Fulton County, Georgia.¹ They are all African American.² The sole Defendant is Brad Raffensperger, sued in his official capacity as the Georgia Secretary of State.³ On July 14, 2020, Plaintiffs filed suit asserting that the method of electing members of the Commission causes improper dilution of their votes.⁴ They seek a declaratory judgment that this violates Section 2 and an order directing the Secretary to administer Commission elections in a manner that complies with the VRA.⁵

On May 27, 2021, Plaintiffs moved for partial summary judgment on certain of the Secretary's affirmative defenses.⁶ The Secretary opposed the motion and Plaintiffs replied.⁷ After the close of discovery, on July 9, Plaintiffs filed a second motion for partial summary judgment on the Secretary's remaining affirmative defenses and the *Gingles* prerequisites.⁸ The Secretary opposed this motion

¹ ECF 62-1 (Def.'s Resp. to Pls.' SUMF), No. 1.

² *Id.*

³ ECF 1 (Compl.), ¶ 10.

⁴ *See generally* ECF 1 (Compl.).

⁵ *Id.* at 10–11 (*ad damnum* clause).

⁶ ECF 56 (Pls.' First MSJ) (First, Second, Fourth, Fifth, and Sixth Defenses).

⁷ ECF 62 (Def.'s Resp. to Pls.' First MSJ); ECF 68 (Pls.' Reply on First MSJ).

⁸ ECF 79 (Pls.' Second MSJ) (Third, Seventh, Eighth, Ninth, and Tenth Defenses).

(in most respects), and Plaintiffs replied.⁹ Also on July 9, the Secretary filed his own motion for summary judgment.¹⁰ Plaintiffs opposed, and the Secretary filed a reply.¹¹ On July 28, the United States filed an *amicus* brief.¹² The Court heard argument on November 8.¹³ The basis for the Court's rulings follows.

II. Applicable Law

A. Summary Judgment Standard

Summary judgment is appropriate when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A fact is “material” only if it can affect the outcome of the lawsuit under the governing legal principles. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A party seeking summary judgment has the burden of informing the district court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If a movant meets its burden, the party opposing summary judgment must present evidence showing either

⁹ ECF 85 (Def.'s Resp. to Pls.' Second MSJ); ECF 87 (Pls.' Reply on Second MSJ).

¹⁰ ECF 80 (Def.'s MSJ).

¹¹ ECF 84 (Pls.' Resp. to Def.'s MSJ); ECF 88 (Def.'s Reply on MSJ).

¹² ECF 86 (U.S. Stmt. of Interest).

¹³ ECF 95 (minute entry); ECF 96 (Nov. 8, 2021 H'g Tr.).

(1) a genuine issue of material fact or (2) that the movant is not entitled to judgment as a matter of law. *Id.* at 324.

B. The Voting Rights Act

Section 2 of the VRA prohibits practices that deny or abridge the right to vote of any United States citizen based on race or color. 52 U.S.C. § 10301(a). Such a violation is established

if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. § 10301(b). Section 2 does not, however, create an entitlement to proportional representation for members of a protected class. *Id.*

1. Gingles

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court first interpreted Section 2 after Congress amended it in 1982. The amendment emphasized that a court's focus must be on the *results* of the challenged practices rather than the intent behind their adoption. *Id.* at 35–36. Under *Gingles*, plaintiffs must satisfy three prerequisites to establish a vote-dilution claim:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates. *Second*, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. *Third*, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.

Id. at 50–51 (second emphasis in original) (footnotes omitted) (citations omitted).

While at-large elections are not *per se* violations of Section 2, they are impermissible if under the totality of the circumstances they “result in unequal access to the electoral process.” *Id.* at 46.

2. Senate Factors

In addition to the three *Gingles* prerequisites, courts must generally consider several factors that were identified in the Senate Report accompanying the 1982 VRA amendment. *Id.* at 44–45. These Senate Factors are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions,¹⁴ or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Solomon v. Liberty Cnty., Fla., 899 F.2d 1012, 1015–16 (11th Cir. 1990) (Kravitch, J.

specially concurring). Two additional factors may also be probative:

8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

¹⁴ “Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates.” *Gingles*, 478 U.S. at 38 n.5 (internal quotation marks omitted) (citations omitted).

9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 1016. These "Senate Factors" will "typically establish" a Section 2 violation.

Id. at 1015. *See also Gingles*, 478 U.S. at 45 (concluding that these nine factors "will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims") (footnote omitted). Ultimately, *Gingles* "calls for a flexible, fact-intensive inquiry into whether an electoral mechanism results in the dilution of minority votes." *Brooks v. Miller*, 158 F.3d 1230, 1239 (11th Cir. 1998).

III. Discussion

The Court first addresses whether (1) Plaintiffs have suffered a harm that gives them standing to sue and (2) the Secretary is the proper Defendant. The Court next considers the existence of an appropriate remedy, which is at the heart of the parties' dispute. Third, the Court assesses whether Plaintiffs have carried their burden to establish the three *Gingles* prerequisites. Finally, the Court examines the Secretary's affirmative defenses.

A. Injury, Standing, and the Proposed Remedy

Constitutional standing is a necessary element of every case invoking federal jurisdiction. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Its existence is a threshold issue. *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1296 (11th Cir.

2019) (“Because standing to sue implicates jurisdiction, a court must satisfy itself that the plaintiff has standing before proceeding to consider the merits of her claim, no matter how weighty or interesting.”). Moreover, in order to carry their initial burden under *Gingles*, Plaintiffs must show that the challenged practice is tied to the injury sought to be remedied. *Gingles*, 478 U.S. at 50 n.17. And the proposed remedy must itself be feasible: If there is no feasible remedy, there can be no injury. *Davis v. Chiles*, 139 F.3d 1414, 1419–20. *See also id.* at 1423 (“[A] plaintiff must propose a viable and proper remedy in order to establish a prima facie case under Section Two.”) (citations omitted). Here, the Secretary argues that Plaintiffs lack both statutory and constitutional standing because their injury is a partisan one, and the proposed remedy impermissible.¹⁵

1. The Nature of Plaintiffs’ Injury

The parties agree that Plaintiffs *allege* they are being injured by the at-large method of electing members of the Commission because this system dilutes the strength of their votes.¹⁶ But the Secretary argues that, because members of the Commission are elected on a statewide basis, Plaintiffs’ only injury is that they do

¹⁵ *See, e.g.*, ECF 80-1 (Def.’s MSJ), at 4–14. *See also* ECF 37 (Ans.), at 2 (Third and Fourth Defenses).

¹⁶ ECF 1 (Compl.), ¶ 36; ECF 80-1 (Def.’s MSJ), at 6.

not like the outcome.¹⁷ Thus, his Third and Fourth Affirmative Defenses respectively assert that Plaintiffs lack constitutional and statutory standing.¹⁸ Plaintiffs counter that they are entitled to summary judgment on these defenses.¹⁹

Adopting the Secretary's interpretation would amount to a *per se* rule that vote dilution in violation of Section 2 can *never* take place on a statewide-level. Section 2, however, applies to both states and their political subdivisions, 52 U.S.C. § 10301(a). The Court finds no basis to adopt a blanket rule that vote dilution can never occur at a statewide level. Nor has the Secretary pointed to any case law that requires such an interpretation, although the Secretary is quick to note that neither Plaintiffs nor the United States have pointed to any case law supporting their interpretation either.²⁰

If the Commission were a countywide commission rather than a statewide elected body, there would be little question that the current at-large method of elections could cause an injury for purposes of Section 2 and constitutional standing. *See, e.g., Houston Lawyers' Ass'n v. Att'y Gen. of Tex.*, 501 U.S. 419, 421

¹⁷ ECF 80-1 (Def.'s MSJ), at 7-8.

¹⁸ ECF 37 (Ans.), at 2.

¹⁹ ECF 56 (Pls.' First MSJ), at 1, 7-9 (Fourth Defense); ECF 79 (Pls.' Second MSJ), at 1, 8-10 (Third Defense).

²⁰ ECF 88 (Def.'s Reply on MSJ), at 3.

(1991) (concluding Section 2 applied to at-large, district-wide electoral scheme used for the election of trial judges in Texas); *Gingles*, 478 U.S. at 46–47 (recognizing that multimember districts and at-large voting schemes may dilute the votes of racial minorities); *United States v. Marengo Cnty. Comm’n*, 731 F.2d 1546, 1550 (11th Cir. 1984) (concluding district court was clearly erroneous in holding that the county’s at-large system had no discriminatory results). In fact, the Secretary concedes that the Section 2 injury *alleged* by Plaintiffs is “one that has been accepted by courts since the inception” of the VRA, although the Secretary asserts they have failed to *prove* the existence of that injury.²¹

The Court agrees with the United States’ assertion that statewide vote dilution of the type alleged here is a cognizable injury under Section 2.²² There is no legal basis to distinguish between States and their political subdivisions based on the language of Section 2. Plaintiffs must still, however, propose a viable remedy (without which they will lack the necessary injury for standing purposes).

To the extent the Secretary seeks summary judgment because Plaintiffs’ vote-dilution injury is not cognizable and they therefore lack standing, his motion is **DENIED**. However, Plaintiffs’ motions are **DENIED** to the extent they seek

²¹ ECF 88 (Def.’s Reply on MSJ), at 2.

²² ECF 86 (U.S. Stmt. of Interest), at 5–10.

summary judgment on the Secretary's Third and Fourth Affirmative Defenses because, if Plaintiffs are unable to establish after trial that their proposed remedy is feasible, they will not have shown the existence of an injury. *Davis*, 139 F.3d at 1419–20. Those defenses therefore remain viable.

2. The Secretary as Defendant

For a plaintiff to have constitutional standing, his alleged injury must be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” *Lujan*, 504 U.S. at 560 (alterations in original) (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)). Further, “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Id.* at 561 (citing *Simon*, 426 U.S. at 38, 43, 96).

The Secretary argues that he is not the proper Defendant because an order enjoining him from administering elections for members of the Commission and directing him to comply with Section 2 would not redress Plaintiffs' purported injury.²³ The Secretary declares that, under such an injunction, the Governor could simply continuously appoint people to vacant positions on the Commission since

²³ ECF 80-1 (Def.'s MSJ), at 10–14. *See also* ECF 37 (Ans.), at 1 (Second Defense).

the Secretary would be unable to administer elections for those positions.²⁴ Plaintiffs counter that the Secretary conceded the issue of whether he is a proper party by failing to identify any missing but necessary parties in his initial disclosures or the joint preliminary report.²⁵

This is the same basic argument the Secretary made at the motion to dismiss stage, which was rejected by the Court.²⁶ At the time, the Secretary served as the Chair of the State Election Board, which was responsible for adopting rules and regulations governing the conduct and administration of elections. O.C.G.A. §§ 21-2-30(d), -31(2) (2008). But that statute was amended, effective March 25, 2021. Act of Mar. 25, 2021, 2021 Ga. Laws Act 9 (S.B. 202). The Secretary is no longer Chair, and is only an *ex officio* nonvoting member of the State Election Board. O.C.G.A. § 21-2-30(a), (d) (2021). The question before the Court is whether these changes mean that the Secretary is no longer a necessary or sufficient Defendant.

Although the parties disagree about the scope of the Secretary's current duties,²⁷ he or his office remain responsible for (among other things) qualifying

²⁴ ECF 80-1 (Def.'s MSJ), at 11-12.

²⁵ ECF 56 (Pls.' First MSJ), at 6.

²⁶ ECF 36 (Jan. 5, 2021 Op. & Order), at 29-33.

²⁷ See, e.g., ECF 85-1 (Def.'s Resp. to Pls.' SUMF), No. 2.

certain candidates for elections, including political-body and independent candidates for the Commission; building the databases used to create absentee ballots and program voting machines; and certifying election results.²⁸ The Secretary also co-signs the commission ultimately issued to the winner of an election for the Commission.²⁹ *See generally* O.C.G.A. § 21-2-50(a) (2019).

The Secretary admits that his proffered hypothetical—in which the Governor simply appoints commissioners to fill vacancies, *ad infinitum*—would violate the Georgia constitutional provision that requires members of the Commission to be “elected by the people.”³⁰ GA. CONST. ART. 4, § 1, ¶ I. Georgia law provides that the Governor shall appoint a person to fill any vacancy on the Commission, and that such person shall “hold his office until the next regular general election.” O.C.G.A. § 46-2-4. The Court presumes that the Governor will abide by his State and Federal constitutional duties. Therefore, the Court will not credit counsel’s hypothetical as providing any reasonable basis to conclude that the Secretary is not the proper Defendant in this action.

²⁸ ECF 79-1 (Def.’s Stipulated Facts), ¶¶ 1-2, 4.

²⁹ *Id.* ¶ 5.

³⁰ ECF 80-1 (Def.’s MSJ), at 13-14.

If Georgia's current method of electing members of the Commission violates Section 2 and the Secretary is enjoined from conducting elections under that process, the cause of Plaintiffs' alleged vote-dilution injury will be stopped. This is enough under *Lujan* for purposes of traceability and redressability. 504 U.S. at 561. Nothing about such an injunction would prevent the next regular election from taking place as the Secretary pontificates.³¹ Rather, under this scenario, the election would take place, with the Secretary certifying the results, using a method that complies with Section 2—whether that method is developed by the Georgia General Assembly or this Court. *See, e.g., Perry v. Perez*, 565 U.S. 388, 391–92 (2012) (per curiam) (noting that, when the Texas legislature failed to enact new redistricting plans after the 2010 census, “[i]t thus fell to the District Court in Texas to devise interim plans for the State’s” elections) (citation omitted).

The changes in Georgia's election law do not, therefore, alter the conclusion the Court reached at the motion to dismiss stage.³² The Secretary's motion is **DENIED** as to (1) redressability to the extent he argues he is the incorrect Defendant and (2) the argument that Plaintiffs' injury is not cognizable. Plaintiffs'

³¹ ECF 88 (Def.'s Reply on MSJ), at 6.

³² ECF 36 (Jan. 5, 2021 Op. & Order), at 28–33.

first motion for summary judgment is **GRANTED** to the extent it seeks judgment on the Secretary's Second Affirmative Defense.

3. Plaintiffs' Proposed Remedy

"In assessing a plaintiff's proposed remedy, a court must look to the totality of the circumstances, weighing both the state's interest in maintaining its election system and the plaintiff's interest in the adoption of his suggested remedial plan." *Davis*, 139 F.3d at 1419–20 (citing *Houston Lawyers' Ass'n*, 501 U.S. at 426). *See also Brooks*, 158 F.3d at 1239 (same). The Eleventh Circuit has, however, cautioned that "[i]mplicit in th[e] first *Gingles* requirement is a limitation on the ability of a federal court to abolish a particular form of government" *Davis*, 139 F.3d at 1421 (quoting *Nipper v. Smith*, 39 F.3d 1494, 1531 (11th Cir. 1994) (plurality opinion)). *Cf. Holder v. Hall*, 512 U.S. 874 (1994) (plurality opinion) (concluding a plaintiff cannot maintain a Section 2 action against the size of a government body).

Plaintiffs' proposed remedy is therefore relevant to both the first *Gingles* prerequisite and the totality-of-the-circumstances analysis. This does not mean, however, that the Court must rule on whether Plaintiffs have satisfied the remedy portion of the first prerequisite for the case to advance to trial. *See, e.g., Brooks*, 158 F.3d at 1240 (finding no error in district court's conclusion — after bench trial — that the harm that would result from plaintiffs' proposed remedy was "too great to

justify ordering such a system” and that the plaintiffs had therefore failed to establish the first prerequisite); *Ala. State Conf. of the Nat’l Ass’n for the Advancement of Colored People v. Alabama* (Alabama NAACP), Case No. 2:16-cv-731-WKW, 2020 WL 583803, at *4, *37 (M.D. Ala. Feb. 5, 2020) (concluding after six-day bench trial that the plaintiffs had failed to meet the first prerequisite because they had not shown “that a feasible remedy can be fashioned”). The Court concludes that summary judgment on matters related to Plaintiffs’ proposed remedy is inappropriate.

i. The State’s Interests

The Secretary’s Eighth Affirmative Defense asserts that the relief Plaintiffs seek would “result in a violation of the U.S. Constitution because Plaintiffs’ proposed remedies require the alteration of the form of government of the State of Georgia.”³³ His discovery responses further explained that this defense is based on Georgia’s sovereignty under the Guaranty Clause of the U.S. Constitution (ART. IV, § 4) and the Tenth Amendment since (he argues) Plaintiffs’ proposed remedy would require a change in Georgia’s Constitution.³⁴ Thus, the Secretary contends that a remedy requiring the election of Commission members through

³³ ECF 37, at 2 (Eighth Defense).

³⁴ ECF 85-1 (Def.’s Response to Pls.’ SUMF), ¶ 4.

districts rather than at-large would force a new form of government on the State and “fundamentally alter[] the nature that [the] sovereign state has set up [for] its constitutional commissions to govern utilities.”³⁵ He compares this case to *Holder v. Hall*, 512 U.S. 874, in which the Supreme Court held that Section 2 cannot be used to change the size of a government body.³⁶

The Secretary further argues that, “given the unique interests of the State in the design of the [Commission],” Plaintiffs cannot demonstrate a permissible remedy to their alleged injury.³⁷ He asserts that members of the Commission exercise authority over and “take calls from constituents across” the entire State.³⁸ Accordingly, he concludes that the “unique nature of the structure and purpose” of the Commission—including its quasi-judicial function—“is furthered by statewide elections” of its members.³⁹

³⁵ ECF 80-1 (Def.’s MSJ), at 16.

³⁶ *Id.* at 18. *See generally id.* at 18–20.

³⁷ *Id.* at 16 (citing *Nipper*, 39 F.3d at 1530–31 (plurality opinion)). *See also* ECF 37 (Ans.), at 2 (Eighth Defense).

³⁸ ECF 80-1 (Def.’s MSJ), at 16–17.

³⁹ *Id.* at 18. The order denying the motion to dismiss addresses the Secretary’s arguments that the Court should apply judicial-elections cases. *See generally* ECF 36 (Jan. 5, 2021 Op. & Order), at 34–39.

The Secretary acknowledges, however, that the precise issue in this case is one of first impression.⁴⁰ He also accepts that the State's interests are a factor to be considered "in weighing the totality of the circumstances,"⁴¹ so they are not a *per se* bar to Plaintiffs' preferred remedy. "Because the State's interest in maintaining an at-large, district-wide electoral scheme for single-member offices is merely one factor to be considered in evaluating the 'totality of circumstances,' that interest does not automatically, and in every case, outweigh proof of racial vote dilution." *Houston Lawyers' Ass'n*, 501 U.S. at 427 (concluding that a state's interest in maintaining its electoral system is properly considered under the totality of the circumstances).

Plaintiffs contest the factual and legal predicates on which the Secretary's arguments are based.⁴² They assert that summary judgment in favor of the Secretary is inappropriate and that there remain disputed issues of fact.⁴³ The United States' *amicus* brief also asserts that the Secretary misapplies *Holder* because

⁴⁰ ECF 80-1 (Def.'s MSJ), at 18.

⁴¹ *Id.* at 17-18 (citing *Brnovich*, 594 U.S. ___, 141 S. Ct. 2321, 2339-40 (2021)).

⁴² ECF 79 (Pls.' Second MSJ), at 11-14.

⁴³ ECF 84 (Pls.' Resp. to Def.'s MSJ), at 11. *See generally id.* at 9-16.

nothing in Plaintiffs' proposed plan requires a change in the number of commissioners.⁴⁴

The Court concludes that these matters, including the State's interests in maintaining its current form of electing members to the Commission, involve disputed issues of material fact that cannot be resolved on the parties' cross-motions for summary judgment. However, questions of first impression on Georgia law are also involved, so some additional discussion is warranted.

ii. The State's Chosen Form of Government

All Georgia voters currently may vote for each member of the Commission. O.C.G.A. § 46-2-1(a). Plaintiffs' proposed remedy would change that system such that voters would only be eligible to vote for the one member of the Commission for the particular voting district in which the voter resides.⁴⁵ The Secretary asserts that implementing such a system would impermissibly force the State to adopt a new form of government.⁴⁶ Plaintiffs' briefing does not tackle this issue head on, focusing primarily on the Secretary's arguments about the State's specific interests

⁴⁴ ECF 86 (U.S. Stmt. of Interest), at 10–13.

⁴⁵ ECF 80-1 (Def.'s MSJ), at 18; ECF 84 (Pls.' Response to Def.'s MSJ), at 9–11. *See also* ECF 96 (Nov. 8, 2021 H'g Tr.), at 7–8.

⁴⁶ ECF 80-1 (Def.'s MSJ), at 15–16; ECF 96 (Nov. 8, 2021 H'g Tr.), at 7–8.

in maintaining the current system.⁴⁷ However, the parties ably addressed this point during oral argument.⁴⁸

In effect, the issue centers on the meaning of the phrase “elected by the people” in the constitutional provision establishing the Commission. GA. CONST. ART. IV, § 1, ¶ I(a). The phrase is not used elsewhere in the Georgia Constitution in a similar context from which the Court might glean meaning. Nor has the Court found, or the parties pointed to, any case law on point. Does “elected by the people” mean that Georgia’s Constitution requires all eligible voters in the State to have the opportunity to vote for each member of the Commission, or is that outcome only dictated by the statute (O.C.G.A. § 46-2-1(a)), which requires members of the Commission to be elected statewide? Stated somewhat differently, does implementing Plaintiffs’ proposed remedy require abrogating the State Constitution? The parties disagree sharply about the answer.

During oral argument, the Secretary urged this Court to certify the issue to the Georgia Supreme Court.⁴⁹ Plaintiffs counter that this is unnecessary because the answer is irrelevant—no matter its interpretation, the State Constitution

⁴⁷ ECF 84 (Pls.’ Response to Def.’s MSJ), at 10–16.

⁴⁸ See generally ECF 96 (Nov. 8, 2021 H’g Tr.).

⁴⁹ ECF 96 (Nov. 8, 2021 H’g Tr.), at 7–8.

cannot override Section 2.⁵⁰ While Plaintiffs' point about Section 2 is well taken, it certainly does not make the answer immaterial. Whether the at-large election of members of the Commission is required by the Georgia Constitution or only by statute bears on the totality-of-the-circumstances analysis the Court must undertake. It could affect, for example, the weight the Court should place on the State's interests in maintaining its current form of electing members of the Commission. *Davis*, 139 F.3d at 1421. Clarity on these issues may be necessary for the Court to assess the totality of the circumstances.

Given the issues that remain to be presented at trial, however, the Court cannot conclude that certification is required at this stage. The Georgia Supreme Court does not "give advisory opinions or respond to certified questions that are anticipatory in nature." *GEICO Indem. Co. v. Whiteside*, 311 Ga. 346, 346 n.1 (2021) (citing *CSX Transp. v. City of Garden City*, 279 Ga. 655, 658 n.5 (2005)). It is possible this Court may be able to rule after trial without needing to certify any questions. Ga. Sup. Ct. R. 46 (permitting certification of legal questions to that court when "it

⁵⁰ ECF 96 (Nov. 8, 2021 H'g Tr.), at 39–41 (citing *City of Rome v. United States*, 446 U.S. 156 (1980), abrogated on other grounds as stated in *Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 209–11 (2009); *Marengo Cnty. Comm'n*, 731 F.2d 1546). See also ECF 84 (Pls.' Resp. to Def.'s MSJ), at 13 (citing S. Rep. No. 97-417, at 29 n.117 (1982); *Hous. Laws.' Ass'n*, 501 U.S. at 427; *Marengo Cnty. Comm'n*, 731 F.2d at 1571).

shall appear [to the certifying court] . . . that there are involved in any proceeding before it questions or propositions of the laws of this State *which are determinative of said cause* and there are no clear controlling precedents in the appellate court decisions of this State”) (emphasis added). Waiting until after trial to assess whether certification is appropriate will obviate the risk of presenting questions that ultimately may not be dispositive. Moreover, it would provide the Georgia Supreme Court with a complete record to consider in ruling on any questions that this Court does certify. *See, e.g.,* Ga. Sup. Ct. R. 47 (“The Court certifying to this Court a question of law shall formulate the question and cause the question to be certified and transmitted to this Court, *together with copies of such parts of the record and briefs in the case as the certifying Court deems relevant.*”) (emphasis added).

4. Summary

Georgia’s interests in maintaining the at-large method of election of members of the Commission (and thus the appropriateness of the remedy sought by Plaintiffs) cannot be determined on summary judgment. Accordingly, the Court **DENIES** Plaintiffs’ request for judgment in its favor on the Secretary’s Eighth Affirmative Defense. It is also therefore improper to conclude as a matter

of law that Plaintiffs suffered no injury and thus lack standing. The Court **DENIES** the Secretary's Motion for Summary Judgment.

B. The *Gingles* Prerequisites

The Supreme Court has made clear that the three part test of *Gingles* is a threshold that a plaintiff must meet in order to maintain a section 2 claim. *Solomon*, 899 F.2d at 1017 (Kravitch, J. specially concurring). These requirements

present mixed questions of law and fact. Initially, the district court must make findings of fact concerning the polity's demographics and actual voting patterns in particular elections. The subsequent determination of the legal inferences to be drawn from those facts, however, involve questions of law and the application of legal standards.

Id. at 1017 n.6. Accordingly, while those factual issues that are not in dispute are appropriately resolved here, the inferences to be drawn from them under the totality of the circumstances are not. They must await trial. As discussed below, unless otherwise noted, the parties do not dispute the following facts, which establish that Plaintiffs have satisfied the three basic *Gingles* prerequisites.

1. Geography and Compactness

Under the first *Gingles* prerequisite, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. *See also Wright v.*

Sumter Cnty. Bd. of Elecs. & Registration, 979 F.3d 1282, 1303 (11th Cir. 2020) (citing *Gingles*, 478 U.S. at 106). The minority group must have the potential to elect its representative of choice in a single-member district. *Wright*, 979 F.3d at 1303 (emphasis added) (citing *Grove v. Emison*, 507 U.S. 25, 40 (1993)).

Demographic information maintained by the Secretary's office shows that 29.95% of Georgia's electorate is "Black, not of Hispanic origin."⁵¹ These voters are sufficiently numerous and geographically compact to form a majority in at least one single-member district in a five-district plan for the election of Commission members.⁵² The illustrative plan proposed by Plaintiffs also shows—and the Secretary acknowledges—that the creation of such a district is possible.⁵³ Accordingly, the parties agree to all the necessary facts to establish this part of the first *Gingles* prerequisite.

⁵¹ ECF 79-1 (Def.'s Stipulated Facts), ¶ 10.

⁵² ECF 85-1 (Def.'s Resp. to Pls.' SUMF), No. 5.

⁵³ ECF 1-3 (Pls.' Illustrative Districting Plan); ECF 35 (Dec. 8, 2020 H'g Tr.), at 40 (counsel for the Secretary acknowledging Plaintiffs' proposed map draws a majority-minority district).

Plaintiffs further contend that, had their proposed plan been in effect since 2012, it would have allowed Black voters to elect a candidate of their choice in at least one district.⁵⁴ The Secretary disputes this assertion.⁵⁵

As the Court reads *Gingles* and its progeny, to satisfy the first prerequisite Plaintiffs need not prove their candidate of choice *would* have been elected. They have put forward enough facts – that the Secretary does not dispute – to establish that their proposed single-member, majority-minority district would give African Americans the *potential* to elect their representative of choice to the Commission. This is sufficient to satisfy the first prerequisite of geography and compactness. *Gingles*, 478 U.S. at 50 n.17 (“Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.”) (emphasis in original); *see also Solomon*, 899 F.2d at 1018 n.7 (Kravitch, J. specially concurring) (“So long as the *potential* exists that a minority group could elect its own representative in spite of racially polarized voting, that group has standing to raise a vote dilution challenge under the Voting Rights Act.”) (citing *Gingles*, 478 U.S. at 50 n.17) (emphasis added).

⁵⁴ ECF 85-1 (Def.’s Resp. to Pls.’ SUMF), No. 9.

⁵⁵ *Id.*

Plaintiffs are therefore entitled to summary judgment in their favor on the first *Gingles* prerequisite of geography and compactness because they have shown that African Americans are sufficiently large and geographically compact to constitute a majority in a single-member district. The Secretary may present evidence at trial about the inferences the Court should draw from these facts under the totality of the circumstances.

2. Political Cohesiveness

The second *Gingles* prerequisite is that “the minority group . . . show that it is politically cohesive.” 478 U.S. at 50. The parties agree that Black voters have been politically cohesive in general elections for members of the Commission since 2012.⁵⁶ In fact, Plaintiffs’ expert concluded – and the Secretary does not dispute – that such cohesion was present in all general and runoff elections for seats on the Commission from 2012 through the present.⁵⁷

However, the Secretary asserts that there are “no particularized needs of the Black community in the context of utility regulation, because each ratepayer is treated the same and the process of ratemaking is applied statewide.”⁵⁸ The

⁵⁶ ECF 85-1 (Def.’s Resp. to Pls.’ SUMF), No. 6.

⁵⁷ *Id.*, No. 11.

⁵⁸ ECF 79-1 (Def.’s Stipulated Facts), ¶ 8.

Secretary further argues that determining the causes of the polarization – racial or partisan – are inappropriate for resolution on summary judgment.⁵⁹

The Court does not view this second prerequisite as requiring an assessment of the *relevancy* of political cohesion as applied to the functions of the Commission, nor the *causes* of polarization. Rather, the weight to be afforded to this *Gingles* prerequisite and the conclusions to be drawn from it should be part of the totality-of-the-circumstances analysis under the Senate Factors. *Gingles*, 478 U.S. at 37 (identifying extent of racial polarization in elections under second Senate Factor); *Solomon*, 899 F.2d at 1015 (Kravitch, J. specially concurring) (same). *See also Nipper v. Smith*, 39 F.3d 1494, 1497 (11th Cir. 1994) (Tjoflat, J. opinion) (noting Supreme Court and Eleventh Circuit have not yet determined under a totality analysis “whether section 2 plaintiffs . . . must demonstrate that their diminished opportunity to participate in the political process and to elect representatives of their choice is being caused by the interaction of racial bias in the voting community and the challenged scheme”) (omission in original).

Plaintiffs are therefore entitled to summary judgment on the second *Gingles* prerequisite. In so ruling, the Court draws no conclusions or inferences about why

⁵⁹ ECF 85 (Def.’s Resp. to Pls.’ Second MSJ), at 12–14.

candidates of choice were not elected, the causes of polarization, nor even the relevancy of these facts given the functions of the Commission.⁶⁰ The parties remain free to present evidence on these issues at trial.

3. Racial Bloc Voting

The third *Gingles* prerequisite requires that “the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority’s preferred candidate.” *Gingles*, 478 U.S. at 51 (citations omitted).

The parties agree that, since 2012, of the 25 candidates for the Commission whose race was known, four were Black.⁶¹ Candidates preferred by Black voters in those elections were (1) not supported by the majority of white voters and (2) defeated,⁶² though such candidates are not themselves necessarily Black.⁶³ General elections for Commission members during that time were polarized along

⁶⁰ *Id.* at 14 (arguing the Eleventh Circuit has held it is improper to resolve such issues at summary judgment).

⁶¹ ECF 79-1 (Def.’s Stipulated Facts), ¶ 11.

⁶² ECF 85-1 (Def.’s Resp. to Pls.’ SUMF), No. 7.

⁶³ *See, e.g.*, ECF 79-4 (Popick Expert Report), at 13 (identifying race of black-preferred candidates).

racial lines.⁶⁴ White voters thus vote sufficiently as a bloc in Commission elections to have defeated the Black-preferred candidate in every election since 2012.⁶⁵

The parties also agree that their experts appropriately used a statistical estimating method called Ecological Inference (EI) to determine the existence of polarization in voting.⁶⁶ The EI method shows “significant polarization” in Georgia elections,⁶⁷ but the parties resolutely disagree about the cause(s). The Secretary attributes it to partisanship.⁶⁸ Plaintiffs counter that race heavily informs a voter’s partisan preferences.⁶⁹ Plaintiffs also argue that the reason for the polarization is not relevant to an analysis of the *Gingles* prerequisites.⁷⁰

In *Gingles*, the Supreme Court treated the terms “racial bloc” and “racial polarization” as interchangeable. 478 U.S. at 53 n.21. While the *extent* of racial polarization is one of the Senate Factors, *id.* at 55, the *existence* of racial-block voting is part of the *Gingles* third prerequisite. In establishing this prerequisite, “the

⁶⁴ ECF 85-1 (Def.’s Resp. to Pls.’ SUMF), No. 8.

⁶⁵ *Id.*, No. 13.

⁶⁶ ECF 87-2 (Pls.’ Resp. to Def.’s SAMF), No. 1.

⁶⁷ *Id.*, No. 2.

⁶⁸ *See generally* ECF 80-3 (Barber Expert Report).

⁶⁹ *See generally* ECF 80-4 (Fraga Rebuttal Report).

⁷⁰ ECF 87-2 (Pls.’ Resp. to Def.’s SAMF), Nos. 3–7, 9–10.

minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.” *Id.* at 51.

[T]he question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and, consequently, establishes minority bloc voting within the context of § 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white “crossover” votes rises to the level of legally significant white bloc voting.

Id. at 56 (citations omitted).

Further, the plurality opinion in *Gingles* concluded that, “[f]or purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. *It means simply that the race of voters correlates with the selection of a certain candidate or candidates*; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates.” *Id.* at 51 (emphasis added). Thus, four justices concluded that the existence of political polarization does not negate the import of racial-bloc voting. *See also generally Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (emphasizing that “Congress made clear that a violation of § 2 could be established by proof of discriminatory results alone”); *Davis*, 139 F.3d 1414 (not requiring racial bias to be the cause of racial bloc

voting to establish the *Gingles* factors). Thus, the Court does not interpret the applicable case law as requiring proof of intentional racial bias on the part of the electorate to satisfy the third prerequisite under *Gingles*.

The Court concludes that Plaintiffs have shown the existence of racial-bloc voting as a matter of law, and entry of summary judgment in favor of Plaintiffs on the third *Gingles* prerequisite is appropriate. However, given the “discrete inquiries” necessary under the Senate Factors to assess “legally significant” racial polarization and the extent of such polarization, those elements and the weight they should receive must be examined at trial.

4. Summary

Plaintiffs’ motions for summary judgment are **GRANTED** with respect to the three basic *Gingles* factors—(1) geography and compactness, (2) political cohesiveness, and (3) racial bloc voting. The causes of polarization, including the effects of partisanship, will be examined as part of the totality-of-the-circumstances analysis at trial, as will Plaintiffs’ proposed remedy and injury.

C. The Secretary’s Affirmative Defenses

Plaintiffs’ motions for summary judgment challenge all of the Secretary’s affirmative defenses. Those defenses are:

1. The allegations in Plaintiffs’ Complaint fail to state a claim upon which relief may be granted.

2. Plaintiffs' claims are barred for failure to name necessary and indispensable parties.
3. Plaintiffs lack constitutional standing to bring this action.
4. Plaintiffs lack statutory standing to bring this action.
5. Plaintiffs' federal claim against Defendant is barred by the Eleventh Amendment to the United States Constitution.
6. Plaintiffs' claim is barred by sovereign immunity.
7. Plaintiffs' Complaint requests relief that will result in a violation of the U.S. Constitution because Plaintiffs' proposed remedies require the use of race as a predominate factor in the redistricting process, which is prohibited by the Equal Protection Clause of the Fourteenth Amendment.
8. Plaintiffs' Complaint requests relief that will result in a violation of the U.S. Constitution because Plaintiffs' proposed remedies require the alteration of the form of government of the State of Georgia.
9. Defendant denies that Plaintiffs have been subjected to the deprivation of any right, privilege, or immunity under the Constitution or laws of the United States.⁷¹

The Secretary's Tenth Affirmative Defense is actually a reservation of rights: "Defendant reserves the right to amend its defenses and to add additional ones, including lack of subject matter jurisdiction based on the mootness or ripeness

⁷¹ ECF 37 (Ans.), at 1-3.

doctrines, as further information becomes available in discovery.”⁷² The Secretary has withdrawn his Seventh, Ninth, and Tenth Affirmative Defenses,⁷³ and the Court has already addressed the Second, Third, Fourth, and Eighth Affirmative Defenses above. The Court addresses the Secretary’s remaining affirmative defenses (First, Fifth, and Sixth) *seriatim*.

1. First Affirmative Defense: Failure to State a Claim

The Court has already ruled that Plaintiffs’ Complaint withstood dismissal under Rule 12(b)(6).⁷⁴ Discovery is now complete. The Secretary’s contention that Plaintiffs’ first summary judgment motion was premature is therefore moot. The Secretary’s argument about why the Court’s Motion to Dismiss Order did not dispose of this defense is that the denial was “on an exceedingly charitable standard of review,” and surviving summary judgment is different.⁷⁵ That is true but somewhat beside the point. As Plaintiffs point out, whether a party has failed to state a claim is determined based on the face of the pleading. To withstand dismissal under Rule 12(b)(6), “a *complaint* must [] contain sufficient factual

⁷² *Id.* at 3.

⁷³ ECF 85, at 7 n.3.

⁷⁴ ECF 36 (Jan. 5, 2021 Op. & Order).

⁷⁵ ECF 62 (Def.’s Resp. to Pls.’ First MSJ), at 2–3.

matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Am. Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (emphasis added) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

The Court has already ruled on the sufficiency of the Complaint, so the Secretary’s First Affirmative Defense is moot and judgment in favor of Plaintiffs on that defense is appropriate. The Court **GRANTS** Plaintiffs’ motion for summary judgment on the Secretary’s First Affirmative Defense. This, of course, has no bearing on the burden Plaintiffs must carry to prevail at trial.

2. Fifth and Sixth Affirmative Defenses: Eleventh Amendment and Sovereign Immunity

The Court understands that the Secretary has maintained these defenses to preserve them for appellate review, since the Court has already rejected them.⁷⁶

To reiterate, Supreme Court and Circuit precedent compel this Court to find that (1) private plaintiffs have standing to sue under Section 2; (2) such causes of action are not barred by the Eleventh Amendment; and (3) Section 2 is a valid exercise of congressional power under the Fourteenth and Fifteenth Amendments, overriding states’ sovereign immunity. The Court **GRANTS** summary judgment in favor of Plaintiffs on the Secretary’s Fifth and Sixth Affirmative Defenses.

⁷⁶ ECF 36 (Jan. 5, 2021 Op. & Order), at 41, 44–46.

IV. Conclusion

The Court **DENIES** Defendant's motion for summary judgment [ECF 80] in its entirety and **GRANTS in part** and **DENIES in part** Plaintiffs' partial motions for summary judgment [ECF 56; ECF 79]. Plaintiffs' motions are **GRANTED** with regard to the *Gingles* prerequisites of (1) geography and compactness; (2) political cohesiveness; and (3) racial bloc voting [ECF 79, at 15–19]. To the extent that Plaintiffs' proposed remedy is considered part of the first *Gingles* prerequisite, Plaintiffs' motions are **DENIED**. Neither Plaintiffs nor the Secretary [ECF 80-1, at 15–21] are entitled to summary judgment on that issue.

Plaintiffs' motions are **GRANTED** as to the Secretary's First and Second Affirmative Defenses [ECF 56, at 5–6].

Plaintiffs' motions are **DENIED** as to the Secretary's Third and Fourth Affirmative Defenses [ECF 56, at 7–9; ECF 79, at 8–10].

Plaintiffs' motions are **GRANTED** as to the Secretary's Fifth, Sixth, and Seventh Affirmative Defenses [ECF 56, at 9–10; ECF 79, at 8].

Plaintiffs' motions are **DENIED** as to the Secretary's Eighth Affirmative Defense [ECF 79, at 10–14].

Plaintiffs' motions are **GRANTED** as to the Secretary's Ninth and Tenth Affirmative Defenses [ECF 79, at 7].

Finally, Plaintiffs separately move the Court to take judicial notice of certain census data that they assert is relevant to the fifth Senate Factor.⁷⁷ While the Secretary does not believe the data is relevant to the resolution of this case, he does not oppose the Court taking judicial notice of the data itself.⁷⁸ Accordingly, Plaintiffs' Motion for Judicial Notice of Census Data [ECF 57] is **GRANTED**.

Within seven days after entry of this Order, the parties are **DIRECTED** to file a joint scheduling proposal, to include pre-trial deadlines, a proposed timeframe for trial (including an estimated length of the trial), and post-trial deadlines. The joint proposal may note areas of disagreement. Following receipt and review of the joint scheduling proposal, the Court will enter a trial order or schedule a conference for further discussion.

SO ORDERED this 24th day of January, 2022.



Steven D. Grimberg
United States District Court Judge

⁷⁷ ECF 57 (Pls.' Mot. for Judicial Notice), at 2.

⁷⁸ ECF 61 (Def.'s Resp. to Pls.' Mot. for Judicial Notice).

SUPP. APPENDIX B

RETRIEVED FROM DEMOCRACYDOCKET.COM

1
2
3
4
5
6
7
8 The following is the PDF of an official transcript. Official
9 transcripts may only be filed in CM/ECF by the Official Court Reporter
10 and will be restricted in CM/ECF for a period of 90 days. You may
11 cite to a portion of the attached transcript by the docket entry
12 number, referencing page and line number, only after the Court
13 Reporter has filed the official transcript; however, you are
14 prohibited from attaching a full or partial transcript to any document
15 filed with the Court.
16
17
18
19
20
21
22
23
24
25

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

RICHARD ROSE, et al.)
) Docket Number
Plaintiffs,) 1:20-CV-2921-SDG
)
v.)
) Atlanta, Georgia
BRAD RAFFENSPERGER, in his) February 25, 2022
Official Capacity as Secretary of)
State of the State of Georgia,)
)
Defendant.)

TRANSCRIPT OF PRELIMINARY INJUNCTION
BEFORE THE HONORABLE STEVEN D. GRIMBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES OF COUNSEL:

FOR PLAINTIFFS: MR. BRYAN L. SELLS
THE LAW OFFICE OF BRYAN L. SELLS
P.O. Box 5493
1226 Springdale Road, NE
Atlanta, Georgia 31107-0493

MR. NICOLAS L. MARTINEZ
MR. WESLEY A. MORRISSETTE
BARTLIT BECK - IL
Suite 300
54 West Hubbard Street
Chicago, Illinois 60654

FOR DEFENDANT: MR. BRYAN TYSON
MR. BRYAN JACOUTOT
MS. CHARLENE MCGOWAN
TAYLOR ENGLISH DUMA
Suite 200
1600 Parkwood Circle
Atlanta, Georgia 30339

OFFICIAL COURT REPORTER: ALICIA B. BAGLEY, RMR, CRR

Proceedings recorded by mechanical stenography, transcript
produced by computer

I N D E XFOR THE PLAINTIFFS:

MICHAEL BARNES

Direct Examination by Mr. Martinez	8
Cross-Examination by Mr. Tyson	23

BRIONTE McCORKLE

Direct Examination by Mr. Morrisette	27
Cross-Examination by Mr. Tyson	37
Redirect Examination by Mr. Morrisette	44

JAMES WOODALL

Direct Examination by Mr. Morrisette	46
Cross-Examination by Mr. Tyson	53

P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; February 25, 2022;
all parties present)

THE COURT: All right. Let me call the case Rose, et al. vs. Raffensperger, Case Number 20-CR-2921. Let's have appearances of counsel beginning with the plaintiffs.

MR. SELLS: Your Honor, Bryan Sells for the plaintiffs.

MR. MARTINEZ: Your Honor, Nico Martinez for the plaintiffs.

THE COURT: Good morning.

MR. MORRISSETTE: Your Honor, Wesley Morrisette for the plaintiffs.

THE COURT: Good morning.

MR. MORRISSETTE: Good morning.

THE COURT: For the Secretary.

MR. TYSON: Good morning, Your Honor. Bryan Tyson for the Secretary joined by Bryan Jacoutot and Charlene McGowan.

THE COURT: All right. Good morning everyone.

I feel like I should have brought a big pot of coffee for you all. I know how hard you all have been working on this case, the redistricting case here and other districts, so thank you for all you're doing on behalf of your clients and for, despite all of that hard work, still submitting high-quality briefs in this case which I appreciate very much.

We are here on plaintiffs' motion for a preliminary

1 injunction which was filed with an expedited consideration request on
2 February 3rd. I've reviewed the briefs. Like I said, they're very
3 well done. Looking forward to argument. For counsel, if you wish to
4 remove your mask while arguing, speaking, you're welcome to do so.

5 All right. With that, since it's the plaintiffs'
6 motion I'll hear from plaintiffs' counsel first.

7 MR. SELLS: So, Your Honor, we have a couple
8 housekeeping items we'd like to raise first.

9 THE COURT: Sure.

10 MR. SELLS: As far as how we intend to move forward
11 today, you know, with the Court's permission, of course, we have a
12 Zoom witness, Michael Barnes, who has submitted written testimony
13 along with the Secretary's brief and we will just do a few minutes of
14 cross-examination of him on that, if that's alright.

15 THE COURT: All right.

16 MR. SELLS: And then we intend to present two live
17 witnesses, again very short, but to supplement what we have put in our
18 briefs. We also, as a result of probably all of that, have some
19 additional exhibits that we'd like to enter into the record. We're,
20 of course, mostly relying on documents that are already in the record
21 from the summary judgment briefing, the Secretary does the same, but
22 we'll be wanting to supplement with just a few of those and I'm not
23 sure logistically how the Court would prefer us to do that. We don't
24 have exhibit books with us, mostly electronic copies of things, so
25 we're hoping that it's alright with the Court if we could transmit

1 those to Ms. Holland or to chambers electronically.

2 THE COURT: Sure. I believe there's a mechanism to do
3 that. Is that right, Ms. Holland?

4 THE CLERK: Yes.

5 THE COURT: So, yeah, we can arrange for that after the
6 hearing on the best mechanism for getting it on the docket.

7 MR. SELLS: We appreciate that. It's only a handful of
8 items.

9 THE COURT: Sure. How long do you anticipate your
10 presentation of evidence to go?

11 MR. SELLS: I would anticipate that the evidentiary
12 portion of today will be less than an hour or thereabouts.

13 THE COURT: All right.

14 MR. SELLS: Argument will be substantially longer.

15 THE COURT: Okay. We do need that coffee then.

16 MR. TYSON: Your Honor, if I could raise one
17 housekeeping issue as well before we get started.

18 THE COURT: Sure.

19 MR. TYSON: I wanted to clarify for the Court on the
20 effect of -- the State's position on what is the effect of not having
21 the 2022 elections for the Public Service Commission. In the
22 plaintiffs' brief we talked about there being a vacancy, we responded
23 about there being a vacancy. The plaintiffs raised an excellent point
24 in their reply about a holdover provision. We spent a good chunk of
25 yesterday afternoon and Ms. McGowan and Mr. Willard at the AG's office

1 yesterday evening making sure we had the right answer on this from the
2 State.

3 So what we would have in this situation is a holdover
4 for Commissioner Johnson and Commissioner Echols, the plaintiffs are
5 correct about that. There was some litigation in the late '80s and
6 early '90s around Superior Court judges called the Brooks litigation
7 and in that there was a failure of the State to preclear some of the
8 changes in election laws and so they couldn't be enforced and the
9 District Court stayed the elections because we hadn't gotten
10 preclearance. A *quo warranto* was filed against those judges to try to
11 remove them from office saying their term had expired and the Georgia
12 Supreme Court -- the case is *Garcia vs. Miller* at 261 Georgia 531, a
13 1991 case. The Georgia Supreme Court determined that even though
14 provisions of the State constitution that had previously said a judge
15 would continue to serve until his successor was qualified and elected
16 had been removed in the '76 and '83 constitutions that the public
17 interest -- public policy of the State was to ensure the orderly
18 administration so the office wasn't vacant as long as it was filled by
19 an incumbent who's legally qualified to exercise the powers and
20 perform the duties which pertain to it.

21 There have been two other more recent cases that have
22 also cited that. They are *Kanitra*, K-A-N-I-T-R-A, vs. *City of*
23 *Greensboro*, 296 Georgia 674, that was a 2015 case that found the same
24 thing and then *Clark vs. Deal*, 298 Georgia 893, which was a 2016 case
25 also saying these holdovers would continue. So I just wanted everyone

1 to be clear at the outset that from the Secretary's position if no
2 election is held for 2022 and we believe we can persuade you that this
3 should continue, but if the Court was to enter an injunction
4 Commissioners Johnson and Echols would continue serving until such
5 time as there was an election.

6 THE COURT: Would that be the next scheduled election
7 or a special election?

8 MR. TYSON: If the Court found there was a Section 2
9 violation, I think it could order any remedial election it determined
10 was necessary, but under state law there wouldn't a vacancy until
11 there was an election. If the injunction was dissolved because you
12 found in favor of the State, though, I think that we would be open to
13 a *quo warranto* and would have to hold a special election as soon as
14 possible for those two positions.

15 THE COURT: Gotcha. I don't take anything you're
16 saying as a concession that that should in fact be the remedy and it's
17 just a procedural point, but I appreciate that.

18 MR. TYSON: Certainly. I wanted to make sure from the
19 briefing it was all clear. Thank you, Your Honor.

20 THE COURT: Thank you.

21 All right. With that, we're ready to go? Do you want
22 to start with the Zoom witness?

23 MR. SELLS: Yes, Your Honor.

24 (off-the-record discussion)

25 THE COURT: I assume you're not invoking the rule of

1 sequestration.

2 MR. TYSON: Are the witnesses you all are calling fact
3 witnesses?

4 MR. SELLS: They are. They're parties, Your Honor.

5 MR. TYSON: They're parties, okay. Then we won't
6 invoke the rule.

7 THE COURT: All right. Thank you.

8 DIRECT EXAMINATION

9 BY MR. MARTINEZ:

10 Q. Good morning, Mr. Barnes. Can you hear and see me?

11 A. Yes, sir, I can.

12 Q. Great. Thank you, sir, for appearing this morning. We
13 appreciate all the work that you do for elections in the state of
14 Georgia and I want to be respectful of your time so let's dive right
15 in.

16 Mr. Barnes, you are the Director of the Center of Election
17 Systems which is a division of the Secretary of State's Office;
18 correct?

19 A. Yes, sir, I am.

20 Q. And how long have you held that position?

21 A. I have been associated with the Center for Election Systems
22 since 2005. The Center for Election Systems was previously housed at
23 Kennesaw State University where we were under contract with the
24 Secretary of State's Office and then the Secretary of State's Office
25 absorbed the Center for Election Systems January 1st of 2018. So I

1 have been with the Center since 2005 and with the Secretary of State's
2 Office since 2018.

3 Q. You understand, Mr. Barnes, that the Secretary of State is the
4 defendant in this case?

5 A. I do.

6 Q. And you are aware that he has relied on your testimony in the
7 redistricting case a couple weeks ago in support of his opposition to
8 our preliminary injunction motion here; correct?

9 A. I am aware that I participated in that redistricting case and
10 testified as a witness.

11 Q. Are you aware that in this case the Secretary of State is relying
12 on your testimony from that redistricting case?

13 A. I am.

14 Q. And are you aware that he filed that testimony as an exhibit to
15 his response to our preliminary injunction motion?

16 A. I am.

17 Q. In the redistricting case you also submitted a sworn declaration;
18 correct?

19 A. Correct.

20 Q. You did not submit a declaration in this case; correct?

21 A. Correct.

22 Q. Elections for the Public Service Commission are not at issue in
23 the redistricting case; correct?

24 A. That is my understanding, yes, sir.

25 Q. Your testimony in that case was therefore not specific to

1 elections for the Public Service Commission; correct?

2 A. Correct.

3 Q. Mr. Barnes, you attached the 2022 election calendar to your
4 declaration in the redistricting case. That calendar is publicly
5 available on the Secretary of State's website. I'd like to pull it up
6 here briefly on the screen. Let me start here, Mr. Barnes. Does this
7 appear -- or is this the -- I'm scrolling down. Is this the
8 declaration that you submitted in the redistricting case?

9 A. It appears to be, but I have submitted a lot of declarations in
10 the last few years for various cases.

11 THE COURT: Mr. Martinez, if you can identify it for
12 the record by the ECF and case number.

13 MR. MARTINEZ: Certainly, Your Honor. This is the
14 declaration that was submitted on January 18th, 2022, in Case Number
15 21-CV-05337, and it is Document ECF Number 45-2.

16 BY MR. MARTINEZ:

17 Q. Do you see that, Mr. Barnes?

18 A. I do.

19 Q. And I'm going to head to the last page of your declaration in the
20 redistricting case. Mr. Barnes, is that your signature?

21 A. Yes, it is.

22 Q. I want to move briefly to what was submitted as Exhibit 1 to that
23 declaration, which is the 2022 State Elections and Voter Registration
24 Calendar. Do you see that, sir?

25 A. I do.

1 Q. I want to focus your attention briefly on a couple of aspects of
2 this calendar. So you see on the left-hand column here where my
3 cursor is there's a column for elections, do you see that, Mr. Barnes?

4 A. I do.

5 Q. And then do you see here where it says Special Election Date?

6 A. I do.

7 Q. And the Special Election Date listed there, which is upcoming, is
8 March 15th, 2022; is that correct?

9 A. That is correct.

10 Q. And then there's also listed here a Special Election Runoff Date,
11 do you see that?

12 A. I do.

13 Q. And that is listed for April 12th?

14 A. I do see that.

15 Q. Okay. Then if we look down a little bit further there is another
16 entry here for Special Election Date and that lists May 24th as that
17 date; is that correct?

18 A. That's correct.

19 Q. And then further as we go down there's a Special Election Runoff
20 Date that lists June 21st, 2022; is that right?

21 A. That's correct. That would be a runoff for any special election
22 that had to be scheduled for May 24.

23 Q. Okay. The last one I want to just put into the record is --
24 there's also an entry for the possibility of a special election on
25 general election day which is November 8th, 2022; is that right?

1 A. That is correct.

2 Q. And then finally a Special Election Runoff Date of December 6th,
3 2022; is that right, sir?

4 A. Yes, that is correct.

5 Q. Thank you. The Secretary of State will have to prepare for and
6 administer any special elections that are held on those dates;
7 correct?

8 A. The Secretary of State has to prepare -- our office has to
9 prepare election databases for those jurisdictions that have to
10 conduct a special election or election on those dates. So, for
11 example, for the March elections that are coming up our office
12 prepared, I believe, 12 election project files for those counties that
13 needed to have a special election in March and then we will be
14 constructing election project files for all 159 counties in relation
15 to the general primary and any additional special elections that are
16 scheduled and held in conjunction with the general primary. So those
17 special elections will be embedded within the general primary and
18 nonpartisan general election project. If the county fails to call the
19 special election within the 90-day requirement then we would be
20 building a second election project to execute the special election if
21 that jurisdiction still needed to conduct a special election on
22 May 24.

23 Q. Are there any special elections scheduled to take place on
24 March 15th?

25 A. There are special elections -- yes, there are special elections

1 to fill vacancies in various counties. Some of them are municipal
2 vacancies, some are county vacancies.

3 Q. Has your office already conducted the work it needs to perform to
4 prepare for those special elections?

5 A. For those elections that are being done in March, yes, those
6 projects have been completed and those projects have been delivered to
7 the various jurisdictions.

8 Q. Your office also prepared for the special elections that were
9 held in 2021; correct?

10 A. That is correct, yes, sir.

11 Q. And those included, at least in terms of a runoff, a special
12 election for a Public Service Commission seat; is that right?

13 A. That is my recollection of what was on the ballot. Let's see,
14 in 2021 or in 2020?

15 Q. Let me clarify. I think I used the phrase "special election" in
16 regard to that Public Service Commission runoff. What your office
17 prepared for was a runoff for a Public Service Commission seat that
18 was held on January 5th, 2021; is that right?

19 A. I'd have to go back and remind myself of what was on the ballot
20 in 2021 to be absolutely specific.

21 MR. MARTINEZ: Just so there's no confusion --
22 actually, before I move onto that, Your Honor, I'd ask permission to
23 move Mr. Barnes's declaration from the redistricting case, including
24 that exhibit with the election calendar, into the record.

25 MR. TYSON: We have no objection.

1 THE COURT: All right. I'll admit as Plaintiffs'

2 Exhibit 1.

3 BY MR. MARTINEZ:

4 Q. Mr. Barnes, do you see a document on your screen with the title
5 here List of Elections?

6 A. I do.

7 Q. Okay. And the year here is 2021?

8 A. Yes, sir, it is.

9 Q. Okay. If I scroll down you'll notice there are a few
10 references -- and I should add this is from the Secretary of State's
11 publicly-available website. There are a few references, July 13,
12 2021, to special election; June 15th, 2021 -- excuse me, June 15th,
13 2021, to a special election; July 13th, 2021, to a special election
14 runoff; February 9th of 2021, another special election which there are
15 results. What I was referring to is this January 5th, 2021, what is
16 referred to here as a Federal Runoff. Do you see that, Mr. Barnes?

17 A. I do. I do.

18 MR. MARTINEZ: Your Honor, permission to move this list
19 of 2021 election documents from the Secretary of State's website into
20 the record.

21 MR. TYSON: No objection, Your Honor. That would be
22 Exhibit 2?

23 MR. MARTINEZ: Exhibit 2.

24 BY MR. MARTINEZ:

25 Q. Just focusing real quick on that January 5th, 2021, date,

1 Mr. Barnes, do you see -- these are the results, again, from the
2 Secretary of State's website for that January 5th, 2021, let's refer
3 to it as the Federal Runoff. Do you see that, sir?

4 A. I do.

5 Q. And then if I scroll down you'll see there are those federal
6 senate races, but there was also a runoff for Public Service
7 Commission District 4 on that date. Do you see that, Mr. Barnes?

8 A. Yes, I do.

9 Q. Does that refresh your recollection that in fact there was a
10 runoff for a Public Service Commission seat on January 5th of 2021?

11 A. Yes, it does. Thank you.

12 Q. And your office prepared for that Public Service Commission
13 runoff election; correct?

14 A. Yes, sir. That Public Service Commission District 4 runoff was
15 held in conjunction with the federal runoffs that were required for US
16 Senate -- for the two US Senate seats.

17 MR. MARTINEZ: Your Honor, permission to introduce as
18 Exhibit 3 the results of the January 5th, 2021, elections.

19 MR. TYSON: No objection.

20 THE COURT: It's admitted.

21 BY MR. MARTINEZ:

22 Q. Mr. Barnes, you testified -- Mr. Barnes, you testified in the
23 redistricting case that your office has already begun the process of
24 building ballots for the 2022 elections; is that correct?

25 A. Yes, sir, that is correct.

1 Q. That was important in the context of redistricting because if the
2 district boundaries were to change that would impact the ballot
3 combinations that you had already begun to build; correct?

4 A. Correct. In that regard, what we were discussing was the need
5 to have precinct and combo definitions in order to build that
6 particular piece of the election project file that has to be
7 constructed. The election project file from which the ballots will be
8 generated is a relationship database that requires a lot of
9 construction to contain precincts, divisions of precincts, the local
10 districts within each individual precinct and then, finally, the
11 contest and candidates that are being placed on the ballot that's
12 needed for the given election.

13 Q. It was the potential change of district boundaries that would
14 have affected all of those aspects of the election projects that your
15 office is building; correct?

16 A. Any change in relation to precincts, the splitting of precincts,
17 the list of contests, the list of candidates, all of those things
18 impact the final ballot that is produced.

19 Q. Depending on the extent of those changes, the impact on your
20 office could be significant; correct?

21 A. Yes, sir.

22 Q. We're here today, Mr. Barnes, as you know, on our motion for a
23 preliminary injunction. Have you reviewed our motion?

24 A. I have not.

25 Q. Are you aware, Mr. Barnes, that the plaintiffs here are not

1 seeking to change any district boundaries with this motion?

2 A. I believe -- my understanding is that this is solely geared
3 toward the Public Service Commission race.

4 Q. Right. And is it also your understanding that the plaintiffs'
5 motion does not involve changing any of the boundaries for Public
6 Service Commission elections at this point?

7 A. That is my understanding, yes, sir.

8 Q. Let's talk briefly about qualification and a little more about
9 what your office does to undertake the building of ballots with a
10 focus on the Public Service Commission. Mr. Barnes, as I understand
11 it, as part of the process your office undergoes to build ballots your
12 office inputs the election contests that are going to take place this
13 cycle; is that correct?

14 A. That is correct. Again, we have to build a relationship
15 database for every individual jurisdiction that's conducting an
16 election. So in this circumstance, a general primary, 159 counties
17 have to have constructed an elections project and the construction of
18 that elections project contains a lot of information. It contains
19 information about the various districts, political districts, that are
20 at play, the precincts that are within the jurisdiction, the divisions
21 of the precincts, we've referenced those as the district combinations,
22 and those district combinations tell us what the local districts are
23 going to be associated to that portion of the precinct. And then we
24 also have to lay in the contest, what contests are scheduled for that
25 election, and we have a list of contests that are normally scheduled

1 within the election cycle and we have that list of contests currently
2 so we have begun adding those contests into the structures. The last
3 piece of the puzzle, per se -- or one of the last pieces of the puzzle
4 is those candidates that will qualify for those contests. Once we
5 have those candidates, then we can actually finally move forward in
6 constructing a ballot that you would actually begin proofing for
7 content and correctness.

8 Q. Mr. Barnes, you mentioned your office building in the contests
9 that are going to be taking place in 2022. Would that include the
10 statewide Public Service Commission elections for Districts 2 and 3?

11 A. Yes, sir. The two Public Service Commission races that we are
12 currently placing into the election project are for District 2 and
13 District 3 and those contests are appearing in each jurisdiction's
14 election project so every county is having that contest -- those two
15 contests placed into their election project at this time.

16 Q. So because the Public Service Commission is currently a statewide
17 election, you don't have to include it in the ballot combinations your
18 office prepares for some counties versus others; correct?

19 A. It's not a portion of the ballot combo; however, it is a portion
20 of the database. The precinct has to be -- the precinct and the
21 district combos within have to be related to the individual contests
22 that pertain to those portions within the precincts. So if I have a
23 Precinct A and it has, let's say, three district combos in it, each
24 one of those district combos have to be related to the contests that
25 pertains directly to those combos, but they also have to be related to

1 the statewide or other countywide offices that are related for that
2 election.

3 Q. And my point, though, is that because the Public Service
4 Commission election as they stand are statewide those contests are
5 going to appear regardless on any of the ballots that are sent out by
6 your office; correct?

7 A. As long as we build the project properly and relate those
8 contests to all the individual combos and precincts then, yes, sir,
9 those races are scheduled to be on the ballot.

10 Q. Mr. Barnes, you mentioned qualification. The last day for
11 candidates to qualify for this year's Public Service Commission
12 election is March 11th; correct?

13 A. That is correct.

14 Q. After qualifying ends on March 11th the Secretary of State
15 receives the list of qualified Public Service Commission candidates
16 from the political parties; correct?

17 A. That is correct.

18 Q. As you stated earlier, your office then adds the Public Service
19 Commission candidate names from those lists to the appropriate Public
20 Service Commission election on the ballot proofs; correct?

21 A. That is correct.

22 Q. Your office then sends those ballot proofs for the county to
23 review; correct?

24 A. At my office, once we place the candidate into the individual
25 contests we then begin the process of generating the ballot proofs.

1 But before those ballot proofs are submitted to the county for review
2 we have to send those proofs through a review of our own office where
3 the person who builds the file is proofed by someone else within the
4 office to verify content is correct before the county sees it. So
5 there is an extra proof level that's placed into the process before
6 the county reviews it, but you are correct.

7 Q. After qualifying, there's both an internal proofing process that
8 happens at your office and then an external one by the counties; is
9 that right?

10 A. That is correct.

11 Q. Your office cannot send the counties ballot proofs until
12 qualifying ends and you know which candidate to add to the ballot
13 proofs; correct?

14 A. That is correct.

15 Q. The counties will then review those proofs and return them to
16 your office with any corrections; is that right?

17 A. That is correct. Counties will review the proofs and then if
18 they find corrections those corrections are submitted to our office in
19 writing. Then the corrections are made to the elections project. A
20 new set of ballot proofs containing the needed corrections are then
21 again proofed internally and then submitted to the county for review.

22 Q. I believe you testified in the redistricting case the counties
23 will often find errors -- I'm sure minor errors in the ballot proofs
24 that they are reviewing; correct?

25 A. Yes.

1 Q. As you stated, your office will then make those corrections and
2 generate revised proofs, send those back to the counties and then the
3 counties will sign off on those proofs once they are accurate;
4 correct?

5 A. That is correct.

6 Q. Mr. Barnes, if your office were enjoined by the Court here from
7 adding the names of the Public Service Commission candidates to the
8 ballot proofs after the close of qualifying, your office would simply
9 not input those names onto the proofs that are then later sent to the
10 counties; is that right?

11 A. If we were ordered to not place candidate names for a specific
12 race, then those names would not be added because that's itself -- I
13 would hope we would also be told that the contest would not be placed
14 on the ballot to eliminate confusion. So we would hope to get that as
15 close to qualifying as possible because once we put a candidate name
16 into the structure and once we generate a ballot for proofing
17 elements, if we then get an order after a proof has been generated to
18 go back and take the candidate name or the contest out is a much
19 heavier lift.

20 Once you put a candidate's name in place, it generates a
21 ballot display which then allows for styling and organization of the
22 ballot. Up until that point you can easily remove contests, easily
23 remove candidates because you don't have a ballot designed yet. But
24 once the ballot is laid out, even before it's generated for proofing,
25 the process of removing it is a much heavier lift, it will take a lot

1 more time to do.

2 Q. And not inputting the names or deleting the names of the contests
3 already on the ballots, you know, since that's a relatively easy
4 process, the burden on the State to do that, on your office, would be
5 minimal; correct?

6 A. If the ballots have not been promulgated, if they've not been
7 built, then taking the contests and the candidate's name off is not a
8 heavy lift. But once a ballot proof has been assembled it becomes
9 much harder.

10 Q. For that reason, it would be less burdensome for your office if
11 the Court were to issue that injunction pausing the Public Service
12 Commission election now as opposed to after those proofs have been put
13 together; correct?

14 A. Any change that would be needed to the ballot is easier to
15 handle before you start building the ballot than it is after you have
16 already begun building the ballot.

17 Q. In particular in this case, it's easier if the injunction comes
18 down before March 11th, correct, because that's the date after which
19 you start to add those candidate names to the ballot proofs; is that
20 right?

21 A. Yes, sir, that is correct.

22 MR. MARTINEZ: Thank you, Mr. Barnes. I have no more
23 questions.

24 MR. TYSON: Very briefly.

CROSS-EXAMINATION

BY MR. TYSON:

Q. Good morning, Mr. Barnes. Good to see you.

A. Good to see you.

Q. Thanks for your time this morning. We know this is a busy season for you and your team and we appreciate it.

I just want to briefly follow up on a couple of Mr. Martinez's questions. He asked you about building the election projects for the counties. Do you recall that?

A. I do.

Q. Has your office already built election projects for counties for the May primary to include both Public Service Commission races?

A. We have already built preliminary structures, I think, for about 12 elections -- election project files for about 12 counties where those contests are already in place. The ballot-building team already has a template in place that has those contests so that the structure could be populated quickly and easily once the candidate names have been qualified and submitted.

Q. If the Court were to direct the PSC races were not happening for the 2022 elections would your office have to go remove those contests from the files you built?

A. Yes, we would have to go back and remove those contests from the files that we currently have built.

Q. Mr. Martinez asked you about your testimony in the redistricting case not being specific for the Public Service Commission. Do you

1 recall that?

2 A. I do.

3 Q. And is the process your office follows the same for Public
4 Service Commission elections as for any other elections?

5 A. It's the same process.

6 MR. TYSON: Okay. Thank you, Your Honor. I don't have
7 any other questions. Thank you, Mr. Barnes.

8 THE WITNESS: Thank you.

9 THE COURT: Any redirect, Mr. Martinez?

10 MR. MARTINEZ: Nothing, Your Honor.

11 THE COURT: Mr. Barnes, let me ask you -- can you hear
12 me?

13 THE WITNESS: Yes, sir.

14 THE COURT: Let me ask you a question. Is there a
15 mechanism for -- you testified that once the election project has been
16 created and the ballot has a format to it that's already been set is
17 there a mechanism for marking a contest as sort of marking it off --
18 rather than removing it, sort of marking it off the ballot like
19 crossing it off or indicating, you know, do not vote without affecting
20 the design and layout of the ballot?

21 THE WITNESS: There is a mechanism within the election
22 system. If the ballot has been generated and if the contest is
23 present on the ballot, there is a mechanism to where you can set the
24 contest is not counted so that if the ballot has been produced and
25 printed out and distributed, but if the Court said, no, we're not

1 counting the votes for that contest, you could then -- the county
2 could then enable the election project to not count the contest and
3 then, depending upon when that directive was given, the county could
4 generate the election media that populates the touchscreen devices
5 that they use for in-person voting to where that contest was not even
6 seen on the touchscreen itself, it would not even be displayed, but
7 it's a matter of when the directive was given and at what time.

8 THE COURT: All right. Is that less of an
9 administrative burden than removing the names entirely from the
10 ballot?

11 THE WITNESS: It becomes a situation then of each
12 individual county executing the task at hand and following the right
13 procedures. If the directive were done at the building stage, it's
14 only our office having to touch it and make sure it's right. If it's
15 done later on where you have to engage 159 county elections offices
16 and make sure they do things without any mistake, it becomes a much
17 heavier lift.

18 THE COURT: So for the November '22 election, when
19 would that building phase be for when the Secretary could implement
20 that change rather than the counties?

21 THE WITNESS: For the November build process -- let me
22 look at my wall calendar right quick. We will be building election
23 project files starting around the middle -- or finishing election
24 project files around the middle August for counties to begin the
25 proofing phase. Middle of August to early September.

1 THE COURT: All right. Thank you. Anything further
2 for this witness?

3 MR. MARTINEZ: Nothing further from the plaintiffs.

4 MR. TYSON: Not from us, Your Honor.

5 THE COURT: All right. Mr. Barnes, thank you. You're
6 excused. Appreciate your participation.

7 The next witness is live; is that correct?

8 MR. SELLS: Yes, Your Honor.

9 MR. MORRISSETTE: Plaintiffs will be calling
10 Ms. Brionte McCorkle.

11 THE COURT: I'm sorry. Say that again.

12 MR. MORRISSETTE: Brionte McCorkle.

13 THE COURT: All right. Come on up.

14 THE WITNESS: Hi.

15 THE COURT: Hi. If you can please stand for a moment.
16 Ms. Holland will swear you in.

17 THE CLERK: If you could please raise your right hand.

18 (witness sworn)

19 THE CLERK: Thank you.

20 THE COURT: Thank you. You may be seated. If you can
21 please -- do you feel comfortable removing your mask?

22 THE WITNESS: Yeah, uh-huh.

23 THE COURT: If you could please state your name and
24 spell your last name, please.

25 THE WITNESS: My name is Brionte McCorkle. It's

1 B-R-I-O-N-T-E. Last name M-c-C-O-R-K-L-E.

2 THE COURT: Thank you.

3 DIRECT EXAMINATION

4 BY MR. MORRISSETTE:

5 Q. Good morning, Ms. McCorkle. What is your educational background?

6 A. I went to Georgia State University. I studied public policy.

7 Q. Okay. Do you have any additional degrees?

8 A. I do not.

9 Q. Okay. What is your career background?

10 A. I have spent most of my career working for environmental
11 nonprofit organizations. I've worked on everything from green
12 building, energy efficiency to transportation and now energy and solar
13 and clean energy is a big thing for me now. So, yeah, I've spent most
14 my time in environmental nonprofits. And although it wasn't an
15 official job, I ran for Atlanta City Council in 2017, learned a lot
16 about elections and campaigning and I've, yeah, been supporting people
17 with doing those things as well.

18 Q. Okay. Where are you currently employed?

19 A. I work for Georgia Conservation Voters. It is an environmental
20 nonprofit organization.

21 Q. Okay. What is your current title?

22 A. I am the executive director.

23 Q. And what are your duties in that role?

24 A. You know, lots of management of organizational operations. So
25 there's a financial accounting role, making sure we're, you know, in

1 good standing with our books as well as with the IRS because we're a
2 501c3, we also have a 501c4 and a political action committee so there
3 are lots of regulations that I'm in charge of managing and making sure
4 we comply with. In addition to that, I help manage all of our
5 programs. Our main programs are clean energy, democracy voting rights
6 and environmental justice so I manage a team of people -- 13 people
7 now, so really exciting that we've grown, to execute all those
8 programs and, of course, to be able to operate.

9 Q. And how long have you been at this current employer?

10 A. I started at Georgia Conservation Voters in January 2019.

11 Q. And have you always had the same title?

12 A. I have not. Well, no, actually, with Georgia Conservation
13 Voters, yes, I've always been the executive director.

14 Q. Okay. What is your role in this present case?

15 A. I'm a plaintiff.

16 Q. And why did you get involved in this case as a plaintiff?

17 A. Yes. So I'm a black voter, right, and I pay Georgia Power bills
18 and often look at those bills and I've also, in my professional
19 capacity, spent a lot of time engaging with the Public Service
20 Commission trying to get more clean energy, get more energy
21 efficiency, trying to lower rates and so it became very clear that the
22 current election structure of the Public Service Commission does not
23 lend itself to the commissioners wanting to be responsive to the
24 communities that I serve. So I felt like we needed to, yeah, address
25 the way that they're currently being elected because it's diluting the

1 voting power of black voters.

2 Q. And how important would you describe the Public Service
3 Commission's work?

4 A. You know, there's always this rhetoric about kitchen table
5 issues, you know. So your power bill is a kitchen table issue, it
6 hits your kitchen table every month -- or your counter, wherever you
7 put your mail. People are paying bills every day and the Public
8 Service Commission is making decisions about the cost of those bills.
9 They're also making decisions about the energy choices, the sources of
10 energy that the power company is investing in. We know that there are
11 some energy sources that are cleaner than others and the choices that
12 they're making result in additional costs that are being piled up on
13 bills. Could you repeat your question? I want to make sure I
14 answered it thoroughly.

15 Q. I asked why is the Public Service Commission so important to you.

16 A. Yeah, I get -- I'm deep in this. So they're making lots of
17 decisions about the types of energy we use that has consequences for
18 the cost of bills. It also has consequences for the future, our
19 future, our ability to address climate change which we know is
20 happening. So we need to be making investments in renewables now,
21 making investments in energy efficiency and reducing the amount of
22 energy that we're using now and that's really critical for the future
23 of everyone in this room and all of our children, including mine, so
24 that is incredibly important to me and I think lots of people. Yeah,
25 and -- I think that's sufficient for now.

1 Q. Would it be fair to say that you follow the issues addressed by
2 the Public Service Commission pretty closely?

3 A. I do. I won't say that I'm an expert, I know all the nooks and
4 crannies about everything they do, but I do follow the bigger
5 procedural things that they're doing and especially around energy.

6 Q. Do black Georgians have any particularized needs that come before
7 the Public Service Commission?

8 A. Absolutely.

9 MR. TYSON: Your Honor, I'll just object as to
10 foundation on this. I'm not sure we've laid a foundation Ms. McCorkle
11 can testify as to the particularized needs of all black Georgians.

12 THE COURT: Testify as to her personal knowledge.

13 BY MR. MORRISSETTE:

14 Q. In your role, how much involvement do you have with black
15 Georgians and the issues that are important to them that are addressed
16 by the Public Service Commission?

17 A. So I have always organized in black communities and especially
18 now in this role I get to really focus on it in a very clear way, it's
19 very clearly stated in my organization's mission statement and
20 strategic approach, and so we spend a lot of time working in
21 communities of color. We do a lot of listening to understand the
22 issues that are impacting people. So it's not that we come in and are
23 like, hey, you've got this problem with energy. You know, we let it
24 sort of flow naturally from, you know -- and it comes in lots of
25 different spaces. So we do a ton of organizing in communities of

1 color. We have our largest base here in the metro Atlanta area and
2 the metro areas in other parts of the state. We've got a good number
3 of people that we're organizing in Savannah and Albany. So we're in
4 communities of color. We're not just in Atlanta. We're in other
5 parts of the state as well. And, yeah, energy and energy burden, the
6 amount of money people are paying out of their income to be able to
7 keep the lights on is something that is a recurring theme in the
8 African American community that -- you know, again, we don't plant
9 that, but it comes up naturally as a stressor so ...

10 Q. Okay. Do you recall any particularized issues that came before
11 the Public Service Commission that were particularly important to
12 black Georgians?

13 A. Yeah. One of the things that comes to mind quite clearly is the
14 Covid pandemic, right, we all were impacted by that. In particular
15 the Covid pandemic hurt the black community, you know, both in terms
16 of health, but also financially. There were quite a few studies and
17 statistics that came out that showed that the impact was particularly
18 acute in black communities and so there was a moratorium to stop, you
19 know, utilities from being able to shut off, you know, vital utilities
20 for people in the middle of this pandemic which of course caused a ton
21 of economic upheaval and financial uncertainty in communities and
22 especially the black community. The moratorium unfortunately was
23 short-lived, it did expire, and the Commission and Georgia Power, they
24 wasted no time in resuming the shutoffs and shut off hundreds of
25 thousands of people in a very short period of time after the

1 moratorium was lifted so that was a clear need for the black community
2 in that moment that went unaddressed. It would have helped everybody,
3 but especially, again, the black community.

4 Q. So in your opinion, was the Public Service Commission responsive
5 as to black Georgians' needs as it pertained to the disconnection
6 moratorium?

7 MR. TYSON: Your Honor, I'll impose an objection. I
8 believe Ms. McCorkle testified to her personal opinion, but not as an
9 expert opinion or lay opinion.

10 THE COURT: It's overruled. I take the question to be
11 as to her personal opinion.

12 BY MR. MORRISSETTE:

13 Q. Do you remember the question?

14 A. Could you repeat it?

15 Q. In your opinion, was the Public Service Commission responsive as
16 to the needs of black Georgians as it pertained to the disconnection
17 moratorium?

18 A. No, it was not.

19 Q. Okay. Are there any other issues that you recall being
20 particularly important to black Georgians that were before the Public
21 Service Commission?

22 A. Yes. So in 2019 we engaged in the rate case proceedings,
23 Integrated Resource Plan and the rate case proceedings. So the
24 Integrated Resource Plan is Georgia Power's -- it's like a fancy term
25 for long-term planning. They're making decisions about the kind of

1 energy that they're investing in, what plants they're retiring, what
2 plants or other types of energy infrastructure they're going to build
3 and invest in. They also could make decisions about energy efficiency
4 and solar and they do some of that. And then they use that particular
5 proceeding and the investments they decided to make and they use that
6 to justify the rates -- the rate case, their case and the rate case
7 which follows the Integrated Resource Plan.

8 So during the rate case they decide, you know, how much --
9 what are the rates that their customer classes are going to pay. They
10 have multiple customer classes. You've got residential, you've got
11 commercial, industrial, and transportation so they've got different
12 classes of customers. But what we've seen them do continually is vote
13 to increase residential rates and residential customers are paying
14 quite a bit of the load there.

15 So during that process we did a lot of organizing to make
16 sure that people understood this because, again, people know they have
17 high power bills. They don't always understand the connection between
18 the power bills, the Public Service Commission, and these proceedings
19 being where these increases are being made so we did work to -- you
20 know, we heard that the community is struggling with this issue so
21 we're helping them connect the dots -- hey, your Public Service
22 Commissioner is making this decision -- so we did work to get them to
23 submit comments. We had protests. Various organizations, including
24 mine, attempted to meet with the Public Service Commission about the--
25 commissioners to ask them to not increase rates on customers,

1 especially not at that time, especially not residential customers.
2 So those requests really fell on deaf ears. They did ultimately end
3 up raising rates on residential customers as they normally do and they
4 also tacked on additional fees in addition to the rates. So, yes, I
5 felt like our concerns were incredibly neglected, they were not
6 addressed in that particular proceeding.

7 Q. Are there any other issues that are covered by the Public Service
8 Commission that black Georgians have particularized needs regarding?

9 A. So the public -- so during the Integrated Resource Plan, again,
10 Georgia Power's making decisions about their power infrastructure,
11 their generating capacity. One of the things that they've invested
12 heavily in the past are coal plants -- coal plants to produce energy.
13 Those coal plants produce a byproduct called coal ash, it's the waste
14 that's left over after burning coal for energy. That coal ash is
15 quite toxic and right now it's sort of sitting -- Georgia Power has a
16 lot of it sitting in unlined ponds all across the state. The water,
17 groundwater, nearby some of these ponds have been tested and it has
18 been shown to have contaminants in it from these coal ash ponds and
19 the community has asked to have these coal ash ponds excavated,
20 cleaned up, you know, lined, capped. You know, there's all kinds of
21 things that they could do to store it properly other than leaving it
22 sitting contaminating groundwater and so the Commission's been
23 unresponsive to comments and organizing trying to get the coal ash
24 plants cleaned up, many of which are sited in communities of color.

25 And, yeah, it's worth pointing out also that the nation's

1 largest carbon emission coal plant is Plant Scherer. It is just north
2 of Macon. That community is about 70 percent African American so they
3 are exposed to quite a bit of air pollution from that power plant and
4 that one doesn't -- it's going to continue to operate for quite some
5 time, according to their latest proposed plan.

6 Q. I'm sorry.

7 A. It's okay.

8 Q. So in your opinion, has the Public Service Commission been
9 responsive to black Georgians' particularized needs as it pertains to
10 those environmental justice issues?

11 A. No, it has not.

12 Q. Are you aware of any particular issues that the Commission may be
13 handling in the upcoming 2023, 2024 years?

14 A. Yes. So there's another Integrated Resource Plan and rate case
15 happening this year. You know, the IRP will likely take place over
16 the summer and the rate case will start usually in late summer, early
17 fall, and they usually make the decision during the holidays when
18 people are checked out about what they're going to do with rates.

19 And so then as we look towards 2023, another thing I
20 think the Commission's been nonresponsive about is Plant Vogtle.
21 Plant Vogtle is a nuclear plant that's currently under construction.
22 Units 3 and 4 in particular are the ones that are actively under
23 construction. The plant is incredibly behind schedule and incredibly
24 over budget. The original estimate for that plant was \$14 billion.
25 The costs have ballooned to \$30 billion and counting. The Southern

1 Company, which is the parent company of Georgia Power, recently
2 announced another round of cost delays or delays in constructing the
3 plants and getting them up and on line so now they're estimating that
4 Unit 3 will be on line in March 2023 and the fourth one will be on
5 line at the end of the year. The significance of that timeline is
6 that the Commission before would periodically hear Georgia Power's
7 requests to tack those cost overruns onto customer bills and typically
8 those cost overruns end up in the residential customer bills so they
9 usually would do that periodically. But in August of 2021 they
10 decided that they were not going to hear those cases as frequently,
11 that they were going to wait until the plants were on line and then
12 hear Georgia Power's case for placing those cost overruns on customer
13 bills after the units were on line so that's what's happened. So
14 that's coming up in 2023, assuming that the plant stays on schedule,
15 but it has not had a track record of doing so.

16 Q. In your view, why is it important that black voters have an
17 opportunity to elect a commissioner to the Public Service Commission?

18 A. It's incredibly important to have someone who intuitively
19 understands these needs from the black community, who's connected,
20 who's constantly listening to and can be responsive in advocating for
21 the things that we're asking for on the Commission. Right now I can't
22 point to one person on the Commission - not even the District 3
23 commissioner that supposedly represents me - that is that voice for
24 the black community that understands the needs and is actively
25 advocating for it. So we need someone on the Commission who

1 understands that and who is going to be a fighter and who is going to
2 push back against the power company and right now it feels like the
3 Commission is very much not doing that.

4 Q. Does your right to vote for commissioners on the Public Service
5 Commission have a monetary value to you?

6 A. No, it does not.

7 Q. Would you forfeit your ability to vote for commissioners on the
8 Public Service Commission for monetary compensation?

9 A. No, I would not. It's important to have a voice in everything
10 that's happening here at the Commission.

11 MR. MORRISSETTE: Plaintiffs have no further questions.

12 THE COURT: Thank you. Any cross-examination?

13 MR. TYSON: Yes, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. TYSON:

16 Q. Good morning, Ms. McCorkle. How are you?

17 A. Good. How are you?

18 Q. Good. I'm Bryan Tyson for the Secretary in this case. I have
19 just a few questions based on Mr. Morrisette's questions of you. So
20 the current makeup of the Commission is five republicans; correct?

21 A. It is.

22 Q. Have you worked in any campaigns to try to defeat any of those
23 incumbents at any point?

24 A. Sorry, I'm trying to relive 2020 and the 2021 election cycle.

25 Q. It was a lot for all of us.

1 A. I did. So, yeah, my organization, you know, has a 501c4 and a
2 political action committee so we did support Daniel Blackman in the
3 2020 Public Service Commission election and the runoff that followed.

4 Q. And Mr. Blackman's a democrat; correct?

5 A. Yes. He's also black.

6 Q. And Mr. Morrisette asked you about some specific needs of the
7 black community related to the Public Service Commission and I want to
8 make sure I have these right. From the notes I have, I have the
9 moratorium on shutoffs during the pandemic, that was one of the needs;
10 correct?

11 A. Uh-huh.

12 Q. That's a yes?

13 A. Yes, yes.

14 Q. And then I had the increases on residential customers in the rate
15 proceeding, is that another particularized need?

16 A. Yes.

17 Q. And I had the coal ash ponds and dealing with coal ash, is that
18 also a particularized need, in your view?

19 A. Environmental justice more broadly. I spoke about coal ash, but
20 Plant Vogtle, the nuclear plant in Augusta, it's in the Augusta area,
21 that's also an environmental justice concern. Plant Scherer is a
22 environmental justice concern. So you can more summarize it as
23 environmental justice.

24 Q. Okay. Thank you for that. Just so I understand, within the
25 umbrella of environmental justice we have coal ash, we have Plant

1 Vogtle, those would be the two areas that fall under that umbrella of
2 particularized needs?

3 A. Coal ash, coal plants, right.

4 Q. Coal plants, too. Okay. Got it. That would be the Plant
5 Scherer that you referred to?

6 A. Uh-huh, yes.

7 Q. Thank you. It helps our court reporter have a clearer transcript
8 for sure.

9 A. This is my first time doing this. I'm trying to be clear.

10 Q. So let me just ask you briefly about each of those. So for the
11 moratorium during the Covid pandemic you mentioned that the shutoffs
12 were begun again after that moratorium was removed; right?

13 A. Uh-huh, yes.

14 Q. And have you done any study to know if black Georgians were more
15 affected by the shutoff than white Georgians were?

16 A. That's really difficult because a lot of that data wasn't
17 available. The power company isn't particularly transparent with the
18 racial makeup of its customer base nor where the disconnections are
19 happening. I believe that my team received some of that data, but I'm
20 not sure the extent to which it was analyzed.

21 Q. So would it be fair to say, then, that it's your belief that the
22 elimination of the moratorium affected black voters -- or black
23 Georgians more than white Georgians, but you don't have any data for
24 that?

25 A. Well, I do know that I have data for the impact of the pandemic

1 on the black community. We do already know the black community has
2 less income and generally less wealth than white Americans so I think
3 it is safe to say that the black community acutely felt the shutoffs.
4 I'm not saying that they were the only people that were shut off, but
5 that it was probably acute in the black community and I'd love to see
6 the analysis on that.

7 Q. You'd agree that lower-income white Georgians would be affected
8 by eliminating the moratorium on shutoffs, too; correct?

9 A. Yes, absolutely.

10 Q. Okay. So ultimately the main impact of the moratorium was based
11 on someone's socioeconomic status; is that fair to say?

12 A. We know that a lot of people who are living in poverty are
13 black, that's fair to say.

14 Q. My question was specifically about the moratorium. You'd agree
15 that lower-income white Georgians were affected by the elimination of
16 the moratorium like lower-income black Georgians were; correct?

17 A. It depends on what you're implying with the word "like," but,
18 yes, they were also impacted by shutoffs.

19 Q. Okay. Thank you. And then you mentioned the rate proceedings
20 and the request to not increase on residential customers. Do you
21 recall talking about that with Mr. Morrisette?

22 A. We did ask the Commission not to increase rates or add these
23 fees to customer bills during the rate case.

24 Q. Are black Georgians disproportionately residential customers more
25 so than white Georgians are of Georgia Power?

1 A. Again, that's unclear because Georgia Power isn't particularly
2 transparent with the data of its customer base. Although we do know
3 that quite a bit of their customer base is in urban areas where the
4 state's black voters live mostly, the largest populations.

5 Q. But sitting here today, you don't know for sure whether there are
6 more white residential ratepayers or black residential ratepayers;
7 correct?

8 A. I don't know the answer to that question, but I'd love to see
9 the data.

10 Q. On the environmental justice pieces you talked about coal ash and
11 the unlined ponds. Which coal ash ponds were you speaking of when you
12 said that they were in unlined ponds? Is that all coal ash ponds or
13 were there particular ones?

14 A. This is not my main area of organizing. I play a supportive
15 role so I don't have a mental map, unfortunately, of all the coal ash
16 ponds. I wish I had something that I could reference, I could pull it
17 up and be like "This one, for example," but I don't actually have that
18 at this moment. I'm happy to find that map, happy to overlay racial
19 demographic data from the most recent census to show where it's most
20 acute in black communities.

21 Q. So sitting here today you can't say for certain which communities
22 are affected by which unlined coal ash ponds; right?

23 A. Not at the top of my head. Maybe one day.

24 Q. Okay. Do you know if any coal ash ponds are located in
25 predominately white areas?

1 A. Again, not off the top of my head.

2 Q. Okay.

3 A. But I could find that data and submit it, if needed.

4 Q. Certainly. But you don't have it here today with you; right?

5 A. I do not.

6 Q. Okay. Thank you. And then in Plant Scherer you referenced the
7 pollution north of Macon; is that right?

8 A. Uh-huh.

9 Q. Is that a yes?

10 A. Yes, yes.

11 Q. Okay. And is Plant Scherer located in Bibb County or is it in a
12 different county?

13 A. I'm not sure. I know it's Juliette, Georgia. I'd again have to
14 look at the map to reference the county boundary. I'm trying to be
15 great with all the county boundaries, but, you know, Georgia has quite
16 a bit. I do know it's north of Macon. I know it's Juliette, Georgia.
17 I know that Macon is about 70 percent African American.

18 Q. That was going to be my next question. The 70 percent African
19 American number you referenced refers to Macon, not to the particular
20 community where the plant is located; right?

21 A. Right. But, you know, air pollution is not going to stay where
22 it's generated. It's going to dissipate.

23 Q. Sure. Is it your understanding that the Public Service
24 Commission has anything to do with air pollution requirements?

25 A. They don't regulate air pollution, but they do have -- they

1 could encourage Georgia Power to invest in more renewable energy, you
2 know, yeah, so...

3 Q. So any effect that the PSC has on air pollution is going to be
4 indirect; is that fair to say?

5 A. If the Public Service Commission is encouraging Georgia Power to
6 shut down coal plants, I would say that's direct in a sense, yeah.

7 Q. But the Public Service Commission doesn't regulate the emissions
8 of coal plants; right?

9 A. No, it does not.

10 Q. You also mentioned Plant Vogtle and the cost overruns that have
11 happened there and you indicated the next time the PSC's going to hear
12 about adding the cost overruns to the rate base will be when the
13 plant -- or I guess Units 3 and 4 are open; right?

14 A. Yes.

15 Q. And that could happen --

16 A. That's how I understand it.

17 Q. I'm sorry?

18 A. I would say, yes, that's how I understand it.

19 Q. And that could happen in 2023, it could happen in 2024, we're not
20 sure what that timeline is right now; right?

21 A. Well, the power company insists it will be March 2023.

22 Q. But I believe you testified you're not sure that's going to hold;
23 right?

24 A. The power company has a history of not meeting its stated
25 deadlines, but it also has a history of assuring the Public Service

1 Commission that it will.

2 Q. And you mentioned the reaching out to the Commission. You've
3 spoken with Commissioner Echols before; right?

4 A. I have spoken with Commissioner Echols.

5 Q. Have you spoken with any of the other commissioners in person or
6 personally over the past couple years?

7 A. I've testified in front of the Commission, I've attempted to
8 visit many of their offices, but, no, I've only ever actually sat down
9 and had a conversation with Tim Echols.

10 Q. And Commissioner Echols is District 2; is that right?

11 A. He is.

12 Q. Okay. And you live in District 3?

13 A. I do live in District 3, yes.

14 MR. TYSON: Great. Thank you. I don't have any
15 further questions. Thank you, Ms. McCorkle.

16 THE COURT: Any redirect?

17 MR. MORRISSETTE: Quickly.

18 REDIRECT EXAMINATION

19 BY MR. MORRISSETTE:

20 Q. Ms. McCorkle, Mr. Tyson asked you about your conversation with
21 Commissioner Echols.

22 A. Uh-huh.

23 Q. And that was not the commissioner for your district; correct?

24 A. He was not, no.

25 Q. Okay. Which district do you reside in?

1 A. District 3.

2 Q. Okay. Did you ever try to reach out to the commissioner for
3 District 3?

4 A. Chuck Eaton, yes.

5 Q. Okay. Were you given an opportunity to speak to Mr. Eaton?

6 A. Mr. Eaton, no, I did not. I didn't get a response to any
7 comments I submitted or requests for meetings and he was usually not
8 in his office when I went by.

9 MR. MORRISSETTE: Okay. Thank you. No further
10 questions.

11 THE COURT: All right. May the witness be excused?

12 MR. MORRISSETTE: Yes.

13 THE COURT: All right. Thank you, ma'am.

14 THE WITNESS: Thank you.

15 (witness steps down)

16 THE COURT: Call your next witness.

17 MR. MORRISSETTE: Next plaintiffs would like to call
18 Reverend James Woodall.

19 THE COURT: Before you sit down, Ms. Holland will swear
20 you in.

21 (witness sworn)

22 THE CLERK: Thank you.

23 THE COURT: You may be seated. Do you feel comfortable
24 removing your mask?

25 THE WITNESS: Yes, Your Honor.

1 THE COURT: All right. Please state your name and
2 spell your last name, please.

3 THE WITNESS: My name is Reverend James Woodall. First
4 name J-A-M-E-S. Last name W-O-O-D-A-L-L.

5 DIRECT EXAMINATION

6 BY MR. MORRISSETTE:

7 Q. Good morning, Reverend Woodall. What is your educational
8 background?

9 A. I have an associate's from Cochise College of Intelligence, a
10 Bachelor's of Arts in political science with a minor in religion, and
11 I'm actually finishing up a Master's of Divinity from the Morehouse
12 School of Religion.

13 Q. Okay. Do you have any military training?

14 A. I do. I served eight years as an intelligence analyst in the
15 United States Army.

16 Q. You said you are getting a degree in divinity and you're a
17 reverend; correct?

18 A. That's correct.

19 Q. Okay. Where are you currently employed?

20 A. I currently serve as a public policy associate at the Southern
21 Center for Human Rights. I'm also the CEO of the Major Wish Group
22 which is a profit consultancy.

23 Q. Okay. And how long have you been in those roles?

24 A. At the Southern Center for Human Rights, I just reached my
25 six-month anniversary about two weeks ago, I guess, and I've been the

1 CEO of the Major Wish Group for 3 years.

2 Q. Okay. At the Southern Center for Civil Rights what are your
3 duties?

4 A. My job is to essentially -- well, we're a nonprofit law firm
5 that represents clients impacted by the criminal legal system. We
6 also do advocacy on both the federal, state and local levels to ensure
7 that persons who are impacted by the system are having, you know, the
8 advocacy or that they have representation, we look after those kind of
9 things.

10 Q. Okay. And were you employed previous to joining prior to your
11 new role?

12 A. I was employed, like I said, as a United States Army soldier,
13 but I also had -- it was a volunteer role, 100 percent volunteer, but
14 I was the state President for the Georgia NAACP among other roles
15 there.

16 Q. Okay. What were your duties as the President of the NAACP?

17 A. As the state President for the NAACP I was the primary executive
18 of the state conference, which is a representation of over 170 units
19 across the state of Georgia that represents well over 10,000 members
20 across the state of Georgia.

21 Q. Okay. Were there processes for you to learn the issues important
22 to the NAACP and its membership?

23 A. Always. We have a number of things. One, at our national
24 convention we have what we call our annual plenary session where we
25 talk about the issues that matter to our general body which represents

1 not just Georgia, but all members across the country. Then we have
2 what we call committees and we have committees from criminal justice
3 to housing to economic development and upon the resolutions that come
4 from that plenary session we embrace advocacy on a local level,
5 whether it's on that county level or whether it's statewide.

6 Q. During your time as state President for the NAACP were you ever
7 made aware of any issues as it pertained to the Public Service
8 Commission?

9 A. Well, one, when we think about the last five or so years --
10 well, even more particularly when you think about the pandemic and how
11 persons were able or unable to take care of just the daily
12 responsibilities of adulting, as we say as millennials, it became very
13 difficult and particularly it was -- first it was through the
14 unemployment compensation program and folks were not able to get their
15 unemployment benefits for a host of reasons and then that began to
16 trickle down to rent and we had eviction moratoriums that were issued
17 and municipal court judges around the state were saying we wouldn't
18 prosecute -- or we wouldn't process these kinds of cases and then some
19 said they would. And then it gets down to the utilities in which the
20 likes of Georgia Power and so many other, you know, power companies
21 across the state - because Georgia Power isn't the only one- were
22 starting that process of making sure that people are paying their
23 utilities.

24 I will be very specific. In one county specifically, DeKalb
25 County, there were judges who were saying even after the eviction

1 moratorium and after the utility moratorium was suspended that they
2 would still allow that process to continue because the pandemic wasn't
3 over and, quite frankly, the pandemic to this day is still not over
4 and families are still struggling.

5 Q. As President of the NAACP were you involved in any efforts to
6 apprise the Public Service Commission of the needs of your membership
7 and organization?

8 A. Yes. In fact, there was a rate hike that was proposed -- I
9 can't remember what time period it was off the top of my head. But
10 when the rate hike was proposed I remember we were in front of the
11 Public Service Commission's, you know, office -- I think that is
12 Marietta Street, maybe, I'm not sure what the street name is, or
13 Washington. It's downtown next to the capitol. There was, you know,
14 protests and people were trying to, you know, sit down with the
15 various members of the Public Service Commission and they literally
16 would just walk by us. I was out there alongside many riot members.

17 Q. And why was the disconnection moratorium so important to the
18 NAACP and your membership?

19 A. Well, it wasn't just important to us, even though it was, it was
20 important to Georgians and here's why. Because when you are having --
21 and I'll say this. I personally got in trouble from our members when,
22 you know, the shutdown happened, because one of the things that we
23 realized was that everybody's advocating for the state to shut down
24 when, in fact, cities and counties all throughout this state have
25 families that can't provide for themselves, they can't feed their

1 families, and so we're advocating people to shut down everything and
2 they don't know where their next meal is going to coming from and so
3 our advocacy was strategic in the sense that though we understood the
4 public health implications of not shutting down, we also understood
5 the economic consequences of doing so. So the moratorium was
6 important because if people can't take care of their families, they
7 can't pay their rent, they can't feed themselves, they're not going to
8 pay utilities.

9 The specific case that I mentioned in DeKalb -- there
10 was an issue with the water in which the COO, Michael Thurman,
11 basically said, you know, we want people to be able to live in their
12 homes, we want them to be able to take care of their families and so
13 we're not going to suspend the moratorium, but we're going to give
14 people opportunities and options and flexibility to be able to pay,
15 you know, backlogs of, you know, water bills, but we will not shut
16 them off as long as people made, you know, a concerted effort to pay
17 those off. That was our main thing, we didn't want people taking
18 advantage of the system, but at the same time, you know, ensuring
19 people are not being taken advantage of either.

20 Q. Okay. And you spoke about the NAACP's protests and other efforts
21 to apprise the Public Service Commission of the needs of your
22 membership. In your opinion, was the Public Service Commission
23 responsive to those concerns?

24 A. Well, in my opinion, no, because the moratorium was suspended
25 along with a host of other things and, you know, again, the pandemic

1 is still going and people and families -- and what we see is Atlanta,
2 metro Atlanta, but what we were really concerned about was some of
3 these communities that were not in the metro Atlanta area where we
4 know an overwhelming majority of all voters that are African American
5 happen to be in this like five to seven county radius. But counties
6 like Sumter County or, you know, Bulloch County in Statesboro or, you
7 know, Jeff Davis County or Treutlen County, those counties that may
8 not have, you know, a more, you know, aggregate number of people, but
9 the impact is felt still the same, if not more.

10 Q. Okay. And in your view, why is it important that black Georgians
11 have the opportunity to vote and elect a member of the Public Service
12 Commission?

13 A. Well, it's the Constitution. It's the Constitution that says
14 that essentially one person one vote, that every single voter is able
15 to elect a candidate of their choice. If a person is, you know, put
16 into a position to say "I'm going to vote each and every time, but no
17 matter how many times I vote it doesn't matter," that's what
18 contributes to the apathy, that's what contributes to people not
19 participating, because they're being shown each and every time that no
20 matter how many times they participate that it doesn't matter, that
21 the outcome will still be the same, that the representation will still
22 be the same and the public policy values that show up as elected
23 officials take on these issues will still be maintained and so when
24 you talk about democracy that is the very fundamental aspect of what
25 we're trying to get at and that's really one of the reasons why I

1 joined in on this as a private citizen because I believe that
2 democracy is too important to put up against, you know, political
3 factions. It doesn't matter if a person is democrat or republican.
4 I've voted in republican primaries and I've voted in democratic
5 primaries. What we try to demonstrate is that the values are what
6 moves voters and as the state President that's what I would
7 oftentimes, you know, share with our members, share with our
8 communities across the state, is that we have no permanent friends, we
9 have no permanent enemies. We only have the permanent interests and
10 that's the liberation of our people. So what that means in terms of
11 the Public Service Commission is what's wrong with being able to have
12 representation on that level? It's not a question of, well, you know,
13 are they democrat or are they republican. What matters is that every
14 voter has a say in that process and that they are responsive --
15 whoever is elected is responsive to those voters.

16 Q. Does your right to vote have a monetary value to you?

17 A. Of course not.

18 Q. And would you forfeit your ability to vote for monetary
19 compensation?

20 A. I would never.

21 MR. MORRISSETTE: No further questions for the witness.

22 THE COURT: Thank you. Any cross-examination?

23 MR. TYSON: Yes, Your Honor.
24
25

CROSS-EXAMINATION

BY MR. TYSON:

Q. Reverend, Bryan Tyson. It's always good to see you.

A. Likewise.

Q. Thank you for being with us today. We have some great people working for the Southern Center for Human Rights, I'm glad you're able to work there with them.

I just want to ask you a couple of questions. You indicated the moratorium on disconnections, I believe you spoke with Mr. Morrisette about that, and that impacted all Georgians; right?

A. That's correct.

Q. Okay. Did the NAACP support any candidates for Public Service Commission while you were its President?

A. That's incorrect. No, the NAACP never endorses candidates. In fact, we work with all parties, all candidates -- well, we don't work with candidates at all, but we're more of an issue advocacy based organization.

Q. Got it. And then you testified about DeKalb County, that despite the conclusion of the disconnection moratorium that some judges were still allowing ratepayers to continue having services. Did I hear that right?

A. No, that was focused more so on the evictions. As relates to utilities, the only utility conversation that -- and the reason I bring up DeKalb is because I'm now a resident of DeKalb County so it impacts my pockets. I mean, I'm up-to-date on my bills, but for

1 people who are -- there was issues about water meters being -- I don't
2 say manipulated, but malfunctioning, and so people would be charged
3 exorbitant amounts of fees when in fact they didn't use the services
4 that they were being charged for. So while they worked that out the
5 county basically said, hey, while we fix this we're going to, you
6 know, put a moratorium on disconnections.

7 Q. Got it. Thank you. That helps. So that was referring to water
8 specifically which is outside the Public Service Commission's
9 jurisdiction?

10 A. That is correct. That is correct.

11 MR. TYSON: Okay. Great. I don't have any other
12 questions.

13 THE COURT: Any redirect?

14 MR. MORRISSETTE: No further questions.

15 THE COURT: All right. May the witness be excused?

16 MR. MORRISSETTE: Yes.

17 THE COURT: Thank you, sir.

18 THE WITNESS: Thank you.

19 (witness steps down)

20 THE COURT: All right. Does that conclude your
21 presentation of testimony?

22 MR. MORRISSETTE: Yes.

23 MR. SELLS: For witnesses, yes, Your Honor. I think we
24 have some exhibits that we want to move into evidence if we could
25 maybe have 5 minutes to gather those up and then we'll put them in.

1 THE COURT: Sure. Why don't we take a break and do
2 that housekeeping measure and then proceed to argument.

3 MR. SELLS: I think that's right.

4 THE COURT: How long do you anticipate you need for
5 argument?

6 MR. SELLS: You know, there are nine Senate factors
7 plus proportionately three *Gingles* factors. I think it's going to
8 take a while. Your Honor, I think my presentation is likely to be at
9 least 45 minutes to an hour and then we also have -- and I'm just
10 doing likelihood of success and then we have the other factors so I'm
11 saying -- I'm guessing an hour to an hour and a half for our side.

12 MR. TYSON: And then for our side, Your Honor, we were
13 thinking we're probably in the 30- to 35-minute range, depending on
14 how things go from the plaintiffs' side.

15 THE COURT: All right. Well, I don't want to forfeit
16 your ability to have lunch, but we do have another hearing at 2:00
17 o'clock.

18 MR. SELLS: We're fine pushing through, if that's okay
19 with the Court's staff.

20 THE COURT: Is that all right?

21 MR. TYSON: That's fine with us as well, Your Honor.

22 THE COURT: Okay. All right. Why don't we take a
23 10-minute break then. Is that sufficient? We'll be back at 11:35.

24 (recess was taken from 11:25 a.m. until 11:35 a.m.)

25 THE COURT: All right. Do you wish to tender some

1 exhibits?

2 MR. SELLS: Yes, Your Honor. We have four of them and
3 if we could turn on Mr. Martinez's computer we'll look at them just
4 briefly and I'll be referring to -- or we will be referring to them in
5 our argument.

6 The first are three bills from the General Assembly.
7 There is Senate Bill 472. Well, this one is House Bill 154 from the
8 2011 legislature.

9 THE COURT: I'm sorry. Hold on one -- I'm not seeing --
10 sorry, wrong screen.

11 MR. SELLS: Okay. So this is House Bill 154 from the
12 2011 legislature, that's what the "11" means, and this pertains to the
13 Public Service Commission and I'll be talking about that.

14 THE COURT: All right. So this will be Plaintiffs'
15 Exhibit -- is it 4?

16 MR. SELLS: 4, that's correct.

17 THE COURT: Any objection?

18 MR. TYSON: No objection, Your Honor.

19 THE COURT: All right.

20 MR. SELLS: All right. The next one is House
21 Resolution 152 also from the 2011 session of the legislature.

22 THE COURT: All right. Plaintiffs' Exhibit 5?

23 MR. SELLS: Exhibit 5.

24 THE COURT: Any objection?

25 MR. TYSON: No objection.

1 THE COURT: It's admitted.

2 MR. SELLS: And the third one is Senate Bill 472 which
3 is a bill currently under consideration in the '22 session of the
4 General Assembly.

5 THE COURT: All right. Plaintiffs' Exhibit 6, any
6 objection?

7 MR. TYSON: No objection.

8 THE COURT: All right. It's admitted.

9 MR. SELLS: And our last exhibit is an email chain
10 amongst counsel and the Court from the fall of 2020 where we discuss a
11 request to start discovery.

12 THE COURT: All right. Plaintiffs' Exhibit 7?

13 MR. SELLS: 7.

14 MR. TYSON: And no objection, Your Honor.

15 THE COURT: As long as you don't make Miss Holland a
16 witness, I'll admit that.

17 MR. SELLS: That's it.

18 THE COURT: All right. All of those exhibits are
19 admitted, that's Plaintiffs' Exhibits 1 through 7. Whenever you're
20 ready.

21 MR. SELLS: All right. So may it please the Court.
22 Before I begin I want to recognize my clients who are here, two of
23 whom you saw on the stand, Ms. McCorkle and Reverend Woodall.
24 Mr. Richard Rose is also with us today.

25 THE COURT: Good morning, sir.

1 MR. SELLS: I thank him for his presence.

2 As you know, this is a challenge to the at-large method
3 of electing members of Georgia's five-member Public Service
4 Commission. The Public Service Commission is an important
5 administrative agency that, among other things, regulates the rates
6 that everyday Georgians pay for their utilities. The plaintiffs here
7 are four black voters in Fulton and DeKalb Counties now who allege
8 that the at-large method of electing the Public Service Commission
9 dilutes black voting strength, in violation of Section 2 of the Voting
10 Rights Act of 1965. We have moved for a preliminary injunction
11 seeking limited relief that is necessary to maintain the *status quo*
12 pending resolution of this case on the merits after a trial that is
13 now just a few months away.

14 On a motion for a preliminary injunction this Court
15 must consider what is sometimes called the Winter factors. Those
16 factors are whether the movant is likely to succeed on the merits;
17 two, whether the movant is likely to suffer irreparable harm without
18 injunctive relief; three, whether the harm to the movant without the
19 injunction outweighs any harm that the proposed injunction may cause
20 the opposing party, in this case the Secretary of State; and four,
21 whether the proposed injunction would be in the public interest.

22 There is no dispute, I think, about the legal standard,
23 but I did notice a dispute in the briefing about whether it is higher
24 or lower than the standard for summary judgment. I want to be clear
25 our position is that it is a different standard, yes, but it is a

1 lower standard than summary judgment. In order to win summary
2 judgment, you have to prove that you're entitled to judgment as a
3 matter of law and on a preliminary injunction you just have to show
4 that you're likely to succeed in obtaining judgment at the end of a
5 case. So it's clearly, in our view, a lower standard. But the
6 standard is what it is and I'm going to address the first Winter
7 factor, likelihood of success, and my colleagues are going to address
8 the other factors and some other matters here today.

9 So are the plaintiffs here likely to succeed on their
10 Section 2 claim based on this record? The answer is yes. Section 2
11 of the Voting Rights Act, as amended in 1982, prohibits voting
12 practices and procedures that result in unequal electoral opportunity
13 on the basis of race, color or membership in a language minority. As
14 the Supreme Court has explained, the essence of a Section 2 claim is
15 that a certain electoral practice or structure interacts with social
16 and historical conditions to cause an inequality in the opportunities
17 enjoyed by black and white voters to elect their preferred
18 representatives.

19 As you know, in the case of *Thornburg vs. Gingles*, the
20 seminal case in this area, the Supreme Court identified three
21 preconditions for a vote-dilution claim under Section 2. They are,
22 number one, whether the minority group is sufficiently large and
23 geographically compact to constitute a majority in a single-member
24 district; number two, whether the minority group is politically
25 cohesive; and number three, whether the white majority votes

1 sufficiently as a bloc to enable it usually to defeat the minority's
2 preferred candidate.

3 If the plaintiffs established the three *Gingles*
4 preconditions the Court must then determine under the totality of
5 circumstances whether minority voters have less opportunity than other
6 members of the electorate to participate in the political process and
7 to elect their preferred representatives. Virtually any facts or
8 circumstances are potentially relevant under this
9 totality-of-circumstances test depending on the nature of the claim,
10 but the Supreme Court has identified nine factors that were set out in
11 the Senate report on the 1982 amendments. These are known as the
12 Senate factors that are usually relevant in a vote-dilution claim.
13 I'm not going to list all those factors because we're going to be
14 going over those over the next several minutes.

15 But another important consideration that has emerged
16 since *Thornburg vs. Gingles* is a factor known as proportionately and
17 that links the number of districts in which the minority group forms
18 an effective majority and whether that is roughly proportional to that
19 minority group's share of the relevant population.

20 THE COURT: Mr. Sells, are you also going to address
21 the feasibility of the remedy, which I know in your briefing you
22 represented that my order had satisfied -- or have found that the
23 *Gingles* factors had been satisfied as a matter of law, but the
24 feasibility of the remedy, my understanding is, at least under
25 Eleventh Circuit law, is part of that first *Gingles* factor as well as

1 the totality of the circumstances. So on that, at least that prong,
2 was not disposed of on summary judgment.

3 MR. SELLS: I'm going to tackle that head on, Your
4 Honor. I can get to that now, but it's coming up as --

5 THE COURT: I don't want to mess up your order. I just
6 want to make sure that was addressed.

7 MR. SELLS: Okay. Our position is that there's a
8 strong inference that we are likely to succeed based on the Court's
9 ruling with respect to the three *Gingles* factors in the summary
10 judgment order. Under the law of this circuit satisfaction of the
11 three *Gingles* preconditions means that plaintiffs are likely to win
12 and that's in the *Wright vs. Sumter County* case, also the *Georgia*
13 *State Conference of the NAACP vs. Fayette County* case.

14 And if there were any doubt about that, it's also the
15 law of every other circuit that has considered the case -- considered
16 the issue as well. The First Circuit in a case called *Uno vs. City of*
17 *Holyoke*; Second Circuit in a case called *NAACP vs. City of Niagara*
18 *Falls*; Third Circuit case called *Jenkins vs. Red Clay Consolidated*
19 *School District Board of Education*; Fifth Circuit in a case called
20 *Clark vs. Calhoun County*; Eighth Circuit in a case called *Harvell vs.*
21 *Blytheville School District Number 5*; Tenth Circuit in a case called
22 *Sanchez vs. Colorado*. I can supply the Court with citations, but in
23 the interest of time I'll just say this point, that if the plaintiffs
24 satisfy the three *Gingles* factors they are likely to succeed on the
25 merits is very well-established.

1 The defendant, the Secretary of State in this case, as I
2 read his brief doesn't dispute that the inference attaches once the
3 three *Gingles* factors are satisfied and doesn't dispute that we have
4 satisfied the second and the third, but does have an issue with regard
5 to the first *Gingles* factor and I'll get to that in a moment. I do
6 want to point out, however, that the Secretary identifies no cases in
7 which the three *Gingles* factors were satisfied and the plaintiff did
8 not ultimately prevail. The one case that they do cite in their
9 briefing, which is *Wright vs. Sumter County*, on this point confirms
10 that we are likely to succeed.

11 Now, the Secretary's argument is the one you just
12 mentioned, that we haven't satisfied all of the first *Gingles*
13 precondition and we have a couple of responses to that point. Our
14 first response is that we have satisfied enough of the three *Gingles*
15 preconditions to raise the inference. So, for example, the inference
16 is raised in the First Circuit and the Second Circuit and the Third
17 and the Fifth and the Eighth and the Tenth based on what this Court
18 has already found, that we can satisfy the numerosity and geographic
19 compactness component of the first *Gingles* precondition. We also
20 think that contending that the first *Gingles* precondition essentially
21 has two parts of it really creates a fourth *Gingles* precondition that
22 no court has ever, in our view, recognized. In the Eleventh Circuit,
23 I think the *Wright vs. Sumter County* case makes clear that the
24 inference arises from what we have already established in this case.

25 But as to the argument that we haven't satisfied the

1 feasibility component because of the State's interest in maintaining
2 the at-large system, we think that the State's interest is better
3 categorized as a totality factor, it is the ninth Senate factor which
4 explicitly incorporates the State's interests, but I'll deal with it
5 here because that's the way the Court put it in the summary judgment
6 order. As we understand the Court's concerns, there were really two:
7 Number one, the Secretary has alleged that there are unique aspects of
8 the Public Service Commission that require at-large elections and
9 then, number two, that it's required by the Georgia Constitution so
10 let me address both of those.

11 To the extent, however, that the State is arguing that
12 its interest in having at-large elections somehow overrides the rest
13 of Section 2, we argue that *Marengo County* controls and says that a
14 state's interest may not override the other factors no matter how
15 important it is. I understand that there's a tension between *Marengo*
16 *County* on that point and the judicial cases, but this is not a
17 judicial case and this is a lot more like *Marengo County* straight up
18 commission than it is a judicial body and we think that's apparent
19 from the nature of how the Eleventh Circuit describes why it found the
20 State's interest to be overriding in those cases. So unless this
21 Court finds that those cases control -- and I think it already has
22 found that they don't -- *Marengo County* provides the rule and decision
23 in this case and we are therefore likely to succeed.

24 But as to the unique nature and structure of the
25 Commission I'd like to, if we can, put up ECF 80-2, which is the

1 Secretary's statement of undisputed facts from the summary judgment
2 record which identifies what he claims to be the unique nature and
3 structure of the Public Service Commission that should override the
4 requirements of the Voting Rights Act. I want to turn to Page 3. I
5 believe that the unique nature and structure begins at Paragraph 9
6 which asserts that the Public Service Commission regulates utilities
7 in different ways. Number 10: Commissioners must constantly weigh
8 the reliability of a solid, secure system with the price of operating
9 that system.

10 Okay. Number 11: Decisions about rates affect
11 ratepayers all across the state.

12 Okay. Commissioners take calls from constituents
13 across the state of Georgia, not just in their districts. We heard
14 today about Tim Echols having a sit-down with Ms. McCorkle, for
15 example. And that's about it, Your Honor. I don't think we dispute
16 any of those things. But on their face, those don't add up to an
17 overriding State interest, in our view, nor is there any reason to
18 think that our proposed remedy would change any of those things.
19 Commissioners could still take calls from constituents who don't live
20 in their districts just like I could call the Speaker of the House, if
21 I wanted to. I don't live in his district, but I could certainly call
22 him, there's no prohibition on that. I could call, you know, any
23 member of the legislature I want on which I might have some particular
24 issue. Let's say a senator is sponsoring a bill that I have a
25 particular interest in, it would make sense for me to call so it's

1 really no different in that regard from --

2 THE COURT: Well, I mean, it's different in the sense
3 that -- I mean, certainly they could always take their call if they're
4 nice people, but you would no longer be a constituent.

5 MR. SELLS: I think that's true and that's also true in
6 the legislature.

7 THE COURT: Sure.

8 MR. SELLS: Yeah. But if there were any doubt, I want
9 to show you the deposition of Commissioner McDonald. I asked
10 Commissioner McDonald if there's anything about his work as a
11 commissioner that would change if he were elected from a district
12 rather than at large in the state. Commissioner McDonald, you may or
13 may not know, used to be in the legislature. His answer appears on
14 Pages 57 to 62 and I want to focus in on Page 62.

15 THE COURT: This is ECF Document 73?

16 MR. SELLS: It is ECF 73. The portions we're relying
17 on begin at Page 57, Line 7, but I'll just jump straight to the chase
18 for time considerations. I asked him "But again, there is nothing
19 about your day-to-day work that would change if you were elected by
20 the voters of District 4 only; correct? Answer: Nothing would change
21 except my workload would be kind of cut in over half because I don't
22 just get calls from District 4. I get calls from all over the state."

23 He goes on to say "I was in Alma, Georgia the week
24 before last at a broadband opening down there and an EMC -- Satilla
25 EMC was expanding their broadband program and it was a great, great

1 time for the people down there." That's an admission from the
2 commissioner that nothing would change if he were elected from a
3 district and, as a result, we think that on a preliminary injunction
4 on the record before you we are likely to succeed in showing that
5 there is no overriding State interest that is sufficient to nullify
6 Section 2 in this case.

7 Now, the second piece is the State's chosen form of
8 government and we talked about this at the summary judgment hearing
9 quite extensively. It comes down to what "elected by the people"
10 means. Our position is that "elected by the people" means not
11 appointed by the governor or some other body. That language appears
12 in the Constitution with respect to the Board of Education and the
13 Board of Pardons and Paroles. So the operative part of the Public
14 Service provision is not so much "by the people" as it is "elected by
15 the people," and that contrasts with appointed by the governor.

16 During that summary judgment argument I mentioned that
17 there were bills that I thought made this clear and those are the ones
18 that we've entered into the record today so I want to go over those,
19 if we could. Let's start with Senate Bill 472. We think this is a
20 matter of legal interpretation, by the way, but we think that the
21 Court can look at these bills to help understand what the text means.
22 Senate Bill 472 is a bill that would redistrict the Public Service
23 Commission residency districts and I want to scroll down to show you
24 that this bill, like the existing statute, which I think is 46-2-1,
25 makes clear that members of the Public Service Commission are to be

1 elected statewide at large. Let's scroll down just a bit more.

2 THE COURT: This is Plaintiffs' Exhibit 16?

3 MR. SELLS: This is 6.

4 THE COURT: I'm sorry, 6.

5 MR. SELLS: Yes, Plaintiffs' Exhibit 6.

6 THE COURT: I can't read my own handwriting. 6.

7 MR. SELLS: Yeah. So it appears at Lines 19 and 20.

8 "Each member of the Commission shall be elected statewide." That
9 language is completely unnecessary if it's already in the
10 Constitution. So why would legislative counsel over at the General
11 Assembly put that in there? Because you need to put it in there to
12 specify how the Public Service Commission is to be elected by the
13 people.

14 So let's look at, if we can, HR 152. HR 152 is a
15 proposed constitutional amendment that would change the Constitution's
16 provisions with respect to the Public Service Commission. Do they
17 delete the "by the people" language? No, they don't. They leave that
18 in, but this proposed constitutional amendment goes on to specify that
19 the commissioners would be elected by the voters of their respective
20 districts, that's Line 15.

21 THE COURT: This is Plaintiffs' Exhibit 5; correct?

22 MR. SELLS: Plaintiffs' Exhibit 5, yes, Your Honor.

23 If "elected by the people" means at large, why not
24 delete that if you're trying to make elections occur by district as a
25 constitutional matter?

1 And then lastly, Exhibit 4 is House Bill 154 which is a
2 cousin of the Senate Bill 472. It would have changed the method of --
3 excuse me, it's a cousin of HR 152 from the 2011 session which would
4 have changed the method of electing the members of the Commission by,
5 as you can see on Line 18, specifying that they would be elected not
6 statewide, but by the voters of their respective districts. That
7 would be unconstitutional if their interpretation is correct.

8 THE COURT: Well, it may be; right? I mean, you're
9 suggesting, with all due respect to these particular legislatures,
10 that they are correctly interpreting the Constitution as currently
11 enacted. I mean, to me, the only authority on that would be the
12 Georgia Supreme Court.

13 MR. SELLS: Well, so I get that point. It's not
14 definitive. It is an interpretive aid. But the legislative counsel
15 of the General Assembly isn't in the habit of drafting
16 unconstitutional bills on something like this. And so while the
17 Georgia Supreme Court is the only body who can obviously definitively
18 interpret State law, we think the Court can rely on the General
19 Assembly's own understanding of that language that is at issue.

20 THE COURT: These aren't even acts of the General
21 Assembly; right? These are bills proposed by one particular
22 representative, the senator?

23 MR. SELLS: Several representatives. But, yes, they're
24 all bills that have not passed the legislature, but they were all
25 drafted by ledge counsel as all bills are.

1 So at the end of the day on the State's chosen form of
2 government, I think it's a matter of legal interpretation, primarily,
3 but we think that on that question of law we are likely to succeed
4 because our interpretation of the law -- of the Constitution is the
5 better one and we think that you have to decide that question in the
6 context of our motion for preliminary injunction. You don't have to
7 decide it definitively, you don't have to reach a final determination.
8 But to the extent that you think that *Gingles* 1 includes this
9 question, you have to decide it on a likelihood basis. If you do find
10 that we have satisfied the three *Gingles* preconditions, again, that
11 raises a very strong inference that we're likely to succeed on the
12 merits without even addressing the Senate factors, but I'm going to
13 address the Senate factors because that's an important part of the
14 case as well.

15 Before I get into the nitty-gritty I want to respond to
16 something that was in the Secretary's brief. He asserts on Page 8
17 that the totality of circumstances is not well-suited to preliminary
18 injunctive relief and he cites to the *Fayette County* case. I believe
19 the Secretary is mistaken on that point. *Fayette County* was a summary
20 judgment case, not a preliminary injunction case. You may recall from
21 our argument on summary judgment that I freely conceded the reason why
22 we hadn't sought summary judgment on the totality of circumstances is
23 because it's not well-suited to resolution on a motion for summary
24 judgment whereas the three *Gingles* preconditions are and so I think
25 he's mistaken in transferring that thought to a preliminary injunction

1 contest.

2 In fact, if you were to look for examples of cases
3 under Section 2 where courts have issued preliminary injunctions based
4 on the totality of circumstances, you would find hundreds of them. I
5 won't list them all, but I will point the Court to *United States vs.*
6 *Dallas County Commission*, 79 F.2d 831, Eleventh Circuit case from 1986
7 reversing the denial of a preliminary injunction in a case challenging
8 at-large elections for the Dallas County Commission in Selma, Alabama.
9 I don't think you have to look much further than that, but in the
10 *Wright vs. Sumter County* case we asked for a preliminary injunction
11 and not only were we granted a preliminary injunction, the Court
12 granted a permanent injunction based on our motion there. So PIs
13 happen all the time under Section 2. Not always granted, but it's not
14 the kind of thing that can't be granted because of disputed issues of
15 fact.

16 THE COURT: So if that's true, Mr. Sells, why didn't
17 you raise this motion at the start of the case?

18 MR. SELLS: We wanted discovery. We weren't seeking
19 relief for the 2020 election. We filed the case July 14th. By then
20 the election season was already underway, qualifying had happened and
21 there was no need to. We did, as you'll hear in a minute, seek early
22 discovery. We were not granted early discovery. And we did so
23 because we wanted relief for 2022, we've been clear about that from
24 the very beginning of this case, we have proceeded with diligence and
25 I don't want to steal my colleague's thunder, but that's why. We

1 weren't seeking relief for 2020 and there was time at that point to
2 resolve this case before '22.

3 THE COURT: I know you're being gracious and not
4 blaming the Court on taking as long as we did to rule so I appreciate
5 that, but I understand that's a factor as well.

6 MR. SELLS: Yeah, yes.

7 So let me turn to the Senate factors. In our brief we
8 lay them in numerical order 1, 2, 3, 4, 5, 7, 8, 9. But I want to
9 address them in a different order because the Supreme Court is very
10 clear that they're not all of equal importance. If you look at
11 Footnote 15 of the Supreme Court's opinion in *Gingles* it's very clear
12 that Senate Factors 2 and 7 are the most important. And, in fact, the
13 Eleventh Circuit agrees and in a case called *City of Carrollton Branch*
14 *of the NAACP vs. Stallings*, which appears at 829 F.2d 1547 at
15 Page 1555, an Eleventh Circuit case from 1987, the Eleventh Circuit
16 actually reversed a District Court for failing to give primary
17 importance to Senate Factors 2 and 7 so that's where I'm going to
18 start.

19 Senate Factor 2. In *Marengo County* the Eleventh
20 Circuit says this factor will ordinarily be the keystone of a
21 vote-dilution case. What is Senate Factor 2? It's the extent of
22 racial polarization. Now, the "extent" is kind of a squishy word.
23 How do you measure what the "extent" is? There's no clear one way to
24 measure "extent," but you could look at other cases and I would
25 encourage the Court to look at *Wright vs. Sumter County*. At Page 1305

1 of that decision the Eleventh Circuit discussed the District Court's
2 finding that under Senate Factor 2 voting was highly polarized along
3 racial lines in *Sumter County*. What was that finding based on? It
4 was based on a finding that 10 out of 12 elections that were analyzed
5 in that case were polarized. Ten were polarized, two were not
6 polarized. In the polarized contests black support was about
7 85 percent for their preferred candidate and white crossover was less
8 than 10 percent.

9 You can also look at *Thornburg vs. Gingles*. In that
10 case -- in the appendix to the case at the very end of all the
11 opinions there's some numbers and those are the racial polarized
12 voting analysis that the Supreme Court relied on that came from the
13 District Court and the Supreme Court described the level of
14 polarization in those numbers as severe. What did those show? They
15 showed that cohesion was around 90 percent among black voters, but
16 white crossover was at times in the 30s and 40s. Sometimes it was
17 down around 20, but oftentimes it was around 30 and 40s.

18 So here what do we have? Every single race that our
19 expert, Dr. Popick, looked at was polarized. Cohesion was above
20 90 percent, crossover was mostly in the teens and low 20s.
21 Dr. Popick, who has extensive experience in this area, has analyzed
22 hundreds and hundreds of elections, said in his report that the
23 pattern of racial polarization is "among the clearest I have ever seen
24 in my professional career" and the defendant admitted that voting is
25 racially polarized in response to our statement of undisputed facts at

1 summary judgment, that is all that Senate Factor 2 requires. I don't
2 know whether you'd characterize the record in this case as highly
3 polarized or severely polarized or highly severely polarized, but it's
4 sufficiently polarized to say that we have satisfied the second Senate
5 factor which is the keystone of a vote-dilution case.

6 Now, the defendant's response is that we can't satisfy
7 this Senate factor because we haven't shown why polarization exists.
8 That is not the law. The Secretary, and I think this Court, have
9 already acknowledged that's not existing law that we have to show why
10 polarization exists. No court in the Eleventh Circuit has ever so
11 held. And, in fact, the Eleventh Circuit in *Marengo County* has said
12 that the surest indication of race-conscious politics is a pattern of
13 racially polarized voting which is what we have here.

14 But even if the Eleventh Circuit is unclear - and we
15 don't think it is - it's not at all clear in other circuits that have
16 addressed this issue. It is a common assertion, common defense, and
17 it has been rejected by every circuit court that has addressed the
18 issue and I am going to list some of these. The First Circuit, again,
19 in *Uno vs. City of Holyoke* and the cite there is 72 F.3d at 980;
20 Second Circuit *Goosby vs. Town of Hempstead, New York*, 180 F.3d at
21 Pages 492 and 493; a more recent case from the Second Circuit,
22 *Clerveaux, C-L-E-R-V-E-A-U-X, vs. Ramapo Central School District*, 984
23 F.3d at 230; Fourth Circuit *Lewis vs. Alamance County*, 99 F.3d at 615;
24 the Fifth Circuit *LULAC vs. Clements*, Clements C-L-E-M-E-N-T-S, 99
25 F.2d at Page 850; Seventh Circuit *Milwaukee Branch of the NAACP vs.*

1 *Thompson*, 116 F.3d at 1199.

2 All of these cases that I just cited stand for the
3 completely unremarkable proposition that the defendant can offer
4 evidence at the totality-of-circumstances stage that voting patterns
5 can be explained by factors unconnected with race. But no circuit
6 that I'm aware of or that they have cited says that it's our burden to
7 establish why polarization exists, certainly not at the *Gingles*
8 precondition stage and also not at the Senate factors stage.

9 Under the totality of circumstances the defendant can
10 offer any evidence that he wishes, but he has not done so here. On
11 this motion the defendant hasn't offered that evidence because he says
12 it's our burden to do it. He's wrong about that and so on this record
13 there's no basis for saying that factors unconnected to race explain
14 this severe or highly polarized voting analysis that we've shown.

15 THE COURT: Well, regardless of whose burden it is,
16 doesn't that provide fodder for why we need a trial, why we need to
17 hear evidence on the totality of the circumstances before determining
18 the merits of the case?

19 MR. SELLS: Well, we think we do need a trial, yeah. I
20 mean, there are issues in dispute. But there are issues in dispute in
21 every motion for a preliminary injunction or almost every motion for a
22 preliminary injunction because if there weren't they'd be motions for
23 summary judgment. So, yes, we need a trial on these issues and I
24 expect, you know, trial will be a lot more fulsome than we've had
25 today.

1 But on our motion, given the impending election, it's
2 your responsibility, we think, to make an assessment at this point
3 about whether there are factors in the record that -- factors in the
4 record unconnected to race that explain why voting is so racially
5 polarized and that black-preferred candidates always lose. We think
6 you're not going to find that on this record. Maybe you'll find it
7 after trial, but it's not here now. In fact, the defendants don't
8 even make that argument here on this motion because they say it's our
9 burden. So unless you have any more questions about Senate Factor 2,
10 I'm going to turn to Senate Factor 7.

11 The 7th Senate factor is the extent to which members of
12 the minority group have been elected to public office in the
13 jurisdiction. Here I'll give him credit, the Secretary acknowledges
14 Georgia's shameful history in this regard. In the 142 years of the
15 Public Service Commission only one black person has ever been elected,
16 that was David Burgess, but he was appointed first.

17 Now, a second person has been appointed, but that
18 didn't come until after the close of discovery in this case. The
19 Eleventh Circuit decision in *Marengo County* cast doubt on the
20 significance of appointees that occur post litigation, that appears at
21 731 F.2d at 1572, and the *Wright vs. Sumter County* case suggests that
22 elections for the office at issue are the most probative ones to look
23 at. We think that our expert, Dr. Fraga's report, really drives home
24 the underrepresentation of black people statewide in Georgia. Only
25 four candidates have ever been elected to statewide office in Georgia

1 and in the 164 general elections for statewide office conducted in
2 Georgia between 1972 and 2020 black candidates won only eight of
3 those, which is 4.9 percent. There's no dispute about any of this as
4 a matter of fact and this factor therefore weighs heavily in the
5 plaintiffs' favor.

6 I want to point out the timing, in fact, that
7 Mr. Johnson, who's the second African American appointee, wasn't
8 appointed until after Dr. Fraga submitted his report and we served
9 that on the defendants pointing out the absence of black appointees
10 and making a big deal about the exclusion of black people from the
11 appointments process. Now, I don't know whether they're connected,
12 but temporally that should give the Court some pause in relying very
13 heavily on Mr. Johnson's election.

14 THE COURT: Talk about the argument made by the
15 Secretary that, I mean, black-preferred candidates have won statewide
16 office most recently for both Senate races and Georgia has had
17 democratic governors that presumably were the black-preferred
18 candidates at the time so it's not unprecedented that black-preferred
19 candidates could win statewide office.

20 MR. SELLS: Right. So a couple things I'd say about
21 that. Certainly Reverend Warnock is included in Dr. Fraga's analysis,
22 so his election is in there, and it's still only four black candidates
23 ever being elected statewide in Georgia. It's a really small number,
24 I think the Secretary acknowledges that.

25 When you start talking about, well, in the '90s we had

1 a democratic governor, you're really getting into the second Senate
2 factor and the third *Gingles* precondition and that is we don't really
3 know, but was voting racially polarized in the mid '90s? There's no
4 evidence on that. Even if we had evidence, it wouldn't necessarily
5 negate evidence of the last decade which we have put in the record,
6 that's the only evidence in the record regarding polarization. So I
7 don't think the Court can draw any conclusions whatsoever from the
8 fact that we used to have a democratic governor. I mean, George
9 Wallace was a democrat; right? So that's I think my response to that
10 unless you have other questions.

11 THE COURT: No. That's a fair point, but the two most
12 recent Senate elections are certainly probative.

13 MR. SELLS: Well, okay. Well, there's no analysis --
14 there's no racial black voting analysis of the two most recent Senate
15 elections, those would be exogenous elections and we have focused on
16 the endogenous ones, which everyone universally agrees are the most
17 probative. But we have focused also on the 2021 -- the 2020 and '21
18 races for Public Service Commission. In the very same ballot you saw
19 earlier today, very same ballot where Ossoff and Warnock won, Daniel
20 Blackman lost. So I would suggest it may not be as probative-- even
21 if there were such analysis, it may not be as probative as one might
22 think at first blush. On the very same ballot Daniel Blackman lost.

23 The next factor I want to talk about is
24 proportionately. While not dispositive, courts have relied on that
25 with increasing frequency since the Supreme Court made it important in

1 *Johnson vs. DeGrandy*. It was very important in *LULAC vs. Perry* in
2 2006 and is increasingly one of the touchstones, in my view, of a
3 vote-dilution case. If you have proportionately courts are much more
4 reluctant to find unequal opportunity and if you're below
5 proportionately courts are more likely to find unequal opportunity.
6 And here again there's not really dispute black people make up about a
7 third of Georgia's population and have zero districts in which they
8 form an effective majority. So this factor, a pretty simple one,
9 weighs in the plaintiffs' favor and it's so clear that the Secretary
10 doesn't even mention the factor in his brief and did not dispute it at
11 summary judgment. I would refer to ECF 88-1, that's their response to
12 our statement of additional facts.

13 So I'm going to turn next to the first Senate factor
14 which is whether there's a history of discrimination that touch upon
15 the rights of minorities to register to vote or otherwise to
16 participate in the political process. As the Eleventh Circuit has
17 explained, past discrimination is relevant under the results test
18 because past discrimination can impair present-day ability of
19 minorities to participate on an equal footing with their white
20 counterparts in the electoral process. That's *Marengo County*, 731
21 F.2d at 1567.

22 History of discrimination also supports the inference
23 of race-conscious politics; right? Because where you have a history
24 of discrimination it's more likely that history reverberates today.
25 If we were dealing with a minority group that was new to America or

1 new to Georgia about which there was no history of discrimination, it
2 might seem odd to argue that their votes are diluted by a certain
3 system. That's not what we're dealing with here, okay.

4 The defendant has admitted that Georgia has a long and
5 extensive history of discrimination against African Americans, I don't
6 think any conscious person in Georgia can help but admit that. That
7 admission appears in Paragraph 24 of his answer and in response to our
8 statement of additional facts at Page 5. Given that admission, it's
9 odd that he complains in his brief that we have failed to produce
10 evidence, you know, after he's conceded the issue. I think that's
11 what a concession means is that you don't have to produce evidence on
12 it. The Secretary quotes *dicta* from an Eleventh Circuit case
13 suggesting that a history of discrimination no longer matters, but
14 that is not the law in the Eleventh Circuit. History of
15 discrimination matters under binding precedent. It also, I think,
16 matters to anyone with a moral compass in this state. It does not
17 automatically condemn legislation. You know, Georgia passes election
18 legislation all the time. It's not automatically condemned on the
19 basis of its history of discrimination, but it is a piece of
20 circumstantial evidence of vote dilution under existing law and this
21 factor plainly weighs in the plaintiffs' favor. It would be odd for
22 the Court to find that it doesn't.

23 I've already talked about Senate Factor 2 so I'll move
24 on to Senate Factor 3. The 3rd Senate factor is the extent to which
25 the State has used practices that enhance the opportunity for

1 discrimination against minority voters. Here there's no dispute that
2 Georgia uses three electoral mechanisms that enhance the opportunity
3 for vote dilution. They are staggered terms, a majority vote
4 requirement, and an unusually large election district, that is, the
5 whole state of Georgia. Now, the Secretary argues that there are good
6 government reasons for the first two and that the state does not
7 constitute an election district. Our response to that is as follows:
8 Staggered terms are clearly an anti single shot device, there's lots
9 of case law on that and lots of scholarship on that.

10 Majority vote requirements make it harder for
11 minorities to elect representatives of their choice. They point to
12 Raphael Warnock's success. Indeed, that is an outlier case where he
13 would not have been elected were it not for runoff elections, but the
14 Secretary has identified no instance where it helped the
15 black-preferred candidate in a race for Public Service Commission.

16 THE COURT: Well, doesn't that just show that turnout
17 matters?

18 MR. SELLS: Well, turnout certainly matters.

19 THE COURT: And the Public Service election is not
20 going to get the turnout that you would for a Senate runoff?

21 MR. SELLS: I'm not sure that I follow you there,
22 Judge. You know, there may have been fewer votes cast in the Public
23 Service Commission election, I don't know whether that's true or not,
24 but each race has different dynamics based on the candidates, based on
25 their funding, based on other aspects. You know, so if we're looking,

1 for example, at the January 2021 runoff, I mean, you don't turn out
2 differently in one race versus others, you're presented with the whole
3 ballot so that's what the turnout is.

4 You know, turnout certainly matters, but majority vote
5 requirements hurt minority voters. It is a truism in politics, that's
6 why they exist is to prevent minorities from electing a candidate that
7 is not preferred by a majority. I mean, that's definitionally why
8 they exist. We can debate whether that's good government or not, but
9 they are recognized in the case law as enhancing factors, for whatever
10 that's worth.

11 And as to the State's point that the state is not an
12 election district, at-large elections are an election district and you
13 need look no further than *Marengo County* on that. The Eleventh
14 Circuit makes that clear at Pages 1570 and 71 of that opinion. The
15 reason why large election districts matter is that it makes it harder
16 to campaign and black folks in Georgia have fewer resources in general
17 than whites do for that campaigning.

18 THE COURT: Could I ask with respect to the Senate
19 Factor 3, the way I read it it is, again, not tethered to any
20 motivation behind the size of the district or majority vote
21 requirements. It's simply the impact?

22 MR. SELLS: Right. This is a results test. It's not
23 an intent test. If we had an intent claim, the presence of these
24 factors might support an inference of intent. But we're not raising
25 an intent claim here and they -- under the case law the presence of

1 these factors is thought to make it harder for minorities to win in a
2 system and therefore provide some circumstantial evidence of impact.

3 I'll move to the 4th Senate factor unless you have
4 other questions.

5 THE COURT: No. Thank you.

6 MR. SELLS: The 4th Senate factor is whether members of
7 the minority group have been denied access to a candidate's slating
8 process. What is a slating process? We don't have those, the formal
9 slating processes in Georgia, but it is -- the typical one is the
10 Jaybird Democratic Association. That was in Texas and it was involved
11 in the case of *Terry vs. Adams* in 1953.

12 To give a little bit of history, you probably know that
13 in 1948 the Supreme Court outlawed the white primary in a case called
14 *Smith vs. Allwright*, that was also out of Texas. So states couldn't
15 run all-white primaries after 1948. What did Texas do? It said we're
16 going to privatize all the primaries and let the private organizations
17 run them and all across Texas these democratic associations sprung up
18 and those were challenged as discriminatory and one of them was
19 Jaybird Democratic Association and in the seminal case of *Terry vs.*
20 *Adams* the Supreme Court held that that was state action.

21 In the case of *White vs. Regester* in the early '70s the
22 Supreme Court pointed to the fact that there was the Dallas County
23 Commission or Committee for Responsible Government that kind of did
24 the same thing. It didn't have a primary, but it was an organization
25 that would recommend candidates to the electorate and it had an

1 exclusionary effect. That's what a slating process or organization
2 is, that's where it comes from. The Senate factors come from *White*
3 *vs. Regester*.

4 But in *Marengo County* the Eleventh Circuit recognizes--
5 this is now by the mid '80s -- that after *White vs. Regester* those
6 kinds of organizations faded away, these formal slating organizations
7 faded away, and that slating was now done on a more informal basis;
8 right? The key is whether -- what a slating organization tries to do
9 is ensure that there's a white candidate who's got the clear support
10 of kind of the establishment.

11 In this case our political science expert, Dr. Fraga,
12 makes the point that black Georgians have been excluded from the
13 governor's appointment process which confers on the appointee a
14 significant advantage that comes along with incumbency and it's a
15 modern way of ensuring a white candidate for the office. What happens
16 quite frequently is -- and has happened over the course of several
17 Public Service Commissioner terms is that the commissioner will -- a
18 sitting commissioner will resign shortly before the end of his term
19 and then the governor gets to appoint someone who then becomes an
20 incumbent. That happened with David Burgess, it happened with Jason
21 Shaw, current commissioner, it happened with Tricia Pridemore, a
22 current commissioner, and those are set out in Fraga's report.

23 Now, at the time that we filed this action and at the
24 time that Dr. Fraga wrote his report only one black person had ever
25 been appointed to the Commission in its 142-year history. And the

1 Secretary doesn't dispute Dr. Fraga's analysis on this one bit, but
2 instead he points to, again, the appointment of Fitz Johnson to
3 replace Chuck Eaton as Public Service Commission. Fraga's report was
4 disclosed in April of 2021 and Mr. Johnson was not appointed until
5 July of 2021.

6 THE COURT: If I recall, there was a discovery issue
7 that arose with respect to Mr. Johnson's appointment so was
8 discovery -- I don't remember exactly how that was resolved, but was
9 there discovery taken about the decision to appoint him and whether it
10 had anything to do with this case?

11 MR. SELLS: We have a deposition scheduled for
12 March 8th.

13 THE COURT: I see, okay.

14 MR. SELLS: On this issue I want to point back again to
15 *Marengo County*. Counsel's against placing too much weight on the
16 appointment of a black person after litigation began and, in fact,
17 that was an issue that was decided in that case because the District
18 Court under the 4th -- I think it was under the 7th Senate factor had
19 relied on the appointment of one person and the election of another
20 black person, both of which happened after the litigation was begun,
21 and the Eleventh Circuit reversed, found clear error on that point.
22 So we think the Court should discount Johnson's appointment here. But
23 even if you include it and give it full credit, this factor still
24 weighs in the plaintiffs' favor because two appointees, given the
25 number of appointees over history as detailed in Fraga's report, is

1 still pretty small.

2 So I'm going to turn to Senate Factor 5, unless you have
3 slating questions.

4 THE COURT: No. Thank you.

5 MR. SELLS: The 5th Senate factor directs the Court to
6 consider whether -- excuse me, to consider the extent to which
7 minority group members bear the effects of past discrimination in such
8 areas as education, employment and health which hinder their ability
9 to participate effectively in the political process. The Eleventh
10 Circuit has recognized repeatedly, most recently in *Wright vs. Sumter*
11 *County*, that disproportionate educational, employment, income level
12 and living conditions arising from past discrimination tend to depress
13 minority political participation and where you can show these
14 conditions, including depressed black political participation,
15 plaintiffs don't have to prove any further causal nexus between the
16 socioeconomic status and the depressed level of political
17 participation.

18 Here we rely on our request for judicial notice of
19 census data which reveals striking socioeconomic disparities between
20 black and white Georgians on a wide variety of factors, and I won't
21 list them all in the interest of time. I'll just list two. The
22 poverty rate is 9 percent for non-Hispanic white persons; 18.8 percent
23 for black Georgians. Per capita income is \$40,348 for non-Hispanic
24 white Georgians; \$24,215 for black Georgians. There are a number of
25 factors, they all point to striking disparities, and the defendant

1 doesn't dispute any of those, there was no opposition to our request
2 for judicial notice which you granted along with the summary judgment
3 order.

4 We also rely on the report of Dr. Fraga who compiled a
5 detailed analysis of black and white turnout in recent Public Service
6 Commission elections and I'd like to put that on the screen, if we
7 can. This is ECF 84-2 at Page 6. 84-2, there we go. I want to focus
8 in on Table 1. This is a disparity going back to 2016, which is all
9 he was able to include given the data available to him, and it is a
10 persistent gap ranking from, it looks like, about 7 points -- it's
11 pretty steady right around 7 points, 6, 7 points. The Secretary
12 doesn't dispute Dr. Fraga's analysis except to cite to an internet web
13 page that says the black turnout was really high in 2021. Well, sure,
14 maybe it was record breaking, but so was white turnout. There's still
15 a disparity in the 2021 runoff. The 5th Senate factor weighs
16 heavily in the plaintiffs' favor.

17 I'm going to skip for now the 6th Senate factor and go
18 to Senate Factor 8. We've already talked about the 7th. The 8th
19 Senate factor asks whether there's a significant lack of
20 responsiveness on the part of elected officials to the particularized
21 needs of members of the minority group. The Eleventh Circuit in
22 *Marengo County* explained that this factor is of limited importance
23 under Section 2 for two reasons. The first is that Section 2 protects
24 the access of black voters not simply to the fruits of government, but
25 to participation in the process, and so even if officials are

1 responsive that doesn't mean that they have an equal opportunity to
2 elect.

3 Second, the Eleventh Circuit explained that the idea of
4 responsiveness is highly subjective and that is the intention with the
5 whole purpose of the amended Section 2 which was to emphasize
6 objective factors. In *Marengo County* the Eleventh Circuit says that
7 while unresponsiveness can be probative, a showing of responsiveness
8 is of very little probative value. Here, of course, there's no
9 evidence whatsoever that the Commission has been responsive to the
10 particularized needs of the black community and, in fact, the
11 Secretary seems to suggest in his brief that black people don't even
12 have any particularized needs when it comes to issues that come before
13 the Public Service Commission, but that is not what you heard today.

14 You heard from Ms. McCorkle and Reverend Woodall about
15 discrete issues that they have worked in the trenches on over the
16 courses of their -- over the course of their careers, including, you
17 know, rates, the moratorium cutoff -- or the cutoff moratorium, rate
18 increases and environmental justice. These are all issues that, as
19 you heard Ms. McCorkle say, trickled up from the black communities in
20 Georgia where she's worked over the course of her career and they were
21 presented as such to the Commission through the protests that you
22 heard about from Reverend Woodall leading on behalf of the NAACP.
23 What did they say about responsiveness? I believe Ms. McCorkle said
24 that her advocacy fell on deaf ears. Now, there's literally no
25 contrary evidence in the record and we think that this factor weighs

1 in our favor. I also want to point out that this fact appears in our
2 statement of additional facts and the defendants did not dispute it
3 there. That's ECF 88-1 again.

4 THE COURT: Did not dispute what?

5 MR. SELLS: Did not dispute our assertion that the
6 Public Service Commission is unresponsive to the needs of the black
7 community. Can we put that up on the screen? It's ECF 88-1 at
8 Page 8. The Secretary had an opportunity to dispute that as a matter
9 of fact and didn't.

10 THE COURT: I bet he didn't concede that point either,
11 he just objected.

12 MR. SELLS: Yeah. There's an objection to whether it's
13 material, but there's no dispute of it and there's no, I think,
14 serious dispute now. I also think they're wrong that it's not -- to
15 the extent that they think that responsiveness is not material to the
16 totality of circumstances, it's clearly material to the totality of
17 circumstances.

18 We've already covered Senate Factor 9 that goes to the
19 State's interests. We talked about those in the context of the first
20 *Gingles* precondition. So I want to come back now to the 6th Senate
21 factor which directs the Court to consider whether political campaigns
22 have been characterized by overt or subtle racial appeals.

23 Racial appeals are important under Section 2 because
24 they reveal the salience of race and racism among the electorate.
25 Racial appeals only work if they connect with voters. Politicians

1 only use them if they think that they will work. The Eleventh Circuit
2 has said that evidence of racial appeals is, quote, "Very significant,
3 if present. But the absence of racial appeals does not weigh heavily
4 against a plaintiff." The record contains two recent racial appeals
5 and they appear in ECF 84-3. Can we put those up? The first involves
6 Senator David Perdue's campaign. Now, this isn't the racial appeal on
7 the screen, I'm going to show that next. Let's go to the next page.
8 No, let's go to the image that is the appeal right there.

9 As you may know, Senator Ossoff -- now Senator Ossoff
10 was Senator Perdue's opponent and he happens to be Jewish and former
11 Senator Perdue published an ad that elongated Senator Ossoff's nose in
12 one of the, you know, most -- as it says here, "Obviously least
13 original anti-Semitic tropes" and --

14 THE COURT: Does this Senate factor go to political
15 campaigns generally or to the campaign at issue?

16 MR. SELLS: So we argue that it goes to campaigns
17 generally and we think the case law supports that, but it's not -- I
18 haven't found a case at this point where that was an issue, but there
19 are lots of cases where courts find racial appeals in what we would
20 call exogenous elections. The reason why it matters is because it's
21 the same electorate that is being targeted with this anti-Semitic
22 racial appeal that's voting on the Public Service Commission and,
23 again, what it means is that race - in this case religion - is salient
24 among the voters or at the very least politicians think that race is
25 salient among the voters.

1 So let's look at the next one. The next one involves
2 now Senator Warnock. One of the oldest ways of making a racial appeal
3 is to publish pictures of your opponent. Sometimes it's not known
4 what race they are. Of course in a United States Senate race there
5 was no hiding that Raphael Warnock is African American. But to make
6 him seem less appealing to white voters or scarier to white voters it
7 is a -- I don't want to say it's frequent tactic, but it is a
8 well-worn tactic to darken a black person's skin color. Willie
9 Horton -- the Willie Horton ad from the presidential campaign of 1988
10 was a classic example of doing that and Kelly Loeffler's campaign did
11 it to Raphael Warnock in the 2020 campaign. Can we scroll down?
12 That's the un-retouched photo. That's the edited version.

13 THE COURT: To clarify, this is Document 84-3 and that
14 was -- what were the pages you just referenced, 9 and 10?

15 MR. SELLS: That's correct.

16 THE COURT: I'm sorry, the previous ad of Senator
17 Perdue, can we look back to that?

18 MR. SELLS: Yeah.

19 THE COURT: That was 84-3, Page 4.

20 MR. SELLS: Yeah.

21 So let's go back to Reverend Warnock. There's Senator
22 Loeffler's ad darkening his skin, that's very easy to see by
23 comparison, and I think there's another example further down right
24 there. That's a clip from a second ad.

25 THE COURT: That's Page 11?

1 MR. SELLS: Page 11 where it's easy to see that
2 somebody involved in her campaign darkened Reverend Warnock's skin.

3 Now, the Secretary does not dispute these two racial
4 appeals as a matter of fact, but he says that they don't matter
5 because they are from US Senate elections and not Public Service
6 Commission elections, but we've already discussed that. The Secretary
7 says they were done by losing candidates. Indeed they were, but that
8 does not mean that race and racism is not a significant factor among
9 the electorate in Georgia. The Secretary argues that there aren't
10 enough of them, only two is not enough and that simply is not the law.
11 These are examples -- if we had, you know, a dozen of them, sure, it
12 might be clearer that race and racism is a factor in Georgia, but I
13 don't think you need to look beyond the image on your screen to see
14 what's going on.

15 THE COURT: It's a minor point, but the Senate factors
16 state explicitly the reference to racial appeals. I know that Judaism
17 has sometimes been classified as a race. Is that your position for
18 purposes of this argument?

19 MR. SELLS: No, Your Honor. And thank you for allowing
20 me to clarify that. The reason why the racial -- I'm calling it a
21 racial appeal just because that's, you know, the language in the case
22 law. But the reason why the religious appeal, if you will, in Senator
23 Ossoff's case is important here, two words: White supremacy.
24 Anti-Semitism is the same thing as white supremacy, which is the same
25 motivating factor behind, you know, antiblack racism and so it's the

1 flip side of that coin, if you will, and it has been forever, I'm not
2 inventing that. But that's why it's relevant here is that it
3 indicates that -- you know, it is a racial appeal in that it's an
4 appeal to white folks. Contrasting, you know, Senator Perdue with a
5 nonwhite guy with a long nose; right? Trying to depict Senator Ossoff
6 as an other, that is an appeal to white racism, that's why it's
7 relevant here.

8 So the last argument the Secretary makes on this is what
9 I call the some-of-my-best-friends-are-black argument which is that,
10 well, look, Herschel Walker's a leading candidate for the republican
11 nomination for Senate so that means that there's no racism among the
12 electorate and it doesn't mean that. There have been -- as the Court
13 in *Marengo County* makes clear, tokenism is a common factor in American
14 politics and supporting a single black candidate, in this case
15 Herschel Walker, in no way negates the power of race among Georgia's
16 electorate.

17 THE COURT: It's also probably a celebrity exception.

18 MR. SELLS: Well, right. I'm glad you raised that
19 because that's kind of a corollary of
20 some-of-my-best-friends-are-black argument. It's like "I like Michael
21 Jordan," that's one I grew up with or "Michael Jackson's pretty cool."
22 It doesn't mean you're not racist if you like Michael Jordan or
23 Herschel Walker or a football player or Tiger Woods, any of these
24 folks, I think you're exactly right. So this Senate factor weighs
25 heavily in the plaintiffs' favor, there's no contrary evidence.

1 So I've gone now over all the *Gingles* preconditions and
2 Senate factors. Before I conclude, does the Court have any questions
3 on the merits?

4 THE COURT: No. I've been asking as we go along so,
5 no, thank you.

6 MR. SELLS: Okay. So just briefly by way of
7 conclusion, since the beginning of this case the Secretary has tried
8 to convince you that there's something novel or unusual about this
9 case, but I hope -- as my presentation has tried to make clear, we're
10 asking this Court to apply a pretty extensive set of facts to law that
11 has been well-settled for more than 25 years. Most of the law that I
12 talked about today comes from *Marengo County*. We are coloring well
13 within the lines of existing precedent in the Eleventh Circuit that
14 stretches from *Marengo County* right up to *Sumter County* just two years
15 ago.

16 We're not here to debate whether the law of Section 2
17 is good or bad policy, that's a conversation we can have some other
18 time. We're here to ask this Court to apply well-established law to
19 the facts of this case and, if you do that, we think you have to
20 conclude on this record that the at-large method of electing members
21 of Georgia's Public Service Commission likely violates Section 2 and
22 that we are therefore likely to succeed on the merits of our claim.

23 I'm going to turn it over to my co-counsel now to talk
24 about some of the other factors.

25 THE COURT: All right. Maybe we should take a little

1 break before we go to the finale. What do you think? Let's come back
2 at say 1:15. All right.

3 (recess was taken from 1:00 p.m. until to 1:15 p.m.)

4 THE COURT: Mr. Martinez.

5 MR. MARTINEZ: Yes. Good afternoon, Your Honor. I
6 think the good news is after Mr. Barnes's testimony this morning I can
7 streamline things quite a bit so I will do my best to be brief but
8 make our arguments.

9 The first thing I want to add briefly is just one thing
10 to Mr. Sells's comprehensive presentation which with respect to Senate
11 Factor 7 he mentioned the race involving Daniel Blackman for Public
12 Service Commission in 2020 followed by the runoff in 2021. I also
13 wanted to note that Robert Bryant was also a candidate for Public
14 Service Commission for another district seat in 2020 for District 1
15 and he also lost and that, of course, is part of the analysis that
16 Dr. Popick did. Mr. Bryant is also a black person. So talking about
17 sort of what are the most relevant elections for purposes of Senate
18 Factor 7 we would ask the Court to consider also Mr. Bryant's race as
19 well.

20 THE COURT: All right.

21 MR. MARTINEZ: With respect to the other three Winter
22 factors that Mr. Sells laid out at the beginning of his presentation,
23 that's what I'm going to be addressing today. I want to begin by just
24 framing what I think the purpose of our motion here is, which is to
25 reduce confusion among the voters, among the Secretary of State's

1 Office, among the candidates, not to create it or inject it, as the
2 Secretary of State asserts in his response. I think Mr. Barnes's
3 testimony today made that clear.

4 You know, what we're hoping for here is that the Court
5 would be able to prepare for what we think is the most likely outcome
6 here. Not guaranteed, as Mr. Sells made clear, but the most likely
7 outcome to plan for that scenario to make it as least disruptive as
8 possible for elections in the state of Georgia and we believe that
9 that furthers the interests identified in *Purcell* by the Supreme
10 Court.

11 So the first of these remaining factors that I'll
12 address is irreparable harm and, as we pointed to in our brief, the
13 case law makes clear that money cannot remedy the harm caused by
14 another election using a system that dilutes black votes. The
15 defendant in his response does not dispute that case law or that point
16 and the testimony that Your Honor heard this morning from Ms. McCorkle
17 and Reverend Woodall made the irreparable harm in such a scenario
18 clear. They said you cannot put a price tag on their right to vote.
19 You cannot put a price tag on vote dilution. There's no amount of
20 money that could compensate them for having a system that dilutes
21 their voting power. The injunction, the limited injunction, that
22 we're seeking today is necessary to remove the threat that an election
23 would take place using what we believe is an unlawful system even if
24 the Court were to rule in our favor after a trial so that's why we're
25 here today, Your Honor.

1 The second factor or second factor I'm addressing, the
2 third Winter factor, is how do you balance the irreparable harm to our
3 clients against any damage asserted by the Secretary of State and this
4 is where I think Mr. Barnes's testimony this morning is very helpful
5 to the Court. I believe the word that he used in describing what it
6 would take for his office to delete the election contests that have
7 already been included in the ballot combinations for Public Service
8 Commission, the word that I wrote down that he used was "easily," they
9 could be easily removed and, to us, that amounts to a concession that
10 there really is -- if any burden at all, it is a very minimal one on
11 the Secretary of State.

12 The defendant offered no evidence of any burden
13 specific to the relief that we seek here, which as we explained in our
14 brief and in our reply is, you know, pressing pause now and what that
15 means is that the Secretary of State simply does nothing once
16 candidate qualification has completed. Once those lists of names come
17 in for Public Service Commission, he simply does not have to add them
18 to those ballot proofs that later get sent to the county.

19 I want to contrast the approach that the Secretary of
20 State took in this case with what they did in the redistricting case.
21 There they called -- well, they submitted a declaration on
22 Mr. Barnes's behalf. They called him affirmatively to testify about
23 the burden in that case on the Secretary of State's Office. Contrast
24 that with here where they neither submitted a declaration on his
25 behalf, nor called him affirmatively to testify. We, in fact, called

1 him thinking that it's part of our burden to show the lack of damage
2 that would be done to the Secretary of State if we were to prevail
3 here and I think that is telling, that they did not have someone
4 affirmatively come in and testify about here's what the burden would
5 be specifically to us if the relief granted in this motion were to
6 occur.

7 THE COURT: Shouldn't we also consider, though, when we
8 look at the balancing of the equities that Mr. Barnes answered, in
9 response to my question, that there could also easily be done an
10 accommodation on the ballot where the contest is marked as one that
11 should not be voted on and that could be done easily by the Secretary
12 as late as mid-August which would be six weeks, roughly, after the
13 trial?

14 MR. MARTINEZ: Right. So what I would say to that is I
15 would emphasize what Mr. Barnes said specifically about if they had
16 to, for example, delete the ballot contents, which he said he could do
17 now, that he'd much rather do that now as opposed to any time later on
18 and that's simply commonsense. But I think to your point, Your Honor,
19 about what would happen later, my sense is that any risk of voter
20 confusion -- if you allow candidate qualifying to happen, you allow
21 primary season to get underway, candidates -- you know, the primary's
22 set for May 24th. Candidates start campaigning, they start raising
23 money. You know, there's no evidence at this stage that any
24 campaigning has begun. The Secretary in his brief mentions candidate
25 announcements having happened, but points to no evidence of that.

1 So what I would say is that I think the better course
2 for everybody is to press the pause button now, to do so before
3 qualification closes to address some of the issues that Mr. Barnes
4 identified with having to delete contests from the ballots and just
5 press pause now while the Court considers the merits of the case at
6 trial.

7 On burden, you know, really the last thing I would say
8 is there was some discussion about special elections and, you know,
9 part of the examination of Mr. Barnes was intended to show that
10 special elections are not an uncommon event in the state of Georgia.
11 There's one scheduled for March 15th next month. There are a number
12 that you saw highlighted on the screen in 2021 and on the calendar for
13 this year. So if and when we get to the point where a special
14 election needs to be scheduled the Court is going to have plenty of
15 options to deal with that and the Secretary of State's Office is
16 well-prepared to handle that and there was no -- you've heard no
17 argument from the defendant so far that running a special election for
18 these two Public Service Commission seats is any sort of burden. So
19 in our view, this third Winter factor, weighing irreparable harm of
20 our clients to any damage or injury to the defendant, to the Secretary
21 of State, clearly comes out in favor of our clients.

22 The last issue to consider under Winter is what's the
23 public's interest here. In our view, the public has an interest in
24 the certainty of its election process which, as I just explained, is
25 the reason to press the pause button now rather than after the

1 candidate names are out there, after the campaigns have begun in
2 earnest, after the primary season has begun and risk having all of
3 those things take place, but then having the rug pulled out from
4 underneath everyone if, as we believe is likely, the Court is going to
5 rule in our favor on the merits.

6 Perhaps more importantly, though, it avoids what I'm
7 going to call the *Purcell* dilemma, which is if the Court were to rule
8 in our favor, say, in August or September, sometime before November,
9 it avoids the situation where the Court then has to decide is it going
10 to force the Secretary of State to scramble, perhaps at the last
11 minute, or is it going to allow an election to proceed under statewide
12 method that the Court had just found violates Section 2? So to avoid
13 that dilemma that's the value, in our view, of the injunction now of
14 pressing pause now because the election would already be on hold at
15 that point in time. It would allow for a more orderly remedial
16 process. If there's an appellate process, it would allow for a more
17 orderly process in that regard and, as I think everybody agrees now,
18 you would simply have a holdover situation with the current
19 commissioners who occupy seats for Districts 2 and 3 would simply
20 remain in office until the next special election takes place for those
21 seats.

22 THE COURT: I understand all of those arguments and
23 certainly from a purely administrative standpoint the sooner the
24 better, right, for them to make a change. But when we're balancing
25 the equities and looking at the interest of the public, couldn't all

1 of those things be accomplished at any point before the election? In
2 other words, after the trial on the merits, after a full record has
3 been made, at any point we could hit the stop button. I understand
4 that that necessarily causes candidates to spend time and resources,
5 but it seems to me that that goes into this balancing test of
6 potentially stopping an election that I may find is perfectly
7 appropriate.

8 MR. MARTINEZ: Right. And I think the answer to that
9 is, again, trying to avoid this dilemma that would arise because I
10 expect -- if the Court, for example, were to rule in our favor in
11 August or September or October, then I expect the Secretary of State
12 will come in here and make sort of a real *Purcell* argument at that
13 point; right? If you look at the facts in *Purcell*, for example, I
14 think the Ninth Circuit in that case changed the voter ID law with
15 four weeks to go before the election. When you have an election that
16 is much closer in time, I think changing things at that point, issuing
17 a ruling in our favor at that point would create much more confusion
18 than of course doing so now.

19 THE COURT: All right. Thank you.

20 MR. MARTINEZ: Thank you.

21 MR. MORRISSETTE: Good afternoon, Your Honor.

22 THE COURT: Good afternoon.

23 MR. MORRISSETTE: I'll try to make this brief.

24 Aside from the issues covered by my colleagues, there
25 are a few other issues that were raised in defendant's response brief

1 that I'd like to address.

2 It now seems the parties are in agreement that the
3 commissioners for Districts 2 and 3 would just hold over so we no
4 longer need to address that vacancy piece. But, second, defendant's
5 assertion that plaintiffs have a flawed understanding of the
6 Secretary's role in qualifying is false. As Mr. Barnes confirmed in
7 his testimony this morning, the Secretary of State would typically
8 receive a list of qualified candidates for the PSC election from the
9 political parties and then use that list to populate the ballot proofs
10 with the candidate names. Defendant's brief suggests that plaintiffs
11 are seeking to enjoin the Secretary of State from receiving those
12 lists from the political parties, but we're not. Instead, plaintiffs
13 simply seek to enjoin the Secretary of State from using those lists to
14 populate the ballot proofs and defendant's own motion concedes the
15 Court could enjoin the Secretary of State from doing that.

16 THE COURT: Doesn't my order on summary judgment
17 already resolve that issue that the Secretary is the proper defendant?

18 MR. MORRISSETTE: Yes.

19 You heard from Mr. Barnes this morning that it would
20 not be a heavy lift to simply delete both names from the ballot proof
21 and, in fact, Mr. Barnes testified that it would be much more
22 burdensome to have to go back and delete those names once he adds them
23 to the ballot proof.

24 Last, defendant's assertion that the plaintiffs have
25 unduly delayed in bringing the request for injunctive relief is simply

1 false. Plaintiffs have been very consistent in stressing the urgency
2 to receive a ruling in time for the 2022 election and attempting to
3 move this case along quickly. Plaintiffs filed the complaint in July
4 of 2020, more than two years before this year's PSC election, and at
5 that point there was no reason to believe that injunctive relief was
6 necessary or that we wouldn't receive a ruling in time to implement
7 any remedy for the 2022 election.

8 Although defendant asserts that plaintiffs always knew
9 that this case would go to trial, defendants filed a motion to dismiss
10 and their own motions for summary judgment trying to prevent this case
11 from going to trial and as litigation began to slow down by
12 defendant's motion to dismiss, which was ultimately denied,
13 plaintiffs' counsel sent a letter to this Court on October 13th, 2020,
14 which is on the screen now, requesting the Court to start discovery
15 and stressing the importance of getting relief in time for a 2022
16 election.

17 What's up on the screen is Plaintiffs' Exhibit 7. If
18 you look you see plaintiffs wrote "We believe that good cause exists
19 to lift the stay in order to allow discovery to begin. This is a
20 Voting Rights case and the plaintiffs are seeking relief before the
21 2022 election. Qualifying for the 2022 election starts in less than
22 17 months and election officials would likely need some time before
23 then to prepare to hold an election under a new plan."

24 Mr. Tyson actually responded to this letter on behalf
25 of defendants and represented that there was, quote, "Sufficient time

1 for this Court to resolve the important jurisdictional questions
2 raised in the motions to dismiss and then if this case continues after
3 those are resolved to conduct normal discovery and resolve any issues
4 well before qualifying for the 2022 elections."

5 After the Court scheduled oral argument on the motion
6 to dismiss in December 2020, plaintiffs' counsel again raised the
7 issue of starting discovery at that hearing. If you go to the motion
8 to dismiss hearing transcript, Page 42 says "Your Honor, our request
9 to begin discovery is still pending. I hope that you'll give that a
10 fresh look as well." That request was effectively denied because it
11 was not resolved prior to issuing the order denying defendant's motion
12 to dismiss and that decision not to resolve was likely influenced by
13 Mr. Tyson's old representation that we had enough time to reach a
14 resolution in time for the 2022 election.

15 Similarly, plaintiffs filed their motions for partial
16 summary judgment -- plaintiffs filed their motion for summary judgment
17 on the three *Gingles* factors on July 9, 2021, well before injunctive
18 relief was deemed necessary to avoid the risk of the elections being
19 conducted using an unlawful method and when that case again slowed
20 down due to summary judgment briefing and oral argument plaintiffs
21 once again raised the issue of speed and urgency in that November 2021
22 hearing. If you turn to Page 48 and I'll just skip to the top of
23 Page 4 -- the bottom of Page 48 says "We think this increases the
24 urgency of a resolution here before the 2022 election so we
25 respectfully ask the Court to expedite its consideration of these

1 motions and to set the case for trial as soon as practicable," and at
2 the hearing the Court acknowledged that it understood the urgency.

3 Now, once the Court granted plaintiffs' summary
4 judgment motion under three *Gingles* conditions which established a
5 likelihood of success on the merits for the plaintiffs under Eleventh
6 Circuit precedent, plaintiffs moved very quickly in filing the
7 preliminary injunction motion filing that motion only a few days
8 later. So it's crystal clear that plaintiffs have not been sitting on
9 their hands or unduly delaying bringing this preliminary injunction
10 and brought this preliminary injunction as soon as it seemed
11 necessary.

12 THE COURT: It's my fault. That's a very diplomatic way
13 of saying it's my fault.

14 MR. MORRISSETTE: Thank you, Your Honor.

15 THE COURT: Got the point. Thank you. Is that all for
16 argument for the plaintiffs?

17 MR. SELLS: Yes, Your Honor.

18 THE COURT: All right. Thank you. Remind me how you
19 pronounce your last name again.

20 MR. JACOUTOT: Jacoutot, Your Honor.

21 THE COURT: Jacoutot.

22 MR. JACOUTOT: Good morning -- or it's afternoon. Good
23 afternoon, Your Honor. Bryan Jacoutot for the defendant Secretary of
24 State Brad Raffensperger. I just kind of logistically want to let you
25 know the breakdown of the argument. I'll be delivering sort of the

1 merits portion similar to how Mr. Sells spoke to and I'll be
2 specifically discussing the effect of the plaintiffs' proposed remedy
3 on their likelihood of success, as well as their general likelihood of
4 success on the Senate factors. Mr. Tyson will follow and discuss the
5 public interest and equities portion of our argument as well as any
6 *Purcell* principle and latches arguments we have, if that's okay with
7 Your Honor.

8 THE COURT: Yes.

9 MR. JACOUTOT: Great.

10 So the most apparent underlying problem with
11 plaintiffs' motion is that the remedy they request in this case has
12 repeatedly been considered by this Court and the Court has repeatedly
13 acknowledged the potentially dispositive problems associated with it.
14 In its order on the Secretary's motion to dismiss the Court cited the
15 Eleventh Circuit holding that, quote, "A District Court must determine
16 as part of *Gingles* threshold inquiry whether it can fashion a
17 permissible remedy in the particular context of the challenged
18 system." That's Docket 36, Page 34. The Court also expressed, quote,
19 "Concern about its ability to impose on the State of Georgia the
20 remedy plaintiffs seek." But given the posture of the case at the
21 time the Court had obviously let the case continue.

22 At summary judgment just last month the Court again
23 expressed reservations about the plaintiffs' proposed remedy and
24 acknowledged that, quote, "Implicit in the first *Gingles* requirement
25 is a limitation on the ability of a federal court to abolish a

1 particular form of government," and the Court determined without
2 deciding, as it did at the motion to dismiss stage, that the case
3 could proceed. The Court said, quote, "Summary judgment on matters
4 related to plaintiffs' proposed remedy is inappropriate."

5 Plaintiffs' preliminary injunction motion does nothing
6 to advance the ball on the remedy front. Plaintiffs treat the remedy
7 portion of their Section 2 claim essentially as a nonissue despite the
8 Court's very clear reservations about it. And because plaintiffs have
9 not demonstrated that their proposed remedy is viable under Section 2,
10 they cannot succeed on their motion for preliminary injunction any
11 more than they could succeed on the issue at the summary judgment
12 phase.

13 Now, in his argument Mr. Sells stated that we have
14 satisfied enough of the three *Gingles* preconditions to raise the
15 inference that they are likely to succeed. But the *Gingles* factors
16 are what the *Gingles* factors are and he suggested that having this
17 sort of remedy component to *Gingles* 1 creates a fourth precondition
18 and there aren't four, there are three, and in this circuit you need
19 to propose a viable remedy to satisfy the complete first factor in its
20 entirety.

21 Mr. Sells also sort of acknowledges the tension between
22 *Marengo County* when looking at judicial cases. You know, as we've
23 told this Court, we believe the PSC is quasi-judiciary. Mr. Sells
24 highlights that we have said before that we regulate -- the PSC
25 Commission regulates utilities in different ways, that the PSC

1 Commission's constantly having to weigh the reliability of evidence
2 very similar to a court, that rates affect people statewide and sort
3 of in response to this he points out that Commissioner McDonald, that
4 his job would essentially be the same if he was just a districted
5 elected commissioner rather than statewide. But sort of to begin,
6 that's his day-to-day job. He's not talking for the Commission as a
7 whole and how it would be reoriented if it was changed.

8 The real sort of underlying point is that it's a policy
9 decision made by the State and it's one that's constitutionally
10 committed to the State to make. The real key is that it's not that,
11 you know, the Commission's statewide and it's quasijudicial, because
12 it is, but the key is that regulating utilities and the sort of
13 considerations that go into that is what makes the PSC very unique and
14 the regulation of utilities itself is not really a legislative act.
15 It's at least not the only legislative act. It's at least not the
16 only a legislative act, it's quasijudicial, as we have said. The
17 other thing to consider is the terms are, you know, lengthy six-year
18 terms and we have not found any sort of legislative office in the
19 state of Georgia that mirrors that six-year term so it's very unique
20 in how it's structured.

21 Mr. Sells got into the constitutional language and
22 talked about, you know, what the meaning of "elected by the people" is
23 in the Constitution and I think we all agree to disagree on the
24 meaning of these words. The overarching problem for plaintiffs is
25 that it's not the function of this Court to argue it out here

1 necessarily and ultimately that lack of clarity that we can receive
2 from this Court stands in their way of relief. If the Court finds
3 that the language impacts its decision, then it's appropriate to
4 certify it to the Georgia Supreme Court. Mr. Sells went through the
5 portions of some bills. I don't want to speculate on the intent of
6 legislative counsel in drafting those un-passed bills, but I don't
7 think they inform constitutional meaning whatsoever and they tell us
8 little else in the fact that those bills weren't passed.

9 Now, legislators misinterpret or provide varying
10 interpretations of constitutional provisions all the time. They may
11 even pass unconstitutional laws thinking that they are in fact
12 constitutional. None of this bears on the meaning of the
13 constitutional provision at issue. The plaintiffs have to show a
14 clear entitlement to relief and relying on un-passed bills is a
15 rickety foundation upon which to build clear entitlement.

16 Lastly, Mr. Sells noted that under the law of this
17 circuit satisfaction of the three *Gingles* factors usually means that
18 they are likely to succeed, but because of their proposed remedy they
19 have not established this. But even if the proposed remedy, let's
20 say, didn't preclude their motion, I think plaintiffs still have
21 failed to adduce any information that might show they're likely to
22 succeed on the merits with respect to the Senate factors
23 totality-of-circumstances analysis.

24 Now, Mr. Sells sort of addressed Senate Factors 2 and 7
25 first. If the Court's okay, I can just go in order and kind of

1 briefly touch on them.

2 THE COURT: Sure.

3 MR. JACOUTOT: Okay. The Secretary's not here to
4 dispute -- well, Senate Factor 1 deals with the history of
5 discrimination and the Secretary's not here to dispute Georgia's long
6 and unfortunate history of racial discrimination. But we do note for
7 the Court that plaintiffs' motion does not acknowledge the existence
8 of Georgia's more recent history and that the Eleventh Circuit has
9 cautioned, quote, "against allowing the old, outdated intentions of
10 previous generations to taint a jurisdiction's ability to enact voting
11 legislation."

12 Senate Factor 2 deals with racial polarization voting
13 and Mr. Sells, I think, talked very comprehensively on that. The crux
14 of the issue for purposes of this motion is that plaintiffs have
15 deliberately declined to pursue the causal reasons behind why black
16 voters vote the way they do and why white voters vote the way they do.
17 Instead, plaintiffs exclusively focus and their experts' reports
18 exclusively focus on how they vote.

19 Are these elections examined by plaintiffs' expert
20 polarized? Certainly. The Secretary submits that this is due to
21 partisan preferences among the races and not, as required by the text
22 of Section 2, quote, "on account of race or color." Nothing in the
23 plaintiffs' motion disputes this. Indeed, nothing in the plaintiffs'
24 motion addresses this one way or the other and it's the plaintiffs'
25 burden to demonstrate likelihood of success on the merits.

1 THE COURT: What about Mr. Sells' point that answering
2 the why question is not his burden at this stage?

3 MR. JACOUTOT: Well, I think it goes to weight.

4 THE COURT: His argument is it's not his burden at all
5 and certainly not at this stage.

6 MR. JACOUTOT: Well, I think the why question at
7 minimum goes to weight and we put in evidence from the report of Dr.
8 Barber at Docket 80-3 that partisanship better explains why voters are
9 voting the way they do than does race. So you may still say that
10 partisanship can't overrule the racial polarization consideration,
11 excuse me, but it certainly does help explain it and I think it goes
12 to, again, as I said, weight. It would go to the weight of that
13 particular factor.

14 THE COURT: Under the totality of the circumstances?

15 MR. JACOUTOT: Correct.

16 THE COURT: But not in terms of satisfying the Senate
17 factor, do you agree with that?

18 MR. JACOUTOT: I think it will go to the weight of the
19 totality of the circumstances and it might inform on satisfaction,
20 this Court's judgment on whether Senate Factor 2 is satisfied, but
21 that's it. I don't think it necessarily clear-cut establishes it. I
22 think that Your Honor has the ability to weigh the significance of our
23 argument of partisanship versus just the racial polarization and
24 that's all you need to consider.

25 THE COURT: Let me interrupt for a second. I think

1 counsel for the next hearing is here. In case you didn't get the
2 message, we're obviously running a bit behind. We're probably looking
3 at not getting started until at least 2:30. I apologize for that. So
4 just wanted to let you know in case you didn't get that message.

5 MR. JACOUTOT: I hope I'm not putting you all to sleep
6 back there.

7 So Senate Factor 3 goes to voting practices and I think
8 Mr. Sells, again, touched on this. But each allegedly discriminatory
9 voting practice cited by plaintiffs has a very benign explanation
10 behind it and does not, as plaintiff suggests, quote, "enhance the
11 opportunity for discrimination against black voters." As we discussed
12 earlier, the majority vote requirement led directly to the election of
13 the black-preferred candidate in the statewide election Senate
14 contest. Without it, Senator Warnock and Senator Ossoff would have
15 lost their election bids.

16 Staggered terms for office is very interesting and,
17 again, this is a process that's as old as the nation itself. The
18 United States Senate has a six-year term and they stagger elections
19 because it makes sense for a number of reasons. It was good enough
20 for them and it's constitutional and it's constitutional here.

21 As we point out in our brief, on the abnormally wide --
22 or, excuse me, abnormally large voting districts, the state of Georgia
23 is not a voting district at all, it's the state, and statewide
24 elections go to the State's decision and the policy decision of the
25 State to have the entire state weigh in on an electoral matter.

1 Denial of access to the slating process is Senate
2 Factor 4. The Secretary acknowledges that black Americans have not
3 often been appointed to the Commission to the extent that we're
4 classifying that as some sort of slating process. To the extent that
5 it is, as the VRA contemplates that term, it is clear that at least
6 black republican candidates have had access to that process recently.

7 Senate Factor 5, effects of discrimination. The
8 argument that the effects of discrimination have denied black voters
9 access to the ballot box simply doesn't square with the reality on the
10 ground. As candidate for governor Stacey Abrams' political action
11 group, Verified Action, recently noted, there was sky high black
12 turnout that propelled Warnock and Ossoff to victory.

13 THE COURT: Is this part of the record?

14 MR. JACOUTOT: It was in the brief, yes. It was a
15 footnote.

16 THE COURT: I don't think there's evidence.

17 MR. TYSON: I don't think there's testimony on that,
18 Your Honor. I think it's just the link we've provided.

19 THE COURT: All right.

20 MR. JACOUTOT: This level of turnout is obviously a
21 great development and one made possible by Georgia's voter
22 registration friendly environment. The testimony that you heard today
23 did not tie -- excuse me, I think that's in the wrong spot. So that's
24 all I have for Senate Factor 5.

25 Senate Factor 6 is racial appeals, which we saw

1 earlier. You know, the plaintiffs made clear, you know, the limited
2 applicability of exogenous elections, but then use it to show racial
3 appeals characterize Georgia voting. They use two examples and in an
4 election that has nothing to do with the PSC Commission. I think it's
5 difficult to suggest that these two examples show that Georgia's
6 elections are characterized by racial appeals because that's what the
7 Senate factor looks to, whether racial appeals characterize elections,
8 not whether isolated incidences occur that show racial appeals.

9 THE COURT: Do you concede, though, that Senate Factor
10 6 goes to political campaigns generally and not just the election at
11 issue?

12 MR. JACOUTOT: I think since we're weighing the
13 totality of the circumstances that you're more than welcome to
14 consider in your analysis when you're considering this exogenous
15 campaigns, but it would certainly be more probative if they had a --
16 you know, go to weight again, it would be very probative if they had a
17 PSC Commission that showed a racial appeal and I think the lack of
18 that goes probative to the fact that there are not racial appeals
19 characterizing PSC elections.

20 Senate Factor 7. We acknowledge that Georgia has not
21 elected a significant number of black individuals to statewide office,
22 but we do submit that that tide is very clearly turning with the
23 election of Warnock. We also recently had a Supreme Court justice --
24 Georgia Supreme Court Justice Harold Melton. And Stacey Abrams in
25 2018, not only is she running again, in 2018 she came within roughly

1 50,000 votes in a statewide election. So these, again, are things for
2 the Court to consider not just looking at the history, but looking at
3 how the state has evolved over time.

4 Senate Factor 8 is responsiveness. Now, we feel that
5 the record is mixed on this topic and it's not clearly in favor of
6 either party. One plaintiff noted in her deposition that she had her
7 claims resolved by a PSC commissioner. That PSC commissioner happened
8 to not be the one within the residency district that overlapped her
9 residence, but the candidate was from that residence. Others sort of
10 struggled or failed to identify any particularized need of the black
11 community with respect to utility regulation. Needs were based more
12 on socioeconomic factors rather than race and I think the testimony
13 today by Ms. McCorkle reflected that.

14 Now, there's no evidence of particularized need that's
15 been presented. The things have -- the things that are identified are
16 shared problems among races that don't have high levels of income and
17 even among races who have high levels of income, they're concerns for
18 everybody and the witnesses on the stand today specifically stated
19 that they're speaking only for themselves and not for the black
20 community as a whole.

21 Oh and lastly, I believe Mr. Sells put up an objection
22 to a statement of material facts that was filed and said that our
23 objection was unresponsive or essentially allowed the fact to come in
24 and I don't have it in front of me and I don't know if anybody wants
25 to pull it up. But that objection was formed as a result of the local

1 rules. Specifically 56.1(b)(3). There are just certain types of
2 objections you're allowed to make under the local rules and that was
3 one of the objections that we were allowed to make. The fact that it
4 doesn't -- you know, the objection stands and we objected to that
5 statement of material facts and the actual structure of the objection
6 is one that's required by the local rules.

7 Senate Factor 9 is the State interest. I think the
8 State has been quite candid with this Court and the plaintiffs about
9 its interest throughout this litigation in maintaining its chosen form
10 of government. The language of this Court's order on the motions to
11 dismiss and for summary judgment acknowledge the gravity of that
12 interest.

13 To the extent plaintiffs suggest we have failed to draw
14 a link to the statewide formatting of the elections, we think the
15 reason for statewide elections and candidate residency requirements is
16 fairly clear. The legislature wants to maintain the franchise for
17 every voter in Georgia for every commissioner for the PSC. If the
18 statewide character of those elections is removed, then different
19 voters from different areas select commissioners from those areas and
20 we think that presents both a constitutional problem -- a Georgia
21 constitutional problem and a policy problem.

22 Now, if the residency requirements are removed, then
23 metro Atlanta voters will elect metro Atlanta candidates and we risk
24 drowning out the voices of the rest of the state and that's a policy
25 that, through the Constitution, the State is trying to avoid. The

1 current system enfranchises the maximum amount of Georgia voters while
2 also ensuring the statewide composition of the Commission itself.

3 And I thank you for your consideration. If you don't
4 have any questions, I can yield the remainder of my time.

5 THE COURT: All right.

6 MR. JACOUTOT: Yield to Bryan over here.

7 THE COURT: Thank you.

8 MR. JACOUTOT: Thank you.

9 MR. TYSON: Thank you, Your Honor. I'll try to bring
10 all this to a conclusion here for us.

11 I think it's helpful as we begin thinking about the
12 last pieces of the injunction that at the end of the day your job
13 under *Gingles* is to look at the totality of the circumstances. The
14 Senate factors help inform that, but the Eleventh Circuit said in
15 *Wright* that you're not limited to those factors as you look at the
16 totality, because ultimately what we're trying to figure out here is
17 is there a denial or abridgement of the right to vote on account of
18 race or color. If there's a denial or abridgement or some problem
19 that's as a result of socioeconomic status or as a result of political
20 issues or partisanship, that's not a violation of Section 2. So,
21 again, I think that's what we're looking at here in the totality is
22 trying to assess that piece.

23 For the specific issues related to the injunction, I
24 think irreparable harm is tied directly to the likelihood of success.
25 If there is vote dilution on account of race or color, there's

1 irreparable harm because that is clearly irreparable harm. If there's
2 not a dilution, it's on account of something else, there's not
3 irreparable harm and that's kind of the situation we're in there.

4 On public interest and equities, I thought I'd just
5 kind of play out the scenarios in my mind. There's like four possible
6 paths I see. You don't enter the injunction and you find for the
7 State, the election processes continue, there's no interruption for
8 voters, we hold the normal elections in 2022 for Public Service
9 Commission. That's kind of Option 1. Easy, no issues there.

10 Option 2: You don't enter the injunction the
11 plaintiffs request, but you ultimately side with the plaintiffs after
12 the trial. In that scenario, I think, as you talked about with
13 Mr. Barnes, the November election could be canceled and a remedial
14 plan figured out at that point. Obviously, that would be somewhat
15 disruptive for the candidates, but it's a method for resolving what we
16 need to do going forward. Is it going to be a special election, a
17 special primary? We can figure out a solution after the finding of
18 liability.

19 The other option that we have, if you were to enter the
20 injunction, stop, hit pause, as the plaintiffs have said, and then you
21 find for the State after the trial we now have to figure out some sort
22 of remedial structure to conduct statewide special elections which
23 obviously have a cost where every county has to run a special election
24 that could have otherwise been held in the normal course in 2022. The
25 only other place that really makes sense is if the plaintiffs

1 ultimately do prevail and you enter the injunction we craft a remedial
2 plan then. But we can also do that if you don't enter the injunction
3 at the conclusion of the trial and I think there's going to be time
4 for that.

5 The *Purcell* issues the State is concerned about are
6 more trying to address the time period between the conclusion of the
7 trial and the November election. We don't believe there's going to be
8 time, if you find for the plaintiffs after the trial, to then affect
9 and get the general election on the November ballot, there's not time
10 to do that. There is time to stop that election process and then
11 craft a remedy moving forward and so we would suggest that's the more
12 logical and best approach here, to not enter the injunction, let this
13 case proceed and then if you ultimately side with the plaintiffs then
14 craft a remedial plan at that point. Meanwhile, the people of Georgia
15 get to have input on the election process.

16 THE COURT: Well, let me ask you this because when we
17 set the trial for the end of June it was certainly my intent to reach
18 a resolution on the merits in advance of the November election so
19 that, like you said, if I found in favor of the Secretary, the
20 election proceeded. If I found in favor of the plaintiffs, my intent
21 was to enjoin that election from happening. It's certainly never been
22 my intention, nor is it now, to find a violation of the Voting Rights
23 Act and yet allow the election to proceed anyway.

24 MR. TYSON: Certainly.

25 THE COURT: The piece that perhaps I'm a little

1 concerned about now is with respect to the potential for certifying
2 that question concerning the interpretation of the Georgia
3 Constitution to the Georgia Supreme Court because that obviously is a
4 piece that I cannot control in terms of the timing.

5 MR. TYSON: Yes.

6 THE COURT: And as you saw in my order on summary
7 judgment my thinking on that was no need to certify that question
8 unless and until I feel that it is potentially dispositive on the
9 ultimate resolution of the case. But now I'm concerned that by
10 waiting we are putting ourselves in that position of losing control of
11 the timing of getting that -- if it comes down to that being the final
12 piece that I need to come to an answer on the totality question, how
13 that impacts the November election.

14 You probably are more familiar than I am on that
15 process for certifying questions to the Georgia Supreme Court. I saw
16 in your brief you were contemplating that if we were to certify that
17 question we probably would not get a resolution, or at least they're
18 not required to give us an answer, until potentially the summer of
19 2023. Is there a mechanism for expediting that question to the
20 Georgia Supreme Court?

21 MR. TYSON: I know the Supreme Court rules have some
22 expedited processes. I'm not sure I've seen it applied to certified
23 questions particularly, but I think that we could always ask. I think
24 the bigger concern is could you still implement a remedy. We get to
25 summer of 2023, let's say, the Supreme Court says we're wrong,

1 plaintiffs are right, that actually this just means elected, not
2 appointed. You decide, okay, this means there is a violation of the
3 Voting Rights Act. I think at that point this Court's powers are very
4 broad in terms of what you can order as remedies.

5 I was trying to look back through and see other
6 situations. Mr. Sells mentioned the *Dallas County* case, those cases
7 that went up and down the Eleventh Circuit several times and
8 ultimately they held elections that were kind of in conflict with
9 Alabama election laws because the Court ordered these remedial
10 elections to take place. So I think the Court at that point would
11 have the power to cancel, shorten terms, figure out some remedy that
12 we could craft to hold district-based elections.

13 Because ultimately I think it's also important to
14 remember we're not talking about just one district. If this method of
15 election is a violation of the Voting Rights Act, there are then five
16 commissioners who have been elected under a system that violates the
17 Voting Rights Act and we have to have some method to get them changed
18 out to a proper, lawful method, if that were to be the case.

19 So I understand the Court's concern of would we be
20 stuck in the summer of 2023 not able to do anything. Well, we would
21 have the commissioners there, but I don't see a situation where those
22 commissioners, whether they're holdovers because we didn't have an
23 election in November or whether they were elected in November and we
24 have to craft a remedy in the summer of 2023, I think we'll be okay
25 either way on that in terms of this Court's remedial powers.

1 THE COURT: All right. Is it your position, the
2 Secretary's position, that we should still wait on certifying that
3 question?

4 MR. TYSON: Your Honor, we would be open to certifying
5 that question now and we run this on two parallel tracks since we're
6 moving toward the trial, we can try to get an answer to the State law
7 question. I know you had concerns about, you know, is this an
8 advisory opinion almost if it's not going to be necessary. I have not
9 looked back at the Georgia Supreme Court's kind of take on that for
10 certified questions in preparation for today, but I think we would be
11 open to certifying that question if you believe it's going to be very
12 relevant to your judgment as that would obviously help the timeline.

13 THE COURT: All right. All right. Thank you. After
14 you're finished I'd like to hear, Mr. Sells, your position on that as
15 well.

16 MR. TYSON: Certainly, Your Honor. I just have a few
17 more things to cover. I think we've covered most of the rest of
18 these.

19 In terms of the other *Purcell* arguments, I think the
20 issue here -- I mean, you mentioned can we cancel the election. We do
21 have situations where a candidate dies between a primary and a
22 general, for example, there's a mechanism for the political party to
23 replace that candidate and we have to kind of alter the system at the
24 last minute. So there's some precedent for that that I think wouldn't
25 necessarily get into *Purcell* land if it's just going to be straight

1 don't hold the election in November so I wanted to mention that.

2 Then the other piece I think that's relevant here is
3 just in terms of Justice Kavanaugh's concurrence in *Merrill*, I wanted
4 to hit that briefly. The Supreme Court granted the question and asked
5 the question for that Alabama congressional case whether the
6 three-judge panel properly found a violation of Section 2 and I know
7 it's been a minute since I read that and we've had the trial with
8 Judge Jones, but my recollection is there were some of the similar
9 arguments about partisanship and racial polarization. There were some
10 other issues that might have relevance here so that's going to be
11 guidance for the Court as we move forward. But either way, I think at
12 the very least for Justice Kavanaugh we don't have kind of a clear-cut
13 merits question on this point. We don't have -- we have the potential
14 of significant cost to the State if we have to run a statewide special
15 election if we don't hold the November elections and you ultimately
16 decide for the State. So even on the additional factors those two
17 justices thought were relevant, I think we still have those pushing
18 against delaying the election or pushing pause, as the plaintiffs say
19 here. Instead, we should let the process proceed and whenever we get
20 to that point where we're ready for a remedy we can deal with this
21 Court's remedial powers and craft the best remedy for all five
22 commissioners when that time comes. That's all I have to say.

23 THE COURT: All right. Thank you.

24 MR. TYSON: Thank you.

25 THE COURT: Counsel for plaintiffs, if you can address

1 that question I raised as well as any other rebuttal you wish to make.

2 MR. SELLS: Sure. I think I only have one other point
3 that I wanted to raise, which is that -- I think I heard a concession
4 on the *Purcell* issues from Mr. Tyson in talking about his four paths,
5 that if the Court were to rule, say, in August or September that the
6 plan is unlawful that the Court would not then -- that the State would
7 not then seek to interpose a *Purcell* objection to allowing the
8 election to be canceled. I heard your view on it quite clearly, but I
9 just want to make the point for the record that I think in talking
10 about those four paths that there was a concession there on the part
11 of the Secretary.

12 THE COURT: Yes. Let me say unless the Supreme Court
13 or the Eleventh Circuit enters an opinion between now and then stating
14 otherwise -- for me, if there's a violation of the Voting Rights Act,
15 then I'm going to enjoin the election until someone tells me I can't.

16 MR. SELLS: Right. And that's the proper course. I'm
17 just laying down a marker that if the Secretary were to appeal such an
18 injunction we would point to this moment here today.

19 On your question about certifying, do we oppose
20 certification, I think our view remains that it's unnecessary here
21 because the answer doesn't matter on the merits of the case. But I
22 would also say it doesn't get you out of the box of this motion
23 because I think you have to decide whether we are likely to succeed
24 and if you think that the Supreme Court's answer on that is
25 dispositive, I think you have to, you know, do a trial run and see

1 which way you think it's going to come out in order to decide the
2 likelihood of success. I don't think you can just say I'm not going
3 to decide the likelihood of success, I'm going to certify that to the
4 Georgia Supreme Court and I'm thereby not going to decide the motion.
5 I think if you decide that the question has to be certified to the
6 Supreme Court you still have to decide this motion.

7 THE COURT: I didn't mean to suggest otherwise. If I
8 deny this motion, it would not be because that question hasn't been
9 answered by the Supreme Court. It would be for other reasons.

10 MR. SELLS: Right.

11 THE COURT: My question was more as to timing of the
12 trial and how much -- posttrial, does getting that process started
13 sooner rather than later make sense. I know your primary position is
14 that we don't need to certify that question at all. But if I'm
15 inclined to do so, is your preference to do so now or wait until after
16 the trial? I don't mean to put you on the spot. If you want to think
17 about it and file something later, that's fine, too.

18 MR. SELLS: I think I would like to think about that.
19 You know, I'm going to stick with our primary position that it
20 wouldn't matter what the Georgia Supreme Court says. You know, I
21 think what Mr. Tyson put in his brief is correct about the timing.
22 Georgia Supreme Court is not a place to go for quick answers. So to
23 the extent that the answer to that question is in any way necessary in
24 this case, you're talking about at least one, and possibly two,
25 additional election cycles going past under what we think is a pretty

1 clearly unlawful plan.

2 THE COURT: All right. Thank you. Anything further
3 for us to take up today?

4 MR. TYSON: Not for the Secretary, Your Honor. I just
5 would want to note for the record for Mr. Sells that we may appeal
6 based on the merits, but we won't make an appeal based on *Purcell* so
7 we can at least get that put down. If we get to that point. I wanted
8 to make that clear. Otherwise we're good, Your Honor.

9 THE COURT: No waiver taken by that.

10 I'm going to take the motion under advisement. I
11 recognize, obviously, the need for an expedited decision on this and I
12 will try to do so certainly within the next couple of weeks. All
13 right.

14 MR. SELLS: We appreciate you hearing this matter so
15 expeditiously. Appreciate it.

16 MR. TYSON: And we appreciate the accommodation on our
17 response brief as well given what we were doing with Judge Jones so
18 thank you, Your Honor, for that.

19 THE COURT: Absolutely. I hope you finally get some
20 rest this weekend.

21 MR. TYSON: Hopefully so.

22 THE COURT: Let me say again thank you to the
23 plaintiffs for being here. I appreciate you being here.

24 (proceedings conclude at 2:10 p.m.)
25

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF GEORGIA

3 CERTIFICATE OF REPORTER

4
5 I do hereby certify that the foregoing pages are a true and
6 correct transcript of the proceedings taken down by me in the case
7 aforesaid.

8
9
10 This the 2nd day of March, 2022.

11
12
13 /S/ Alicia B. Bagley
14 ALICIA B. BAGLEY, RMR, CRR
15 OFFICIAL COURT REPORTER
16 (706) 378-4017
17
18
19
20
21
22
23
24
25

SUPP. APPENDIX C

RETRIEVED FROM DEMOCRACYDOCKET.COM

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

RICHARD ROSE, *et al.*,
Plaintiffs,

v.

BRAD RAFFENSPERGER, in his capacity as
Secretary of State of the State of Georgia,
Defendant.

Civil Action No.
1:20-cv-02921-SDG

OPINION AND ORDER

This matter is before the Court on Plaintiffs' motion to enjoin Defendant, the Secretary of State for the State of Georgia, from qualifying candidates for the 2022 election for commissioner to the Georgia Public Service Commission (PSC) until a final judgment in this case has been entered. The motion has been fully briefed and the Court held an evidentiary hearing on February 25, 2022. After careful consideration, the Court concludes that Plaintiffs have not carried their heavy burden to show that an injunction should issue. Accordingly, the Motion for Preliminary Injunction [ECF 101] is **DENIED**.

I. Background

The Court has already issued an Order ruling on the parties' cross-motions for summary judgment, which addresses the factual and procedural history of this

litigation.¹ For present purposes, it is sufficient to note that Plaintiffs filed their motion for preliminary injunction on February 3, 2022—after that Order issued.² Plaintiffs assert that they would suffer irreparable harm “if the 2022 elections were allowed to proceed using a method that violates Section 2 of the Voting Rights Act.”³ Secretary Raffensperger opposes the motion, arguing that Plaintiffs are not merely seeking to preserve the status quo but to “interrupt the election process” before a final judgment.⁴

II. Applicable Legal Standard

To obtain preliminary injunctive relief, Plaintiffs must show “(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction issues; (3) the threatened injury . . . outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.” *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003). Such injunctions are “an extraordinary and drastic remedy not to be granted

¹ ECF 97.

² ECF 101.

³ *Id.* at 1.

⁴ ECF 105.

unless the movant clearly established the burden of persuasion as to the four requisites.” *McDonald’s Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). Moreover, when a party seeks to affirmatively enjoin a state governmental agency, the “case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own affairs.” *Martin v. Metro. Atlanta Rapid Transit Auth.*, 225 F. Supp. 2d 1362, 1372 (N.D. Ga. 2002) (citing *Rizzo v. Goode*, 423 U.S. 362, 378–79 (1976)).

III. Discussion

Plaintiffs assert that they have already established the three *Gingles* preconditions and that the Eleventh Circuit recognizes “it will be only the very unusual case” in which a Section 2 violation cannot be established when those conditions have been met.⁵ Plaintiffs are correct that the Court concluded they have satisfied the “three basic *Gingles* prerequisites” of geographic compactness, political cohesion, and racial bloc voting.⁶ This ignores, however, claim-dispositive matters on which the Court declined to rule at summary judgment. Plaintiffs did

⁵ ECF 101, at 1–2 (emphasis omitted) (citing *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1304 (11th Cir. 2020)).

⁶ ECF 97, at 24. See generally *id.* at 24–32.

not present sufficient evidence during the hearing to establish a likelihood of success on those issues.

A. Substantial Likelihood of Success

1. Plaintiffs' Proposed Remedy

Plaintiffs have not shown that their proposed remedy is feasible. “[A] plaintiff must propose a viable and proper remedy in order to establish a *prima facie* case under Section Two.” *Davis v. Chiles*, 139 F.3d 1414, 1419–20. *See also id.* at 1423 (citations omitted). Although Plaintiffs’ counsel characterized the proposed remedy as a factor to be considered under the totality of the circumstances,⁷ as the Court explained in its summary judgment order, Eleventh Circuit precedent makes the feasibility of the remedy relevant to both the first *Gingles* precondition *and* the totality analysis.⁸ Whether Georgia’s interest in maintaining this system of elections for the PSC can alone “override[] the rest of Section 2,” as Plaintiffs’ counsel put it,⁹ is irrelevant. The State’s interests must be considered in light of the evidence in support of or against *each* of the *Gingles* preconditions *and* the Senate Factors.

⁷ *See, e.g.*, ECF 108, at 62–63.

⁸ ECF 97, at 16–17 (citing *Davis*, 139 F.3d at 1421; *Nipper v. Smith*, 39 F.3d 1494, 1531 (11th Cir. 1994)).

⁹ *Id.* at 63.

Moreover, a viable remedy is necessary for Plaintiffs to have constitutional standing. If the remedy is not feasible, Plaintiffs have not suffered an injury that gives them standing to sue.¹⁰ *Id.* at 1419–20. There cannot be a substantial likelihood of success on a claim for which standing may be lacking.

Nothing presented by Plaintiffs during the hearing resolves those mixed issues of fact and law that the Court found inappropriate for resolution at summary judgment.¹¹

2. Totality of the Circumstances

To find a Section 2 violation, the statute requires that the Court consider the totality of the circumstances. 52 U.S.C. § 10301(a). And the Court has already held that it cannot appropriately evaluate the totality of the circumstances before trial.¹² The evidence presented by Plaintiffs during the hearing does not change the Court's analysis in this regard.

The Court cannot conclude based on the evidence presented that Plaintiffs have shown a likelihood of success under the totality of the circumstances. Specifically, at present, evidence related to at least the third, sixth, and eighth

¹⁰ *Id.* at 8–12.

¹¹ *Id.* at 8–12, 16–20.

¹² *See, e.g., id.* at 24.

Senate Factors do not currently weigh in Plaintiffs' favor. This does not mean Plaintiffs will be unable to satisfy these factors at trial. But that is a determination that requires a complete record – and that record is not yet complete.

i. Third Senate Factor: The Extent to Which the State Has Used Voting Practices or Procedures that May Enhance the Opportunity for Discrimination Against the Minority Group.

Plaintiffs point to the State's use of staggered terms, a majority-vote requirement, and unusually large voting districts for PSC elections as practices that increase the chances for discrimination against Black voters.¹³ But Plaintiffs have not presented any evidence showing that these practices create opportunities for discrimination in connection with elections for members of the PSC. Further, describing the entire State as an "unusually large election district" is not helpful in this context. Large electoral districts can be used to undermine one-person, one-vote requirements, or to pack or crack minority populations. The State's borders are not at risk of being drawn in ways that permit any of these problematic practices to be implemented.

Even if the Court were ultimately to find a violation of Section 2 and require PSC elections to take place using single-member districts, no one has challenged

¹³ ECF 101, at 12; ECF 108, at 80–82.

the use of staggered terms or the majority-vote requirement with regard to the PSC. That is, Plaintiffs have never argued that the remedy the Court should implement must un-stagger the terms PSC members serve or require a plurality vote.

ii. Sixth Senate Factor: Whether Political Campaigns Have Been Characterized by Overt or Subtle Racial Appeals.

Plaintiffs pointed to two recent examples of discriminatory appeals in the 2020 exogenous elections for Georgia's United States Senate seats.¹⁴ Without drawing any conclusions as to who is responsible for those appeals, there is no mistaking that they are offensive. But the Court finds that these two examples are simply not sufficient to show that political campaigns in Georgia are "characterized" by such odious appeals.

iii. Eighth Senate Factor: Whether There Is a Significant Lack of Responsiveness on the Part of Elected Officials.

During the hearing, two of the Plaintiffs (Brionte McCorkle and Rev. James Major Woodall) credibly testified about the PSC's lack of responsiveness to Black voters. They specifically identified several areas in which such a lack of responsiveness was evident to them: climate change and other environmental

¹⁴ ECF 84-3; ECF 108, at 88-92.

justice matters; rate increases and the utility disconnection moratorium triggered by the pandemic; and cost overruns and construction delays related to Plant Vogtle.¹⁵ Some of these issues, while important, are not within the aegis of the PSC.¹⁶ A lack of responsiveness about such matters therefore carries little weight in the analysis the Court must make.

None of this testimony, moreover, necessarily demonstrates a lack of responsiveness to Black voters in particular. Rather, many of these issues are ones that would seem to be of special concern based on socio-economic factors rather than race. Plaintiffs did not present any evidence showing that the effect on Black voters is somehow different from the effect these issues would likely have on anyone who is economically disadvantaged.¹⁷ Nor did Plaintiffs present specific data demonstrating that these issues affect Black Georgians more or differently than white ones.¹⁸ The Court does not doubt that these issues are important to many Black voters, just as they may be important to many voters of all races. But

¹⁵ ECF 108, at 29, 31–36, 49–51.

¹⁶ *Id.* at 42–43 (Ms. McCorkle acknowledging that the PSC does not regulate air pollution or coal plant emissions).

¹⁷ ECF 108, at 40–42.

¹⁸ *Id.*

the unresponsiveness of the PSC without regard to the race of the voters is not the correct inquiry.

B. Irreparable Harm

The parties do not appear to dispute that vote dilution which contravenes Section 2 can cause irreparable harm. But it is by no means clear here that such a violation has occurred or is substantially likely to occur. Although it is unnecessary for the Court to assess whether Plaintiffs face irreparable harm in light of that conclusion, evidence presented during the hearing demonstrates that Plaintiffs do not face imminent irreparable harm absent an injunction.

As discussed during the hearing on Plaintiffs' motion, this case is already set for a bench trial to begin on June 27, 2022.¹⁹ That is well before the general election set to take place on November 8.²⁰ The Court scheduled trial sufficiently in advance of the election for the very purpose of entering a ruling on a complete record. If, after trial, Plaintiffs prevail on their Section 2 claim, they will still have an opportunity to obtain injunctive relief related to the 2022 election cycle.²¹ In light of this, Plaintiffs do not face the immediate prospect of irreparable harm.

¹⁹ ECF 99; ECF 100.

²⁰ ECF 110, at 9.

²¹ ECF 108, at 24–25 (testimony of Michael Barnes, Director of the Center for Election Systems, Office of Secretary of State).

IV. Conclusion

Because Plaintiffs have not carried their burden to show a substantial likelihood of success on the merits, and will not suffer irreparable harm absent an injunction at this stage, the Court **DENIES** the Motion for Preliminary Injunction [ECF 101].

SO ORDERED this 7th day of March, 2022.



Steven D. Grimberg
United States District Court Judge

RETRIEVED FROM DEMOCRACYDOCKET.COM

SUPP. APPENDIX D

RETRIEVED FROM DEMOCRACYDOCKET.COM

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF GEORGIA
3 ATLANTA DIVISION

4 RICHARD ROSE, et al.)
5) Docket Number
6 Plaintiffs,) 1:20-CV-2921-SDG
7)
8 v.)
9) Atlanta, Georgia
10 BRAD RAFFENSPERGER, in his) June 29, 2022
11 Official Capacity as Secretary of) Volume 3-A
12 State of the State of Georgia,)
13)
14 Defendant.)

10 TRANSCRIPT OF BENCH TRIAL
11 BEFORE THE HONORABLE STEVEN D. GRIMBERG
12 UNITED STATES DISTRICT JUDGE

12 APPEARANCES OF COUNSEL:

13 FOR PLAINTIFFS: MR. BRYAN L. SELLS
14 THE LAW OFFICE OF BRYAN L. SELLS
15 P.O. Box 5493
16 1226 Springdale Road, NE
17 Atlanta, Georgia 31107-0493

18 MR. NICOLAS L. MARTINEZ
19 MR. WESLEY MORRISSETTE
20 BARTLIT BECK - IL
21 Suite 300
22 54 West Hubbard Street
23 Chicago, Illinois 60654

24 FOR DEFENDANT: MR. BRYAN TYSON
25 MR. BRYAN JACOUTOT
MS. DIANE FESTIN LaROSS
TAYLOR ENGLISH DUMA
Suite 200
1600 Parkwood Circle
Atlanta, Georgia 30339

OFFICIAL COURT REPORTER: ALICIA B. BAGLEY, RMR, CRR

Proceedings recorded by mechanical stenography, transcript
produced by computer

I N D E XFOR THE PLAINTIFFS:

MICHAEL BARNES

Direct Examination by Mr. Martinez	436
Cross-Examination by Mr. Tyson	450
Redirect Examination by Mr. Martinez	456

RICHARD ROSE

Direct Examination by Mr. Morrisette	466
Cross-Examination by Ms. LaRoss	500
Redirect Examination by Mr. Morrisette	512

DEPOSITION OF JASON SHAW	513
--------------------------	-----

WANDA MOSELY

Direct Examination by Mr. Martinez	516
------------------------------------	-----

P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; June 29, 2022;
all parties present)

THE COURT: All right. Are you ready to get going?

MR. SELLS: Your Honor, we have some housekeeping, but
out of respect to Mr. Barnes, I think we should do it after
Mr. Barnes.

MR. TYSON: There are some things we'll stipulate to,
Your Honor, but we can do that after Mr. Barnes.

THE COURT: Sure. All right.

MR. MARTINEZ: The plaintiffs call Michael Barnes.

THE COURT: By Zoom?

MR. MARTINEZ: By Zoom. Good morning, Mr. Barnes.

THE COURT: Hold on. We need to swear him in.

MR. MARTINEZ: I apologize.

THE COURT: Good morning, Mr. Barnes. Can you see me?

THE WITNESS: Good morning.

THE COURT: Can you please raise your right hand.

(witness sworn)

THE COURT: All right. Please state your name and
spell your last name.

THE WITNESS: Michael Barnes, B-A-R-N-E-S.

DIRECT EXAMINATION

BY MR. MARTINEZ:

Q. Good morning, Mr. Barnes.

1 A. Good morning.

2 Q. Can you see and hear me?

3 A. I can.

4 Q. Great. Thank you again for, excuse me, appearing this morning.
5 I'll do my best not to take too much of your time. I know it's a busy
6 season. Can you please state what your current job title.

7 A. Sure. I am the Director of the Secretary of State's Center for
8 Election Systems.

9 Q. Okay. And you just alluded to this, but the Center for Election
10 Systems is a division of the Georgia Secretary of State's Office;
11 correct?

12 A. That is correct.

13 Q. And you have been with the Center of Election Systems for
14 17 years; is that right?

15 A. Yes, sir, that is correct.

16 Q. And the Center of Election Systems has been a division of the
17 Secretary of State's Office since 2018; is that right?

18 A. That is correct.

19 Q. Okay. You understand, sir, that the Secretary of State is a
20 defendant in this case; right?

21 A. Yes, sir, I do.

22 MR. MARTINEZ: All right. Your Honor, I'd ask
23 permission under Rule 611(c) to ask leading questions given that the
24 witness has been identified with an adverse party.

25 THE COURT: Any objection?

1 MR. TYSON: No objection.

2 BY MR. MARTINEZ:

3 Q. Mr. Barnes, are you aware that there are general elections for
4 the Public Service Commission scheduled for this fall?

5 A. Yes, sir, I am.

6 Q. Those elections are for the District 2 and District 3 seats; is
7 that correct?

8 A. Yes, sir, they are.

9 Q. Those general elections are currently scheduled to take place on
10 November 8th, 2022; is that right?

11 A. Yes, sir. That is the date of the general election.

12 Q. All right. There's also a date on the 2022 election calendar for
13 any general election runoffs or special elections; is that right?

14 A. There is a date on the calendar for any general election runoffs
15 or any runoffs that are needed in response to a special election held
16 on the same date of the general election.

17 Q. Okay. Is that date the December 6th -- let me start again. Is
18 that date December 6th, 2022?

19 A. That is correct.

20 Q. Okay. Now, on that December 6th date, I want to make sure I
21 understand, could a special election be held on that date?

22 A. That is not my understanding. My understanding of the elections
23 calendar is that the special election date is the first Tuesday after
24 the first Monday in November and then any subsequent runoff for any
25 election held on that day would be four weeks later.

1 Q. All right. So what is your understanding, then, of when the next
2 special election could be held following this fall's general
3 elections?

4 A. The next special election would be scheduled for March in 2023.

5 THE COURT: I'm sorry. I didn't hear that. What did
6 he say?

7 MR. MARTINEZ: He said March 2023.

8 BY MR. MARTINEZ:

9 Q. Is that correct?

10 A. Yes, sir.

11 Q. You would agree with me, Mr. Barnes, that special elections are
12 not uncommon in the state of Georgia; correct?

13 A. That is correct, sir. Special elections happen a lot.

14 Q. I believe the March 2023 date that you alluded to, that's a date
15 that's set by state statute; correct?

16 A. That is correct.

17 Q. Those dates are known to the public ahead of time; right?

18 A. That is correct.

19 Q. Okay. It's your understanding, then, if necessary, a special
20 election for Public Service Commission Districts 2 and 3 could be held
21 on that statutorily prescribed date in March 2023; correct?

22 A. I do not know of a reason why it could not be.

23 Q. If there were a special election for those Public Service
24 Commission seats in March 2023 when would your office start building
25 ballots for that special election?

1 A. For special elections currently -- we've already started to get
2 questions from counties across the state about when they would need to
3 have information to us for a special election that may be scheduling
4 for March of next year and we have already been telling those
5 jurisdictions that we would need their balloting information by the
6 last week of December, first week of January, so that we would have
7 all the information that we needed to begin building the necessary
8 election projects.

9 Q. Mr. Barnes, there was a special election held in Georgia in March
10 of this year; correct?

11 A. Let's see. March of this year -- there were special elections
12 held in March of this year. There were a few county special elections
13 to fill vacancies. I believe there were -- there weren't any
14 questions on the ballot in March. It was just to fill vacancies.

15 Q. Do you recall for those set of special elections in March 2022
16 when your office started building ballots for those elections?

17 A. It would have been the same timeline I've previously stated.
18 End of December, early January.

19 Q. Thank you.

20 Mr. Barnes, I want to show you an exhibit briefly and
21 ask if you recognize it. What I'm going to share with you has been
22 marked in this case as Plaintiffs' Exhibit 66. I'm going to scroll
23 down and I'll read the -- I'm going to scroll down to the title of the
24 document first. You can see this is the declaration of Michael
25 Barnes. Is that you, sir?

1 A. That is.

2 Q. Okay. And this declaration, which is marked in this case PX 66,
3 was filed in the Alpha Phi Alpha redistricting case on January 18th,
4 2022, that case number is 21-CV-05337 and this is Docket Number 45-2.
5 Do you see that, Mr. Barnes?

6 A. I do.

7 Q. Do you recognize this document?

8 A. It appears to be a document that I was involved with at that
9 time.

10 Q. Okay. Let me go to Page 7. Is that your signature, Mr. Barnes?

11 A. It is.

12 MR. MARTINEZ: Okay. I'd ask permission to move in
13 Plaintiffs' Exhibit 66.

14 MR. TYSON: No objection.

15 THE COURT: It's admitted.

16 BY MR. MARTINEZ:

17 Q. Thank you, Mr. Barnes. I will take that down.

18 Mr. Barnes, I understand that if Judge Grimberg were to
19 cancel the elections for Public Service Commission for Seats 2 and 3
20 that are scheduled for this fall your preference would be that he do
21 so by August 12th; is that correct?

22 A. Yes, sir, that is.

23 Q. And that is your testimony today?

24 A. Yes, sir, it is.

25 Q. At the preliminary injunction hearing in this case, you testified

1 by Zoom at that hearing as well; correct?

2 A. That's my recollection, yes, sir.

3 Q. That was back in February?

4 A. I believe so.

5 Q. Okay. And at that hearing, that preliminary injunction hearing,
6 I believe you testified that it would be better for your office if
7 Judge Grimberg issued a directive canceling the Public Service
8 Commission elections at the building stage because only your office,
9 and not the county's, would have to make necessary changes to the
10 ballots. Do you recall that testimony?

11 A. I do.

12 Q. Okay. Judge Grimberg then asked you "For the November 2022
13 election would that building phase be for when the Secretary could
14 implement that change rather than the counties?" Do you remember that
15 question from Judge Grimberg?

16 A. I do.

17 Q. Okay. You then responded, quote, "Middle of August to early
18 September." Do you recall that testimony?

19 A. I do.

20 Q. All right. Has your testimony changed since then?

21 A. It has not. We will be building the project file based upon the
22 content of the needed election at that time. Now, we have also
23 already begun building the project file for those elections. Since
24 the conclusion of the runoff election a week ago, a little over a week
25 ago, we now know who the candidates are for the general election

1 that's scheduled in November so my office has already begun the
2 process of building the project data files for those individuals.
3 Yesterday we were talking here in the office. I've got ballot
4 builders that are currently working on Cobb County's elections
5 project, also Muskogee County so that work is actually already
6 underway right now. We like to have as much time possible in building
7 these project files just because we want them to be right. The longer
8 time that we have the more time that we have available to proof
9 in-house to make sure they are accurate before we provide those proofs
10 out to the local jurisdictions for their round of proofing and we want
11 to give them as much time to proof the project as well so that we do
12 not have mistakes.

13 Q. Okay. Just so I'm clear, though, your testimony is still that
14 your office will be continuing to build those election project files
15 into early September. Is that still your expectation?

16 A. Yes, that is my expectation.

17 Q. If Judge Grimberg issued an order in early September while your
18 office was still building the election project files your office could
19 still remove the Public Service Commission contests from those files
20 or set those contests to be not counted; correct?

21 A. If an order were to come down in early September, the work could
22 still be done, but then we're into a phase where we're not going to
23 have much time to double-check and proof, but the work could be done
24 because we're going to be at the back end of the ballot-building
25 process for 159 counties at that time frame.

1 Now, we will have already sent out ballot proofs to a
2 number of counties by that point in time for them to be proofing and
3 potentially for those counties to have already approved their ballots,
4 signed off on the contents, and had their print file submitted to
5 their contracted ballot printer for ballot printing. So if an order
6 were to come down in early September, yes, we could make changes. It
7 would be a very -- it wouldn't be easy to do. It would be difficult
8 and hard and take a lot of effort time and the stress level would be
9 high.

10 Q. You also testified at the preliminary injunction hearing that
11 even after an election contest appears on a ballot there is a
12 mechanism to where you can set that contest to be not counted. Do you
13 recall that testimony?

14 A. I do.

15 Q. So even if Judge Grimberg issued an order after the ballot proofs
16 had been sent to the counties, as you just explained, there would
17 still be a mechanism by which those contests could be not counted;
18 correct?

19 A. Yes. There is a mechanism where the contest on the ballot could
20 be not counted, but that enters into a lot of unintended consequences
21 if we execute that path. I don't know if you're familiar with what
22 happened in DeKalb County just a few weeks ago that involved a
23 situation where something on the ballot was put into a disabled state
24 and then when the county did not remember they had done that and
25 created various pieces of media, it created another litany of problems

1 that we had a hard time executing and following through with. But
2 there is a way to, yes, not count the race, but it would not remove
3 the race from the ballot. The race would be on the ballot, it would
4 be displayed, others would be interacting with it, but it would not be
5 counted in the final results.

6 Q. Mr. Barnes, when is the last possible date by which Judge
7 Grimberg could cancel the November Public Service Commission elections
8 and have the votes for those elections be not counted?

9 A. The last possible date, I guess in honesty, is the date of the
10 election itself, because if the order were to come down the date of
11 the election itself directions could be given to all 159 counties on
12 how to set the contest in question to a disabled state and it would
13 then not count the results that would be elected from the various
14 voting locations. The tapes produced from the individual machines
15 that have been used to collect the ballots would still have the votes,
16 they would still show the votes, those tapes would be posted in
17 individual polling locations by statute, but the report that the
18 county would generally produce for distribution would not include
19 that.

20 Q. Mr. Barnes, am I correct that the Secretary of State is
21 responsible for certifying each general election for the Public
22 Service Commission?

23 A. Because it is a state office, once the individual candidates
24 complete certifying their county results those certified returns are
25 then sent to the Secretary of State's Office where the Secretary of

1 State's Office goes through a reconciliation process before certifying
2 the results for the election.

3 Q. So the Secretary of State's Office does in fact certify the
4 results for Public Service Commission elections; correct?

5 A. Yes, that is correct.

6 Q. Does that certification process typically take place after
7 election day?

8 A. Yes, that takes place after election day.

9 Q. In your experience, how long after election day does that
10 typically happen?

11 A. That normally happens -- counties have approximately one week to
12 certify their results and then once they certify their results they
13 have to transmit those results to Atlanta to the Secretary of State's
14 Office to begin their work. Normally it takes, once the state has
15 receive all 159 certification packets, approximately maybe three
16 business days to complete the certification process.

17 Q. Is it possible for the Secretary of State to certify the results
18 of some statewide elections but not others?

19 A. I am not certain on that. I'm not involved in the certification
20 process within the Secretary of State's Office so I'm unsure.

21 Q. The Secretary of State, as I understand it, also signs the
22 commission that's issued to the winner of the Public Service
23 Commission election; is that right?

24 A. That is my recollection, yes, sir.

25 Q. And that process also happens after election day; correct?

1 A. That's correct. That process happens after state certification
2 of the results.

3 Q. Are members of the Public Service Commission currently elected
4 statewide or by district?

5 A. Public Service Commission races are conducted statewide.

6 Q. But members of the Public Service Commission must live in one of
7 five residency districts in order to qualify for that position;
8 correct?

9 A. That's my understanding, yes, sir.

10 Q. All right. For the 2022 general elections your office is
11 building ballots for both statewide and district-based elections;
12 correct?

13 A. In my office, we're building 159 individual county election
14 project files. Each individual county project file is an entity of
15 itself and then within that project file it has contests that are
16 contested jurisdiction wide within the county and it has contests that
17 are contested at district levels, whether it be a state districting
18 office or a county districting office.

19 Q. So your office is, in fact, building election project files for
20 contests that are both statewide in nature and district-based in
21 nature; correct?

22 A. Yes, that is correct.

23 Q. All right. And it would be feasible for your office to build
24 ballots for Public Service Commission elections that are
25 district-based; correct?

1 A. If the law was said it in that manner, yes, absolutely.

2 Q. That is something your office could do relatively easily;
3 correct?

4 A. We would -- if the Public Service Commission office was a
5 districted office, we would treat it like we would treat any other
6 districted office, yes.

7 Q. Your office, Mr. Barnes, has no particular interest in whether
8 Public Service Commissioners are elected statewide or by district;
9 correct?

10 A. That is correct.

11 Q. Mr. Barnes, have you ever seen an official statement from the
12 Secretary of State's Office or any other part of state government
13 articulating a special interest in maintaining the at-large statewide
14 method of electing members of the Public Service Commission?

15 A. No, sir, I have not.

16 Q. Your office also has no particular interest in whether elections
17 in Georgia are competitive versus being landslides; correct?

18 MR. TYSON: Your Honor, I'll just object here. I know
19 Mr. Barnes is testifying as a 30(b)(6) of the Secretary's office. I
20 think he can testify to his personal knowledge, but the question was
21 about office.

22 THE COURT: Yeah. I'm a little concerned because the
23 Secretary of State is the defendant in this case. So are you asking
24 him his personal capacity?
25

1 BY MR. MARTINEZ:

2 Q. I'll ask you in -- as Director of the Center of Election Systems,
3 Mr. Barnes, do you have an understanding as to whether that office,
4 the Center for Election Systems, has any particular interest in
5 whether elections are competitive or whether they are landsites?

6 MR. TYSON: I'll make the same objection, Your Honor. I
7 think he can testify as to his personal knowledge. I don't think his
8 office can take a position on this particular issue. The Secretary is
9 the defendant in this case.

10 MR. MARTINEZ: I mean, we're not asking him to speak on
11 behalf of the entire Secretary of State, but he is the Director of the
12 Office, and he would have personal knowledge of what that center's
13 position is on this issue.

14 THE COURT: Well, I'm taking his testimony to be his
15 own personal opinion. He hasn't been subpoenaed, as far as I know, as
16 a representative here.

17 MR. MARTINEZ: That's correct.

18 THE COURT: All right. So with that understanding, the
19 objection's overruled.

20 BY MR. MARTINEZ:

21 Q. All right. Mr. Barnes -- Mr. Barnes, in your opinion, does your
22 office have any particular interest in whether elections in Georgia
23 are competitive or whether they are landslides?

24 A. In my office we do not have -- we don't really care who wins.
25 We're trying to make sure that we have fair and free elections.

1 Q. Right. What your office cares about is that the elections are
2 open, they're fair, and that the votes are accurately counted;
3 correct?

4 A. That is correct.

5 MR. MARTINEZ: May I have a moment to confer?

6 BY MR. MARTINEZ:

7 Q. Mr. Barnes, just one last question. We talked earlier about the
8 March 2023 date being prescribed by state statute. Do you know which
9 statute that is?

10 A. I should know off the top of my head. 21-2-400, I believe, or
11 21-2-540, it's one of those two. I think it's dash 540.

12 Q. Dash 540. Great.

13 MR. MARTINEZ: Thank you, Mr. Barnes. I have no
14 questions. I'll pass the witness.

15 CROSS-EXAMINATION

16 BY MR. TYSON:

17 Q. Good morning, Mr. Barnes. Thank you for being with us today.

18 A. Good morning.

19 MR. TYSON: Just for reference, Your Honor, I'm looking
20 at 21-2-540, that is the statute that sets out special election dates.
21 Your memory is excellent on that, Mr. Barnes.

22 BY MR. TYSON:

23 Q. Just a couple of quick questions. Can you just explain for the
24 Court what the ballot-proofing process for counties involves.

25 A. Sure. When we have to produce a ballot, a prescribed ballot, in

1 an election laying out all the contests, associated candidates, we
2 produce a physical ballot, it's a proofing ballot. It lays out all
3 the contests as they would be positioned on the voting ballot and that
4 is provided to the jurisdiction, to the county, to the election
5 supervisor, and then they begin the process of proofing its contents.
6 Are the contests that should be there, are they there? Are the
7 candidates that should be there, are they there? Are all the
8 candidates properly spelled? Are all the contests properly
9 identified? Are they positioned properly on the ballot? Do they have
10 all the various ballot styles that they need for a given election? In
11 a lot of jurisdictions, because they have many districted offices and
12 such, they are going to have multiple ballot styles. So making sure
13 that they have all those proper ballot styles in relation to content,
14 but also all those ballot styles are properly related to the
15 individual precincts that voters are tied to so that when the voter
16 comes to vote on election day or during advanced voting or mailed the
17 ballots through the mail, its content is correct and that its vote,
18 when tabulated, will be reported back to the voter's proper precinct.
19 So it's a multilayer process of proofing to make sure that we have the
20 content of the ballot correct.

21 Q. Mr. Martinez asked you about your office's ability to build
22 ballots related to district elections to the PSC. Would there be
23 necessary actions by county registrars if we had districted elections
24 for the PSC versus statewide elections?

25 A. It's going to depend on how the districts are configured. Do

1 the district lines cut through county lines or not? If they do not,
2 then I don't think the county registrar would have to do much there.
3 But if the district lines were to cross through county lines, then the
4 registrars are going to have to develop new district combos at the
5 precinct level and those district combo levels correlate to what
6 contests appear on individual ballots.

7 Q. Mr. Martinez asked you about the timeline for deleting the Public
8 Service Commission race from a general election ballot and you
9 referenced, I think, it happened in DeKalb County. Did that situation
10 in DeKalb County you referenced involve deleting information after
11 voting had begun from a ballot database file?

12 A. Yes, it did. It involved the withdrawal of a candidate. When
13 the ballot was first built there were four particular candidates in a
14 local county commission race. After voting had begun, one of those
15 four candidates withdrew their name and the county then went into the
16 project file locally and they disabled the candidate. At that time it
17 had no impact on the display of the ballot, on the printed ballot,
18 those two things both had four candidates still listed. On the day
19 before advanced voting began DeKalb County realized that they had a
20 districting problem in five precincts, I believe it was, where they
21 had districted properly the county commission District 2 in five of
22 these precincts. In order to solve that problem the new project file
23 had to be built to handle that scenario.

24 The project file that was built in DeKalb was built to
25 settle those four precincts -- or those five precincts, excuse me, but

1 instead of it having four candidates for the county commission
2 District 2 race it was labeled with only three candidates and now we
3 had a discrepancy between a project file that was being used in
4 precincts outside the correction and precincts being in a project file
5 being used in precincts with the districting issue so there was a
6 mismatch, we had one project with four candidates and one project with
7 three candidates, and when it came time to start tallying the votes on
8 election night we started realizing that some touchscreens were
9 showing three candidates, some touchscreens were showing four
10 candidates, some scanners were set to tabulate four candidates, some
11 tabulators were set to scan for three candidates and it created a
12 problem in tabulating the results for that particular contest.

13 Q. Did that contest have to go to a full hand recount to resolve the
14 issues with the election project file?

15 A. It did.

16 Q. Is that experience in DeKalb County part of your reasoning for
17 why you view August 12th as the deadline for knowing whether the PSC
18 race will be on the general election ballot?

19 A. It is, because that was one where we, in discussions with the
20 county, we thought we were accounting for all possible situations and
21 that we were telling the counties, all right, let's do this, let's do
22 this to resolve our problem. If we had to go through that exercise
23 159 times -- I'm confident we would put together great instructions,
24 I'm confident that we would give out good instructions. Am I
25 confident that everybody would follow the instructions without error?

1 I'm afraid I'm not.

2 Q. Would your office want ballot proofs to go out with races -- to
3 counties with races that would not appear on the general election
4 ballot?

5 A. It's our office's preference that whatever is on the proof
6 ballot should be what is scheduled for the election because the
7 county's proofing the ballot and they're not all proofing the ballot
8 at the same time. Because we only have four ballot builders in 159
9 counties, you're going to have some communities early on proofing,
10 some counties later in the process proofing, but we want them all to
11 be proofing the same content. That content stays static as best of
12 possible.

13 The other fear I have is once counties have proofed
14 ballots they may take those proofed ballots and try to use them as
15 sample ballots to provide the public -- to educate the public about
16 what is on the ballot. The content of the proofed ballot is one
17 thing, but the content of the final ballot is something else, that can
18 create additional confusion at the county level and also at the voter
19 level.

20 Q. Mr. Barnes, can you just explain for the Court briefly why that
21 August 12th date is the time when ballot proofs start going out to
22 counties.

23 A. Sure. August 10th is 90 days prior to the general election and
24 by statute local elections -- local special elections have to be
25 called by that 90th day in order for that special election to be added

1 onto the November general election ballot so that the election can be
2 ran in conjunction with the general election. So we at the county
3 have (inaudible) of August 10th, that means you should have all the
4 information that you need relative to what's going to be on your
5 ballot by August 12th so that they can get the information to us so
6 that we can begin finalizing -- reading the proofing packet, the
7 initial proofing packet, that is distributed to the local
8 jurisdictions for review. It is our plan that in the middle of August
9 we're going to begin distributing proofing packets to counties so they
10 can begin reviewing those ballots, proofing the ballots, submitting it
11 for any corrections that need to be submitted to our office so the
12 proper ballot can be built and being made ready to submit to that
13 county's printer and to the county so that they can begin loading
14 their equipment, testing their equipment well in advance of any
15 statutory deadlines for voting.

16 Q. Mr. Barnes, Mr. Martinez also asked you about the ability to have
17 counties set the project file and not count votes up to the day of the
18 election. Do you recall that testimony?

19 A. I do.

20 Q. And that would require, I'm assuming, independent action by all
21 159 counties with that list of instructions you referenced?

22 A. It would.

23 Q. And is that part of the process that happened with that DeKalb
24 County race that resulted in a hand recount, the county had to disable
25 certain parts of the project file?

1 A. It's a situation where a certain part of the project file was
2 disabled and it was done very early on so that they wouldn't count
3 votes for a particular withdrawal candidate and then when that was
4 done in the project file and honestly forgotten about, when
5 adjustments had to be made in the project file for the five precincts,
6 that created the problems that we then started to engage with.

7 Q. Mr. Barnes, are elections a complicated endeavor from a technical
8 perspective to put together?

9 A. Yes, sir, they are.

10 Q. And does making changes late in the process introduce a higher
11 possibility of error by officials?

12 A. Yes, sir.

13 MR. TYSON: If I can consult just briefly, Your Honor.

14 Mr. Barnes, that's all the questions that I have for
15 you. I do just want to say on behalf all of us as Georgians and
16 voters, we know your office has done amazing work under very difficult
17 circumstances for several election cycles now and we really appreciate
18 your service. Thank you for your work. Thank you for all you do for
19 all of us. So thank you.

20 THE WITNESS: Thank you.

21 THE COURT: Any redirect?

22 MR. MARTINEZ: Just a couple things real quick.

23 REDIRECT EXAMINATION

24 BY MR. MARTINEZ:

25 Q. Mr. Barnes, I believe I heard you testify on examination with

1 Mr. Tyson that if the Public Service Commission district lines -- if
2 the Public Service Commission were converted to a district-based
3 election and those district lines did not cut through a county's
4 boundaries that a change of that nature would not be such a heavy
5 burden on the county registrars. Did I hear that correctly?

6 A. If the districts were countywide from districting and
7 registering of voters, it would not be a heavy lift for local voter
8 registrars to handle, that's correct.

9 Q. Mr. Barnes, you're aware that the current Public Service
10 Commission residency districts encompass only whole counties; correct?

11 A. I have not seen the most recent district lines for the PSC, but
12 I know in the past that those districts have been covered countywide.

13 Q. Okay. The Public Service Commission districts that were in place
14 from 2012 until the recent changes earlier this year, your
15 understanding is that those districts encompass only whole counties;
16 correct?

17 A. That's my recollection, yes, sir.

18 Q. Mr. Barnes, you were also asked a few questions by Mr. Tyson
19 about the situation in DeKalb County. Do you remember those
20 questions?

21 A. I do.

22 Q. In the DeKalb County situation, am I correct that the election
23 results still needed to be counted?

24 A. Yes.

25 Q. So that's different from a situation where votes might be ordered

1 to be not counted; correct?

2 A. It is different. However, when you start adjusting the project
3 file once voting begins, then you have to be absolutely certain that
4 the media that you create to power the individual machines, whether it
5 is the BMD, Ballot-Marking Devices, or your precinct-level ballot
6 scanners, you've got to make absolutely certain that the media on
7 those devices match whatever situation you're trying to execute. If
8 you have a discrepancy between the BMD, perhaps, the Ballot-Marking
9 Device, showing five races, but the individual ballot scanner's
10 expecting to receive six races or contests, that can create a
11 situation where it becomes very difficult for the scanner to scan the
12 ballots properly.

13 Q. But even that is not a situation where votes in a certain contest
14 that is appearing on election ballots would simply not be counted or
15 the winner would not be certified by the Secretary of State; correct?

16 A. Well, in this situation it's hard to answer that question. I
17 don't know how the scanners would be acting. I don't know what effort
18 would have to be taken by the local election officials to get the
19 votes counted. The election officials, because the ballot is a paper
20 ballot, is going to be able to count the votes and certify the results.
21 What amount of effort and time is going to be needed by the local
22 jurisdictions to do that in this situation, if we have late changes in
23 the ballot, I just don't know.

24 Q. I understand. My question was about the Secretary of State's
25 role in the certification process and those issues that you were just

1 describing all pertain to what might happen at the county level;
2 correct?

3 A. That's correct. But the Secretary of State's Office can't
4 certify a result until the counties have finished their certification
5 process.

6 Q. All right. If there were an order from this Court that the
7 elections for Public Service Commission Districts 2 and 3 were not to
8 be counted or that the Secretary was enjoined from certifying the
9 results of those elections had they gone forward, then the Secretary
10 would simply not certify those results; correct?

11 A. That is my understanding of it.

12 MR. MARTINEZ: Thank you, Mr. Barnes. I have no more
13 questions.

14 THE COURT: All right. Thank you. May the witness be
15 excused?

16 MR. TYSON: Yes, sir.

17 MR. MARTINEZ: Yes.

18 THE COURT: All right. Mr. Barnes, thank you. I'm
19 glad we were able to get the technology to work smoothly. You are
20 free to go.

21 THE WITNESS: All right. Thank you, sir.

22 THE COURT: All right. Do you want to take up some
23 housekeeping items before we proceed?

24 MR. SELLS: Yes, Your Honor, just a bit, if we could.
25 Yesterday we kind of had an open thread on some pages of PX 77 and a

1 date also in that exhibit. We've worked together, Mr. Tyson and I,
2 and we have come up with what I think is probably a stipulation and I
3 think we can just read that into the record and he'll confirm and that
4 should do it, if that's okay with you.

5 THE COURT: Sure. And this relates to the three pages
6 of documents in PX 77 was excluded yesterday; correct?

7 MR. SELLS: It goes slightly beyond that, but it does
8 relate to that as well, yes.

9 THE COURT: All right.

10 MR. SELLS: The first part of the stipulation is that
11 there's no objection to those three pages coming in.

12 MR. TYSON: That's correct.

13 THE COURT: All right. So do you wish for that to be--
14 I'm not sure if it matters -- but go in as PX 77 or as a separate
15 exhibit?

16 MR. TYSON: I don't have a strong preference, Your
17 Honor. I think it probably -- I mean, maybe it makes sense to mark it
18 separately since Commissioner Pridemore testified about pieces of 77.
19 I'm fine with it coming in as part of 77, whatever makes the most
20 sense.

21 THE COURT: I'm inclined to ask you to do it as a
22 separate exhibit only because since they're not numbered, I'm thinking
23 the transcript may not reflect very well what three pages we're
24 talking about so let's sort of take that out of PX 77 and mark it
25 separately, if we would.

1 MR. SELLS: Okay. That would be PX 97.

2 THE COURT: PX 97. That will be admitted by
3 stipulation.

4 MR. SELLS: There are also five more exhibits that we
5 intend to offer and I think will come in by agreement and those are PX
6 90, PX 91, PX 92, and then DX 38 and DX 39.

7 MR. TYSON: We would stipulate to those coming in, Your
8 Honor.

9 THE COURT: All right. Those exhibits are admitted.

10 MR. SELLS: And then the last piece of our stipulation
11 is regarding the date of the text message that appears on the first
12 page of PX 77. I asked Commissioner Pridemore about the date of that
13 and she was unclear about it, but we are now, both parties, prepared
14 to stipulate that the date of that text is January 26th, 2022.

15 MR. TYSON: And we would make that stipulation, Your
16 Honor.

17 THE COURT: All right.

18 MR. SELLS: That concludes the stipulation piece of our
19 housekeeping. The last piece of our housekeeping this morning is
20 regarding closing argument and based on what we've discussed remains
21 in the case we think that we may wrap up with evidence tomorrow.

22 THE COURT: Wonderful. I mean as much as I enjoy
23 spending time with you.

24 MR. SELLS: Indeed. But we certainly won't have the
25 transcripts by the afternoon to be able to cite to them in our closing

1 argument so we would like to do it on Friday morning, if that is
2 acceptable to you.

3 MR. TYSON: That would work for us, Your Honor. We're
4 fine proceeding Thursday morning or Friday morning, but are happy to
5 go Friday morning given what Mr. Sells has identified.

6 THE COURT: Sure. No, that's fine with me. So you
7 imagine resting the plaintiffs' case by midday tomorrow?

8 MR. SELLS: No, Your Honor. We expect to rest our case
9 in chief today.

10 THE COURT: Oh today.

11 MR. SELLS: And then Mr. Tyson gets to put on his case
12 and then we expect a short rebuttal case and we expect the rebuttal
13 case to be done perhaps even tomorrow morning, but don't hold me to
14 that.

15 MR. TYSON: Your Honor, just for logistically kind of
16 where we are. Commission Pridemore has already testified under our
17 prior agreement so would be part of our proof. The only other witness
18 we're planning to put forward is Dr. Barber, our expert. If we go
19 really fast today and get started with him today, that's fine, but
20 either way we would be through him by tomorrow morning, we expect, if
21 the plaintiffs are able to rest today.

22 THE COURT: All right. And he's available to come
23 today?

24 MR. TYSON: He is. He's here, yes.

25 THE COURT: Okay. Okay. Wonderful.

1 I was going to ask you about closing arguments. You
2 know, obviously I've been taking notes and I have some questions
3 percolating in my mind and I am happy to, formatwise, do it however
4 you prefer. You can do sort of the traditional closing arguments as
5 if we had a jury or we can do it more in the vein of oral argument
6 where I can respectfully interrupt with questions. Do you have a
7 preference for that? I'm happy to sort of table my questions until
8 after the closings are finished, if that's what you prefer.

9 MR. SELLS: Well, I'll just speak for myself, because
10 we haven't had to chance to think about it. But I absolutely think
11 that the purpose of closing argument in a bench trial is to answer
12 your questions. As long as you interrupt respectfully, then I'm fine
13 with that.

14 THE COURT: I wish all lawyers felt that same way, that
15 they're here to answer my questions and not to just give a speech so I
16 appreciate that.

17 MR. SELLS: No, no. I'm not here to give a speech. I
18 will have a speech prepared, but as far as I'm concerned, you can ask
19 whatever's on your mind. You know, my speech will follow a logical
20 progression so you might tailor your questions. But honestly, this is
21 your courtroom and I want to answer your questions so that's how I
22 would prefer to proceed.

23 MR. TYSON: Your Honor, I have a similar kind of
24 perspective. Obviously we want to answer the questions you have for
25 sure. I expect Mr. Sells and I will probably follow a similar outline

1 in terms of *Gingles* 1, 2, 3, walk through the totality, all the
2 different pieces of that, but I'm happy to proceed just as oral
3 argument, if you prefer, or I can just talk and you can interrupt me,
4 that's fine.

5 MR. SELLS: The only place where it gets tricky, of
6 course, is if you ask 40 minutes of questions and we're allotted an
7 hour. So you'll have the clock.

8 THE COURT: Yeah, we will have an hour allotted for
9 each side. But sort of the way I view it is I look at it like a
10 soccer match. If there's been a lot of interruptions, I should give
11 you injury time. So it's a flexible clock.

12 MR. SELLS: Okay. That sounds reasonable.

13 THE COURT: All right. All right. Great.

14 One question along those lines that I'm interested to
15 hear from you and Mr. Tyson that I've been thinking about is you've
16 been raising relevancy objections to the exhibits concerning the
17 racial appeals and obviously I understand that there's an aspect of
18 that that goes to the weight of those advertisements because none of
19 them are particular to PSC elections. But from an evidentiary
20 standpoint, I mean, is it your position that the appeals must be
21 specific to the particular campaign because otherwise I'm not
22 understanding the relevancy objection when they are political campaign
23 advertisements in Georgia.

24 MR. TYSON: Yes, Your Honor. So there is kind of a
25 couple of ways I think about this. The Senate Factor test is whether

1 the racial appeals characterize the campaigns in Georgia so I think
2 "characterize" is an important word there. I think one of the
3 relevancy -- at least at to some of those, the relevancy objection is
4 rooted in -- it's hard to tell if it's a racial appeal or not and
5 Ms. McCorkle testified yesterday about what she believed racial
6 appeals were so I think that's Part 1 of the relevancy objection is
7 that some of these may not be actual racial appeals. They may be
8 perceived by people that way. The second is focused more on the race,
9 the relevant races. I think that probably --

10 THE COURT: "Race" as in skin color or political races?

11 MR. TYSON: "Race" as in elections.

12 THE COURT: Oh, I see. Okay.

13 MR. TYSON: So, for example, a districted election for
14 Congresswoman Greene, for example, is not a statewide race and so we
15 would think that there would be a relevancy problem there applying
16 that to the rest of the state. I can see how you could look at that
17 in terms of does this characterize campaigns so I see that there's an
18 argument there. But from our perspective, the relevancy is is this
19 truly a racial appeal. And then if it is truly a racial appeal, is it
20 a statewide election or is it a districted election?

21 THE COURT: I understand. All right. And I did
22 overrule those objections and I stand by those rulings. I understand
23 the argument, but I do think those go the weight of the admissibility
24 and not its admissibility.

25 MR. TYSON: Thank you, Your Honor.

1 THE COURT: All right. With that, are we ready -- I
2 guess we need to --

3 Officer Ricky, can you assist with helping to move the
4 monitor out of the way? Thank you. Why don't we take a short
5 5-minute recess.

6 (recess taken from 10:00 a.m. to 10:05 a.m.)

7 THE COURT: You may be seated.

8 Are we ready?

9 MR. MORRISSETTE: Your Honor, the plaintiffs call the
10 next witness Richard Rose.

11 THE COURT: All right.

12 THE CLERK: Would you please raise your right hand.

13 (witness sworn)

14 THE CLERK: Thank you.

15 THE COURT: Good morning, sir. Please have a seat.
16 Please state your name and spell your last name.

17 THE WITNESS: My name is Richard Rose. Last name
18 R-O-S-E.

19 DIRECT EXAMINATION

20 BY MR. MORRISSETTE:

21 Q. Good morning, Mr. Rose. Mr. Rose, which city do you currently
22 live in?

23 A. Atlanta.

24 Q. And which county is Atlanta in?

25 A. Fulton.

1 Q. How long have you lived in Fulton County?

2 A. About 41 years.

3 Q. I'd like to ask you a little bit about your background. Where
4 did you grow up?

5 A. I grew up in Memphis, Tennessee.

6 Q. Where did you attend high school?

7 A. Melrose High School in Memphis.

8 Q. What dates did you attend Melrose High School?

9 A. From 1960 to 1965.

10 Q. Was Melrose High School the closest high school to your home?

11 A. It was not.

12 Q. Why did you attend Melrose High School instead of the school
13 closest?

14 A. Memphis city schools were segregated at that time and Melrose
15 was the closest school for African Americans.

16 Q. Roughly how far from your home was Melrose High School?

17 A. About a mile and three-quarters.

18 Q. Did you attend college after high school?

19 A. I did.

20 Q. Which school did you attend for college?

21 A. Clark College.

22 Q. Where is Clark College located?

23 A. Atlanta.

24 Q. What was your major at Clark College?

25 A. First it was math and then I switched to business administration

1 with a minor in math.

2 Q. Did you graduate from Clark College?

3 A. I did.

4 Q. When did you graduate?

5 A. 1970.

6 Q. And this was your undergraduate degree?

7 A. Yes.

8 Q. Did you attend graduate school?

9 A. I did.

10 Q. When did you attend graduate school?

11 A. From approximately 1971 to 1974 or '5.

12 Q. Which graduate school did you attend?

13 A. Georgia State University.

14 Q. And what type of degree were you pursuing at Georgia State?

15 A. An MBA.

16 Q. Did you complete your graduate degree?

17 A. I did not.

18 Q. Have you pursued any other graduate degrees?

19 A. No.

20 Q. Do you have any additional certifications or trainings?

21 A. Yes. I'm a licensed Certified Public Accountant in the state of
22 Georgia.

23 Q. When did you obtain your CPA?

24 A. 1973.

25 Q. What is your current occupation?

1 A. I am a practicing CPA in Georgia.

2 Q. Do you work at an accounting firm?

3 A. I do. It is my own firm.

4 Q. How long have you had your firm?

5 A. About 40 -- 40, 45 years, a long time.

6 Q. Prior to starting your accounting firm where were you employed?

7 A. First I was working for Willie Richardson who actually was a
8 college professor and he hired me once I finished school. Then I
9 worked for Lucas Tucker Company and then George Thomas, CPA.

10 Q. Are you currently involved with the NAACP?

11 A. Yes.

12 Q. What is your current involvement with NAACP?

13 A. I am President of the Atlanta branch of the NAACP.

14 Q. How long have you served in this role at the NAACP?

15 A. This is my eighth year.

16 Q. What are your duties as President of the Atlanta NAACP?

17 A. I am the chief spokesman. I'm the spokesman for the branch. I
18 preside over meetings of the executive committee, which is the local
19 governing board, as well as membership committees and set the strategy
20 and practice and activities for the branch.

21 Q. Does the Atlanta NAACP ever endorse candidates for office?

22 A. No.

23 Q. Were you involved in the NAACP prior to becoming President of the
24 Atlanta chapter?

25 A. Yes.

1 Q. When did you first become involved in the NAACP?

2 A. I first became involved in 1962 in the youth council in Memphis,
3 Tennessee.

4 Q. To what extent were you involved initially?

5 A. I was a leader from the Melrose High School community. We
6 planned and executed sit-ins, picketed, marches, protests that also
7 sometimes included out-of-town protests in Mississippi and other parts
8 of Tennessee and Arkansas.

9 Q. Would you please explain what a sit-in is.

10 A. A sit-in is -- it's civil disobedience where we occupied
11 restaurants that were segregated that denied black service and so we
12 came in and asked for service and seated ourselves.

13 Q. Did you remain active in the NAACP from the time you joined in
14 high school through becoming President of the Atlanta chapter?

15 A. Yes. And also I did some similar work with Southern Christian
16 Leadership Conference called SCLC.

17 Q. Okay. And what does that organization do?

18 A. That is also a civil rights organization. I became acquainted
19 with it while I was in Memphis. My mom's first cousin was one of the
20 organizers of the SCLC so I became acquainted of their activities
21 which included freedom rides and other types of civil disobedience
22 actions.

23 Q. Could you explain what a freedom ride is.

24 A. At the time in southern states seating was segregated between
25 the races. White riders would sit in front, black riders were

1 designated to sit in the rear of the bus or train and so the riders
2 started -- in northern cities where the system was integrated and when
3 they crossed into southern states they refused to give up their seats
4 and be relegated to seats in the rear of the bus and so they were
5 dubbed the freedom riders. They met with a lot of violence, you know,
6 throughout the south. Going from Washington, DC to New Orleans was
7 one of the routes. Some of the other routes were Chicago to New
8 Orleans and so forth.

9 Q. Which years were you involved in the SCLC?

10 A. I was in -- I was here in school so maybe -- it's probably 1968
11 and off and on, you know, just when I got a call between school and
12 work where I might be available. Also, in that regard I worked with
13 Hosea Williams and were actually -- even in 1985 I still was working
14 with both organizations from time to time. Not as an officeholder,
15 but just as a volunteer.

16 Q. Would it be fair to say that you've been involved in civil rights
17 issues for the majority of your life?

18 A. It would be, yes.

19 Q. I want to turn back to the NAACP. What is your understanding of
20 the NAACP's mission?

21 A. Its mission is to ensure political, educational, social, and
22 economic equality for all persons and to fight against -- eliminate
23 racial hatred and racial discrimination.

24 Q. As President of the Atlanta chapter of the NAACP, what is your
25 role in carrying out this mission?

1 A. I lead the branch, I set initiatives, coordinate the various
2 activities we operate on in a committee structure. For example,
3 political action, education, labor industry, economic development.
4 The various activities each has a committee chair. As President and
5 ex official member of each of the committees, and they report back to
6 our executive committee, our local board, for direction, funding,
7 refinement, you know, whatever's needed to make a point.

8 Q. In your role, to what extent are you responsible for
9 understanding the concerns of black Georgians?

10 A. It's paramount that I understand the concerns of black Georgians
11 and I do that in various ways.

12 Q. What are some of the ways that you learn the issues of black
13 Georgians?

14 A. Well, we field calls, telephone calls, website contact-us forms,
15 social media, meetings at various church groups, fraternal groups,
16 sororities. We maintain contact with the community as well as
17 political leaders.

18 Q. So is it correct that you would regularly attend community
19 meetings involving black Georgians?

20 A. Yes, yes.

21 Q. In your engagement with black Georgians, have you ever been made
22 aware of any issues related to the Public Service Commission?

23 A. Yes.

24 Q. What were those issues?

25 A. Well, various issues. There's always the issue of rates, what

1 are the utility rates, and also the placement of power facilities, the
2 placement of waste ponds from coal ash, rural broadband. But
3 primarily rates and placement of environmentally unsafe activities.

4 Q. Okay. Were you ever made aware of any issues involving Plant
5 Vogtle?

6 A. Yes.

7 Q. Were you ever made aware of any issues involving a utility
8 disconnection moratorium?

9 A. Absolutely, yes. Yes.

10 Q. Okay. Let's start with the disconnection moratorium. What was
11 your understanding of how the disconnection moratorium was important
12 to black Georgians?

13 A. So with the pandemic -- a major part of the job market for black
14 Georgians is in service-type industries and so when service
15 industries, restaurants and so forth, beginning to close or curtail
16 activities during the pandemic, those households were hit hardest.
17 Already per capita income of black Georgians is just a little bit over
18 half of white Georgians so utility costs become a major -- more of a
19 percentage -- a higher percentage of the total income of black
20 Georgians versus white Georgians.

21 Q. And what was the main aid that the disconnection moratorium had
22 provided while it was in place?

23 A. Well, it gave black Georgians relief from that fixed cost of
24 utilities in a time when their income was lower before there was any
25 kind of federal action or any kind of state funding to help those

1 individuals.

2 Q. What was your understanding of how the utility rate increases
3 were important to black Georgians?

4 A. Again, the utilities become a major part -- all of us pay
5 utilities unless we are in facilities where we don't actually have
6 that utility, a dormitory or something. But households pay utilities
7 and those costs in a lower-income family become very much more
8 significant than in higher-income families.

9 Q. And how would utility rate increases exacerbate this issue?

10 A. They would basically increase the cost of -- increase the
11 percentage of what those households earn and leave them with less
12 disposable income.

13 Q. What was your understanding of the issues involving Plant Vogtle?

14 A. Well, Plant Vogtle, again, is -- the biggest thing about Plant
15 Vogtle is that the cost of developing and building that facility was
16 passed to the ratepayers instead of the stockholders. If I buy -- in
17 a normal business, that businessowner produces or builds the
18 activities or buys what they need to maintain a business to have a
19 business. In the case of Plant Vogtle the ratepayers are paying the
20 construction costs without any ownership, without any return on
21 investment, without any input in that investment.

22 Q. And from your understanding, financially was the Plant Vogtle
23 project being managed well to keep those costs down?

24 A. Apparently not. There have been a lot of - a lot of lawsuits
25 filed between the people who were supposedly partners in Plant Vogtle

1 about these costs overruns, significant cost overruns, that have been
2 reported for several years about Plant Vogtle.

3 Q. And when there were cost overruns, it was your understanding that
4 those would be added to utility bills?

5 A. Yes.

6 Q. Turning back to the disconnection moratorium. In your
7 experience, was the Public Service Commission responsive to the
8 concerns that black Georgians expressed regarding the disconnection
9 moratorium?

10 A. Well, I think not because of the short time that there was a
11 disconnect moratorium. By contrast, the City of East Point right here
12 in Fulton County sells its own electricity to its residents - about 70
13 to 80 percent of them are black - and their moratorium lasted for
14 about 18 months.

15 Q. Do you recall roughly the time of year in 2020 when the
16 moratorium was terminated?

17 A. I think it was about July.

18 Q. And this was during the pandemic?

19 A. Yes.

20 Q. So it was a hot day in Georgia during a pandemic when peoples'
21 utilities started being cut off?

22 A. Yes.

23 Q. In your experience, was the PSC responsive to the concerns black
24 Georgians express regarding utility rate increases?

25 A. No.

1 Q. How not?

2 A. Well, the short-term of the moratorium, number one, and the --
3 and I don't work, you know, with utilities, I have a broad
4 responsibility, but they apparently -- they seem not to be -- not to
5 have a perspective at all that understood that there is a differential
6 between black and white households in Georgia in terms of income.

7 Q. Were there additional utility rate increases after these concerns
8 were expressed?

9 A. Yes.

10 Q. In your experience, was the Public Service Commission
11 responsive -- scratch that.

12 Now I would like to ask you about this lawsuit. What
13 is your role in this case?

14 A. I am a plaintiff in this case.

15 Q. And why did you get involved in this case?

16 A. Because I recognize that the manner in which Public Service
17 Commissions are elected disenfranchises black voters.

18 Q. Is the Public Service Commission important to you?

19 A. It is.

20 Q. How so?

21 A. Well, their responsibility covers utilities, for example, that
22 all Georgians have to pay.

23 Q. Are you being compensated in any way for your participation in
24 this case?

25 A. No.

1 Q. Mr. Rose, are you registered to vote?

2 A. Yes.

3 Q. And what is your race?

4 A. African American.

5 Q. Where are you registered to vote?

6 A. Atlanta, Georgia; Fulton County.

7 Q. Okay. How long have you been registered to vote in Fulton
8 County?

9 A. About 41 years.

10 Q. Have you been continuously registered to vote since you were
11 18 years old?

12 A. Well, actually, since I was 21, I was a Tennessee resident and
13 so at that time we could register at 21 and so I registered after --
14 actually, I registered in Georgia after I decided to stay in Georgia
15 from college.

16 Q. Have you historically voted in primaries?

17 A. Yes.

18 Q. Have you voted in past PSC elections?

19 A. Yes.

20 Q. Have you ever voted for a non-Democrat Public Service Commission
21 candidate?

22 A. Yes.

23 Q. Do you remember who those people were?

24 A. I don't remember the names, but they were Libertarian
25 candidates.

1 Q. Okay. Do you remember voting for Eric Hoskins?

2 A. Yes.

3 Q. Do you remember voting for a John Monds?

4 A. Yes.

5 Q. Do you remember voting for a David Staples?

6 A. Yes.

7 Q. Do you believe your vote for Public Service Commissions are being
8 diluted?

9 A. Yes.

10 Q. Why do you believe that?

11 A. I believe that because there is -- although the candidates must
12 qualify in a district, the entire state votes on each of the
13 candidates so there is no opportunity for candidates who might be
14 responsive to me to be elected in general in Georgia.

15 Q. Which district do you reside in?

16 A. District 3.

17 Q. Prior to Commissioner Fitz Johnson being appointed, who was the
18 commissioner for District 3?

19 A. Chuck Eaton.

20 Q. Did you ever vote for Chuck Eaton?

21 A. No.

22 Q. Had any candidate for District 3 Commissioner that you voted for
23 ever won?

24 A. Yes.

25 Q. Who was the last one who won?

1 A. David Burgess.

2 Q. Would you feel disenfranchised if you were no longer allowed to
3 vote for commissioners who reside outside of District 3?

4 A. No.

5 Q. Why not?

6 A. Because I think voters should -- candidates should be responsive
7 to voters and that those other districts, I think those voters
8 should -- those district candidates should be responsive to the voters
9 in those districts.

10 Q. In your experience as a registered voter in this state, do you
11 think race plays a predominant role in Georgia elections?

12 A. Absolutely.

13 Q. How so?

14 A. Well, Georgia's -- in general, Georgia's systems and policies
15 and practice are racist. I mean, after all, Georgia is home of the
16 largest shrine to white supremacy in the history of the world at Stone
17 Mountain, Georgia, and its policies reflect the celebration of the
18 heros of the Civil War. We seem to not have stopped fighting the
19 Civil War in all of our practices in Georgia.

20 Q. In your experience as a registered voter, do you think race plays
21 a predominant role in elections for the Public Service Commission?

22 A. Yes.

23 Q. How so?

24 A. Well, except for David Burgess' election once after he was
25 appointed to the position, there has not been a black candidate

1 elected to the Public Service Commission in the history of Georgia.
2 Statewide candidates have a third -- black statewide candidates have a
3 very hard time being elected. It's just only a few exceptions that I
4 can think of since I've been voting.

5 Q. How important to you is it that black-preferred candidates are
6 elected to the Public Service Commission?

7 A. Well, I believe that it's part of the democratic process that
8 voters be allowed to elect their representatives and when that ability
9 is diluted it is disenfranchisement.

10 Q. Do you think having only one black-preferred candidate elected to
11 the Public Service Commission would make any difference in how the
12 Commission addresses issues relevant to black citizens in Georgia?

13 A. I do.

14 Q. Why do you believe that?

15 A. Well, it would be a voice of a different perspective. If we
16 look at the chairman who was a witness yesterday was asked, you know,
17 does she think that black Georgians have had a difficult time based on
18 the history, she says she didn't know because she's not black and so a
19 black person on that board would know about the treatment of blacks
20 and how it's affected all of our lives from birth to death.

21 Q. And how does it make you feel if you feel like you don't have
22 that representation on the Public Service Commission right now?

23 A. I feel disenfranchised. I feel like my vote and my voice has
24 been silenced.

25 Q. Does your right to vote have a monetary value to you?

1 A. No.

2 Q. Would you forfeit your ability to vote for monetary compensation?

3 A. No.

4 Q. Mr. Rose, remind me how long have you lived in Georgia?

5 A. I've lived in Georgia about 52 -- 51 years.

6 Q. Are you familiar with Georgia's history of discrimination?

7 A. I am.

8 Q. How are you familiar?

9 A. Well, 50 years is a long time so I recall the entire 50 years
10 and then I read and I'm familiar with the politics of Georgia through
11 education.

12 Q. Has your involvement in civil rights movements given you any
13 additional information about the history of discrimination?

14 A. It has.

15 Q. How would you describe Georgia's history of discrimination?

16 A. It is typical of southern states that were part of the
17 Confederate States of America where it continues to enact policies of
18 white supremacy which deny black voters and people of color rights for
19 citizenship.

20 Q. In your opinion, does racial discrimination in voting still
21 exist?

22 A. Yes.

23 Q. How so?

24 A. Districting of voters to dilute the strength of black voters.
25 The policies -- the changes in the election process that was enacted

1 with SB 202 in 2021, which seemed to pointedly change all of the
2 methods of voting that black voters had taken advantage of, to make it
3 more difficult for black turnout. For example, the early voting hours
4 were cut from 7:00 to 7:00 to 9:00 to 6:00 where black voters could at
5 first, you know, go to vote before they went to work. But in cities
6 like Atlanta and others the traffic will not allow them to vote so
7 they have to take off work in order to vote. When income levels are
8 already lower, it's a financial burden for black voters -- poor black
9 voters and other poor voters.

10 Q. You referenced SB 202. Is that Senate Bill 202?

11 A. Senate Bill 202.

12 Q. Going back to your history with discrimination, in your
13 involvement with civil rights movements, have you ever been involved
14 in any efforts about voting discrimination?

15 A. In terms of lawsuits, no.

16 Q. Whether it be -- I know you came up during a period of
17 segregation.

18 A. Right.

19 Q. Dealing with issues of protests, picketing, related to voting
20 discrimination issues.

21 A. Yes. I mean, that's part of the activism, to speak out against
22 all actions that tend to limit the rights or infringe on the rights of
23 African Americans and other people of color.

24 Q. Do you recall any other types of voting discrimination you've
25 seen during those types of protests?

1 A. Yeah. The removal of -- change of polling places to make it
2 more difficult for blacks to vote in their communities, reduction or
3 the limit of voting facilities within their polling places where black
4 precincts have long wait lines. White precincts you just go into any
5 polling place in a few minutes. Black polling place lines have been
6 up to 8, 10 hours in 2020. Not way back history. I'm talking about
7 in the last couple years. So all of those kinds of activities and
8 limitations have still -- are still in play. In Lincoln County,
9 Georgia, for example, which is east of Atlanta, there was an attempt
10 to change -- to reduce polling places from five to one. There are a
11 myriad of ways all to limit -- I believe and it's indicated by the
12 data -- all to limit black voter turnout which may change the
13 political structure, change political power.

14 Q. Okay. You mentioned methods that had to do with limiting the
15 time polls were open, having long lines, reducing polling locations.
16 Would you describe those as functions of access and convenience?

17 A. Yes.

18 Q. In your experience, have you found those to be common methods of
19 discriminating against certain groups?

20 A. Yes.

21 Q. And do you still see those types of methods used currently?

22 A. Yes.

23 Q. In your work for the NAACP, have you developed the familiarity
24 with Georgia's voting practices and procedures?

25 A. Yes.

1 Q. And what specifically in your work has led you to develop that
2 familiarity?

3 A. Well, I'm a voter myself and based on the calls -- and we get
4 either telephone calls or website or social media -- where people have
5 difficulty and have had difficulty in voting, whether long lines and
6 so forth, I mean, even to the point of changing where nonprofit groups
7 could not offer water or snacks to people who were in line for hours.
8 There's a high incidence of health concerns like diabetes in the black
9 community. Those diabetics need sustenance in order to maintain their
10 strength to be able to stand in the line.

11 Q. Earlier you mentioned Senate Bill 202, I just want to ask you a
12 few more questions about that bill. What aspects of Senate Bill 202,
13 in your view, provide voting practices or procedures that enhance the
14 opportunity for discrimination against black voters?

15 A. Well, I just mentioned the prohibition of groups giving voters
16 water or snacks while they wait in line, the change in the early
17 voting period, the change in the early voting hours, the change in the
18 number of ballot boxes that were implemented in the 2020 election. I
19 think Fulton County went from 30 plus ballot boxes to 8, all of them
20 being inside of the early voting facilities with hours curtailed. So
21 it's like banking hours, 9:00 to 6:00, instead of the entire time of
22 7:00 to 7:00. In 2020 those ballot boxes were actually outside of the
23 polling places which made it more convenient for black voters to cast
24 their ballots. In addition, the change in absentee balloting which
25 has resulted in -- about 50 percent in '21, about 50 percent of

1 absentee ballot applications or ballots themselves were rejected based
2 on the new rules for absentee ballots.

3 Q. Are there any other practices or procedures related to voting in
4 Georgia that you view as enhancing the opportunity to discriminate
5 against black voters?

6 A. Well, SB 202 also changed the state elections committee makeup.
7 It is now -- I think will be 41 Republicans and in Georgia 41
8 Republicans mean 41 antiblack. Also, local boards will change. There
9 used to be a requirement of Democrats and Republicans and maybe a
10 nonpartisan, that has changed. Morgan County right east of Georgia
11 has now -- has an all Republican county elections board. You know, in
12 Georgia there's essentially 159 counties and 159 different elections
13 and so when those local boards have changed, it imperils the propriety
14 of the vote.

15 Q. You mentioned the state elections committee changing. What is
16 your understanding of what the state elections committee is?

17 A. The elections committee basically is sort of an appeal body from
18 any local elections except that it has the power under this new law
19 that it could take over the functions of a local board. And before
20 the Secretary of State, as an elected person, would be the head of the
21 elections board, the state elections board, that is no longer the
22 case. The legislature decides who the election board chair is.

23 Q. And why do you find that change to be important?

24 A. We find that important because in Georgia the ruling party is
25 Republicans who seem to be -- who have demonstrated that this is about

1 maintaining and exercising power versus a democratic process where the
2 peoples' voice is heard and respected.

3 Q. In your work at the NAACP, have you developed an understanding of
4 how the black community continues to bear the effects of past
5 discrimination?

6 A. Yes.

7 Q. What specifically in your work has helped you develop that
8 understanding?

9 A. My connection to the community itself through the various
10 community organizations, churches, my connection to other civil rights
11 organizations and also black fraternities, Masonic lodges, and the
12 information that is exchanged keeps me abreast of any new activities
13 or new then effective new laws that are passed.

14 Q. In your opinion, in what ways do black Georgians continue to bear
15 the effects of racial discrimination?

16 A. Well, first of all, it is a continuing of generational
17 oppression that affects the new generations. In Georgia, for example,
18 the first public school for blacks was not open until 1924, that was
19 Booker T. Washington High School right here in Georgia. So people --
20 so we had a whole generation of uneducated or limited educated
21 Georgians who had limited wealth prospect. Well, that continues to be
22 the case. It continues to affect --

23 In my own case, for example, my mother was a Leflore
24 County, Mississippi resident. There was no opportunity in public
25 school for her to get a public education so she was educated at a

1 private Presbyterian-run board school in West Point, Mississippi, she,
2 her mother, and her female siblings. So that gave me an opportunity
3 to do better than the children of her other Mississippi peers who did
4 not have an opportunity for education.

5 Q. Do you find that there are current economic impacts lingering
6 from past discrimination?

7 A. Yes.

8 Q. What type of economic impacts have you seen and experienced as
9 far as the lingering effects of discrimination?

10 A. Well, in my own practice my client base is African American
11 which has a lower -- which has less access to capital, less wealth,
12 less opportunities, which also reflects on my income potential. I see
13 that as just a fact. I'm sure that small law firms and other black
14 businesses suffer the same effect. In fact, for example, in Georgia,
15 less than 1 percent of state contracts go to black-owned businesses in
16 this state which is a great economic disparity.

17 Q. In your experience, have the lingering effects of racial
18 discrimination affected the black community as far as healthcare?

19 A. Yes.

20 Q. How so?

21 A. First of all, with limited income there is limited disposable
22 income for just general healthcare and so we see that in incidences of
23 diabetes, high blood pressure, access to healthcare. That extends to
24 the placement of hospitals and healthcare facilities. For example, in
25 East Point, Georgia where our office is located a Wellstar facility

1 hospital just closed last month. There was the hospital where my son
2 was born, who will be 40 this year, in southwest Atlanta has been
3 closed for about 35 years. All of those -- income makes a difference.
4 Hospitals and other facilities are closed -- are opened where they see
5 the highest potential for income and if the community's income levels
6 are lower, then they do not remain in those areas and would not open
7 in those areas. It also applies to food. So food obviously impacts
8 health as well where there's swaths in Atlanta in southeast Atlanta
9 where there's only one grocery store where residents can get fresh
10 fruit and fresh vegetables.

11 Q. In your experience, have you seen a lingering effect of racial
12 discrimination on education and employment?

13 A. Yes.

14 Q. How so?

15 A. Well, employment obviously starts with education. Again, in my
16 own experience, I'm a Certified Public Accountant. How I became
17 acquainted with a Certified Public Accountant is that the President of
18 the NAACP branch in Memphis was the only black CPA in the state of
19 Tennessee and I saw him as a role model and pursued this as a
20 profession. So without role models like that, without exposure to
21 different kinds of professions and opportunities, it limits - it
22 limits the aspirations of so many black communities, particularly in
23 inner city areas like South Atlanta High School or Booker T.
24 Washington and so forth.

25 Q. In your opinion, do these lasting effects of racial

1 discrimination in income, healthcare, education, and employment affect
2 the ability of black Georgians to effectively participate in the
3 political process?

4 A. I do.

5 Q. How so?

6 A. Well, in Maslow's Theory of Hierarchy, the basic needs of a
7 person must come first, they have priority. Food, shelter,
8 healthcare, other activities take precedent over. An activity like
9 voting where people do not derive an immediate benefit, there's no
10 bonus for voting. In fact, it is an expense for many. And then to
11 add to it, you know, Georgia, as well as other southern states, have a
12 history of violence perpetrated by the white community against voting
13 and political activities of the black community. So when you add all
14 that together the psychology of oppression greatly affects many in the
15 black community in terms of participating in the voting process in the
16 process of electing its leaders.

17 Q. You mentioned generally that the basic needs come first. In your
18 experience, has that had an effect on the ability of the black
19 community to donate to candidates of its choice?

20 A. Absolutely.

21 Q. How so?

22 A. Well, again, it's about how much marginal income is there in the
23 household and how do you allocate it. As a professional, I can
24 donate. You know, my service in the NAACP is without compensation,
25 but that is not -- that is not rare, but it's not something that

1 happens in effect much in the black community and it goes with
2 politicians. You know, white politicians -- when you look at campaign
3 reports you see routinely white politician 1,000, 2,000, \$3,000 of
4 donations. Black politicians \$50, \$100 and so -- especially in a
5 statewide race, that's why it makes it much more difficult for black
6 politicians to compete because they don't have the resources to run a
7 statewide campaign versus a districted congressional campaign or state
8 representative campaign.

9 Q. You mentioned that your position at the NAACP is a volunteer
10 position?

11 A. Yes.

12 Q. That means you're not paid; correct?

13 A. Correct.

14 Q. I believe you also testified that you're able to do that because
15 financially you can afford to do so?

16 A. Right.

17 Q. In your experience, has there been a connection between
18 socioeconomic status and the ability to volunteer in campaigns?

19 A. Absolutely. Absolutely.

20 Q. How so?

21 A. Particularly if a person doesn't have a college degree, they
22 will be working six days a week and it may be a full-time job and a
23 part-time job so there's not enough hours. You know, the magic bullet
24 number is each of us has 168 hours a week. How do we get to -- how we
25 use those hours is our individual responsibility and sometimes our

1 preference. But if, based on income, people are less likely or less
2 able to offer meaningful volunteer opportunities, to take advantage of
3 meaningful volunteers opportunities.

4 Q. Do you understand what the term "racial appeal" means?

5 A. Yes.

6 Q. Do you think racial appeals are still prevalent in Georgia
7 elections?

8 A. Yes.

9 Q. What's your basis for that opinion?

10 A. Well, the messaging from various campaigns, they absolutely
11 appeal to white voters in a manner to disparage black voters. It was
12 never enough to claim white supremacy, white people just supreme. To
13 add to that, they had to say blacks were lazy, were dishonest, were
14 mean, were violent, were oversexed and so that carries over into the
15 political arena.

16 Q. Why do you think these racial appeals are still prevalent?

17 A. In order to hold onto white supremacy, I guess it becomes
18 necessary to -- it's always to disparage black politicians and blacks
19 in general.

20 Q. Can you describe some of the racial appeals that you have seen or
21 heard in recent Georgia elections?

22 A. Sure. So, for example, there was a -- in Senator Warnock's
23 case, when there was a picture of him, it made him a darker, blurred
24 image and so that's not pleasing to the eye. There were attempts in a
25 campaign against -- actually, in the Senate campaign that Warnock

1 eventually won, there was a Republican candidate, Collins, the
2 Loeffler campaign pictured him with Democrat leaders from across the
3 country and then at the end they showed him with Stacey Abrams.
4 Basically, you know, here's a white guy that's not so good because he
5 associates with a black candidate.

6 There was a race in Sandy Springs for mayor recently
7 where a member of the Atlanta NAACP was a candidate and the fliers
8 showed "Don't bring Atlanta to" -- "Don't make Sandy Springs another
9 Atlanta," and showed blighted housing and other images to associate
10 that Sandy Springs race and that black candidate with what they would
11 look at as black Atlanta and it's routine, it is routine, I think.
12 There was another case, another ad showing Stacey Abrams -- showing
13 new Black Panther organization with Stacey Abrams signs to further
14 disparage her as, perhaps, a member of the new Black Panther Party or
15 anything black.

16 Q. Have you ever seen a racial appeal involving a bus?

17 A. Yes. There was a candidate for governor in 2018 that had a bus
18 painted with -- he was going to pick up illegals. Drive around in the
19 state and pick up illegal criminals, as he called them. Again, it's a
20 racial appeal against brown people who were presumed to be illegal. I
21 mean, you know, America is a multiracial country, but just to presume
22 that if you are a brown person or a black person then you have done
23 something illegal and should be picked up and bussed away.

24 Q. Mr. Rose, you mentioned seeing an ad about the Sandy Springs
25 mayoral candidate.

1 A. Yes.

2 Q. I'm going to show you what has previously been marked as Exhibit
3 PX 14.

4 MS. LaROSS: Excuse me, Your Honor. Pardon me. Just
5 before we get started with this exhibit -- and there's other exhibits
6 in the binder that I suspect that Mr. Rose will be asked about
7 pertaining to racial appeals pertaining to racial appeals and
8 obviously there was a discussion earlier today. Mr. Tyson laid out
9 our position on that kind of evidence and Your Honor mentioned your
10 position on it as well. We would just also add to that as an
11 objection because some of these exhibits -- and I'm sorry to do them
12 *en masse*, but to the extent that the exhibits aren't authenticated as
13 to where they come from, some of them might come from outside of
14 Georgia and not necessarily are from inside of Georgia. I just wanted
15 to get my objection in before we got started so it's noted for the
16 record.

17 THE COURT: All right. We'll take that up when it's
18 tendered. Are you tendering yet or are you still --

19 MR. MORRISSETTE: I'm trying to establish foundation.

20 THE COURT: Go ahead.

21 MS. LaROSS: One more, Your Honor. We have one more
22 objection in terms of relevancy to racial appeal evidence. To the
23 extent that it assumes that every ethnic reference is relevant,
24 regardless of the target, that it's a racial appeal in that sense, we
25 would object to the relevancy of such an appeal.

1 THE COURT: All right. Thank you. Go ahead, Mr.
2 Morrissette.

3 BY MR. MORRISSETTE:

4 Q. Mr. Rose, do you see this image on the first page?

5 A. 14? Yes.

6 Q. Do you recognize this as the ad you had you referenced earlier?

7 A. Yes.

8 MR. MORRISSETTE: I would like to enter into evidence
9 Exhibit PX 14.

10 MS. LaROSS: Your Honor, we've stated all of our
11 objections for the record, I think they apply to this as well. In
12 addition, this does not appear to be a statewide election.

13 THE COURT: All right. I believe the witness testified
14 earlier that in his view this was a racial appeal; correct?

15 MR. MORRISSETTE: Yes.

16 THE COURT: All right. The objection's overruled.
17 It's admitted.

18 BY MR. MORRISSETTE:

19 Q. Mr. Rose, do you remember the name of the mayoral candidate in
20 this ad in this race?

21 A. I do not. I remember the candidate Dante Carter was the black
22 candidate. I don't remember the white candidate who did this.

23 Q. And how are you familiar with Mr. Carter?

24 A. He's a member of the Atlanta NAACP.

25 Q. I'm going to point you to Page 4 of this document. Do you recall

1 seeing this Tweet in late 2021?

2 A. Yes.

3 Q. Who is Greg Bluestein?

4 A. He's a reporter with the *Atlanta Journal Constitution*.

5 Q. How did you interpret this ad when you saw this?

6 A. It was an appeal, a racist appeal, an appeal to white Sandy
7 Springs voters to make sure you vote for a white candidate, a white
8 mayor, against Dante Carter.

9 Q. Do you remember mentioning seeing an ad involving a bus?

10 A. A bus, yes.

11 Q. I'm going to show you what was previously marked as Exhibit PX
12 28.

13 MR. MORRISSETTE: Hold on just a second. I seem to be
14 having problems with TrialMax.

15 (off-the-record discussion)

16 MR. MORRISSETTE: My apologies, Your Honor.

17 BY MR. MORRISSETTE:

18 Q. Mr. Rose, do you recognize this as the ad you referred to
19 earlier?

20 A. Yes.

21 MR. MORRISSETTE: I would like to move into evidence
22 Exhibit PX 28.

23 MS. LaROSS: Your Honor, we'd just note our relevance
24 objections that we've explained and outlaid for the Court through
25 Mr. Tyson and I've mentioned it as well. So our objection is based on

1 relevance as well as hearsay.

2 THE COURT: Overruled. It's admitted.

3 (recording played)

4 BY MR. MORRISSETTE:

5 Q. Mr. Rose, do you know who Michael Williams is?

6 A. He was a candidate for governor. But other than that, huh-uh.

7 Q. Do you recall seeing this ad during that election cycle?

8 A. Yes.

9 Q. How did you interpret it?

10 A. It was a blatant example of racial appeals to gain support of
11 white voters and was -- you know, in looking at that, I thought there
12 was another ad by the current governor, but he used a truck, again, to
13 pick up illegals was his spiel in that ad.

14 Q. Do you recall mentioning a Tweet by Governor Kemp regarding
15 Stacey Abrams and the new Black Panther Party?

16 A. Yes.

17 Q. I'm going to show you what has previously been marked as Exhibit
18 PX 12 and I'm going to point you to the third page. Do you recognize
19 this Tweet to be the Tweet you were referring to earlier?

20 A. Yes.

21 MR. MORRISSETTE: I would like to move into evidence
22 Exhibit PX 12.

23 THE COURT: The Tweet or the article?

24 MR. MORRISSETTE: The Tweet.

25 MS. LaROSS: Your Honor, I'd just note our ongoing

1 relevancy objection and as well I will object as to hearsay.

2 THE COURT: All right. Those objections are overruled,
3 but PX 12 will need to be conformed to include all your Tweet.

4 MR. MORRISSETTE: We'll do that.

5 BY MR. MORRISSETTE:

6 Q. Mr. Rose, do you recall this Tweet prior to filing this case?

7 A. Yes.

8 Q. And how did you interpret this Tweet?

9 A. It is a racial appeal against the candidacy of Stacey Abrams by
10 associating her with what would be the new Black Panther Party, but
11 people remember the Black Panthers of the '60s as a violent group.

12 Q. Do you recall mentioning an ad against Doug Collins showing him
13 with Stacey Abrams?

14 A. Yes. He was candidate for Senator.

15 Q. I'm going to show you what's previously been marked as Exhibit PX
16 30. Mr. Rose, do you recognize that to be the ad you were referring
17 to earlier?

18 A. Yes.

19 MR. MORRISSETTE: Plaintiffs move to enter into
20 evidence PX 30.

21 MS. LaROSS: Your Honor, we have our objections as to
22 relevance for those grounds that we've stated as well as to hearsay.

23 THE COURT: All right. Overruled. It's admitted.

24 (recording played)

25 BY MR. MORRISSETTE:

1 Q. Mr. Rose, do you recall seeing this video prior to this case?

2 A. Yes.

3 Q. Who's Doug Collins?

4 A. Doug Collins, he was a Senator, state Senator, who was a
5 candidate for the United States Senate to fill the unexpired term of
6 Johnny Isakson. That election was last year, 2021. I think this
7 picture was when Stacey Abrams was the minority leader in the House of
8 Representatives, Georgia House of Representatives.

9 Q. How did you interpret this video?

10 A. It was associating Doug Collins with a black person which makes
11 him -- would make him undesirable -- an undesirable candidate for
12 white voters.

13 Q. Do you recall -- who is Kelly Loeffler?

14 A. Kelly Loeffler was appointed. She held the seat after Johnny
15 Isakson retired as an appointment by Brian Kemp.

16 Q. Do you recall if she won this election?

17 A. She did not.

18 Q. How do you feel when you see these types of racial appeals?

19 A. Well, I'm always insulted, but it just reminds me of the work we
20 still have to do in America.

21 Q. Are there any other racial appeals that you recall that we
22 haven't already discussed?

23 A. Yes. Our current governor, Kemp, when he was running he had an
24 ad where -- there was a shotgun. He was in a truck saying he might
25 ride around and pick up illegals. You know, he had some rather

1 explosive-- I think he was going to explode regulations with a
2 shotgun. Of course, you know, when I see a white man with a shotgun
3 it's a menacing kind of image.

4 Q. I'm going to show you what's been admitted as PX 29.

5 (recording played)

6 BY MR. MORRISSETTE:

7 Q. Mr. Rose, is this the ad you were just describing?

8 A. Yes.

9 Q. How did you interpret this ad?

10 A. Again, it's insulting. It is insinuating that anybody that's
11 not white is undesirable.

12 Q. Is there anything else you would like to tell the judge here
13 today to help him decide this case?

14 A. Well, clearly there's been -- the attempt to maintain power has
15 been -- in various techniques and policies have been used to limit
16 black and brown voters power and voting and this PSC election is just
17 but one of them. It is a way that the entire body, the entire state
18 of Georgia, would limit representation of communities that are
19 majority of color and it continues with policies -- as I mentioned,
20 Georgia still celebrates the principles of the confederacy which is
21 white supremacy, which the Civil War was founded and was based on and
22 that the Confederate States of America was founded on. Unfortunately,
23 we can't get past that. There are -- one of the initiatives from
24 Atlanta NAACP was to protest Stone Mountain, the carvings on Stone
25 Mountain, which continue to reinforce racist policies, racist

1 principles, racist actions, racism in general.

2 MR. MORRISSETTE: Thank you, Mr. Rose, and thank you for
3 being here today. I pass the witness.

4 CROSS-EXAMINATION

5 BY MS. LaROSS:

6 Q. I just wanted to check it was still morning. Good morning,
7 Mr. Rose.

8 A. Good morning.

9 Q. It's good to meet you. My name is Diane LaRoss, you and I have
10 not met before. Although I have seen you in the hallways and in the
11 courtroom. As you know, I represent the Secretary of State in this
12 matter and we understand that you are a party in this case; correct?

13 A. Yes.

14 Q. And you're a party in your own name as Mr. Rose; correct?

15 A. Correct.

16 Q. In other words, you're not involved in this lawsuit on behalf of
17 the NAACP; correct?

18 A. Correct.

19 Q. And your testimony here today is based upon your own personal
20 knowledge and some of that may include things you've learned from that
21 role, the roles that you've played, the many roles that you've played
22 in regard to the NAACP. And your testimony, inclusive of that, is
23 based upon your own personal knowledge; correct?

24 A. Correct.

25 Q. And you've not been asked to testify here as an expert on behalf

1 of the plaintiffs; correct?

2 A. Correct.

3 Q. So in your testimony today that then, therefore, your views on SB
4 202 or other -- the racial history, functioning of the PSC, those are
5 all your personal views; correct?

6 A. My personal views based on data and the facts.

7 Q. But, again, you're not hired as an expert to have explored and
8 studied various data and present that kind of testimony to the Court;
9 correct?

10 A. Correct.

11 Q. And you mentioned, I believe, that you've lived in Georgia for
12 51 years, I think?

13 A. I think, yes.

14 Q. I think you said 41, but then you said 51. So somewhere in
15 there; correct?

16 A. 41 was in Fulton County before I lived in DeKalb.

17 Q. And then you were in DeKalb. So you meant your total time living
18 in Georgia was about 51 years?

19 A. Right.

20 Q. Thank you for clarifying that. And when you mentioned -- and I
21 think you said that you had particular experiences while you were in
22 high school, which I don't like to talk about the year I was in high
23 school, but I appreciate that you did, that in the 1960s you were
24 residing in Tennessee at the time; correct?

25 A. Correct.

1 Q. And then you attended college here in Atlanta, Clark College, I
2 believe you mentioned?

3 A. Yes.

4 Q. And that's now Clark University?

5 A. Clark Atlanta University.

6 Q. Okay. So the entire time that you lived in Georgia we won't
7 confine it to Fulton County because you've mentioned you lived in
8 Fulton and DeKalb -- the entire time that you lived in Georgia,
9 throughout that time have you ever been prevented from registering to
10 vote here in Georgia?

11 A. No.

12 Q. Have you ever been prevented from actually voting based upon your
13 race in Georgia?

14 A. No.

15 Q. In your opinion, do black voters tend to vote for candidates
16 affiliated with the Democratic party?

17 A. Lately, yes.

18 Q. And the Public Service Commission is a statewide office; correct?

19 A. Correct.

20 Q. And it's fair to say that on occasion -- I know you testified
21 about this before -- sorry, earlier in your testimony -- but there
22 have been black candidates that have demonstrated an ability -- sorry,
23 demonstrated an ability to be elected to statewide office here in
24 Georgia; correct?

25 A. Yeah. That would be about four or five total in the history of

1 Georgia.

2 Q. As well we've heard testimony - and I know you've been in the
3 courtroom - about black-preferred candidates. Did you hear that term
4 previously in the testimony during the trial?

5 A. I'm sure. And I know that term.

6 Q. And you're familiar with it just because of your personal
7 experience and all of your extensive experience with the NAACP;
8 correct?

9 A. Correct.

10 Q. And there are occasions, are there not, when some black-preferred
11 candidates are actually white; is that correct?

12 A. Yes.

13 Q. So not all black-preferred candidates are black, in other words;
14 is that correct?

15 A. That's correct. For example, Clarence Thomas would not be a
16 black-preferred candidate if he was running in Georgia.

17 Q. Yeah. But there are many white candidates that you would
18 certainly say are not black-preferred candidates; correct?

19 A. Correct.

20 Q. And I'm correct, am I not, that -- and I think you spoke of him--
21 that there has been a black commissioner who was elected to the
22 Georgia Public Service Commission; correct?

23 A. Correct. That would be David Burgess, he was an incumbent. He
24 ran as an incumbent. And speaking of racial appeals, as I recall, his
25 signage did not include his face. It was just David Burgess, Georgia

1 Tech grad, and he was able to win that first election.

2 Q. So, again, he was able to win the election and so is it your
3 testimony that voters had no idea what race he was during that
4 election?

5 A. Some of them did. Not all voters. He did not emphasize that in
6 his race and that happens. You know, one of the first campaigns that
7 I helped with was Marvin Arrington in 1969. He was running for City
8 of Atlanta alderman. So on the north side of town we put Marvin
9 Arrington, Atlanta born, Emory Law School grad to de-emphasize that he
10 was a black candidate. On the south side we included Clark College,
11 Turner High School.

12 Q. You would agree, though, that there are Georgia voters that --
13 let me strike that and start again.

14 You would agree, would you not, that some Georgia
15 voters and there are voters out there that don't necessarily vote
16 along race lines; is that correct?

17 A. I would assume so, I think that's fair to say.

18 Q. And it would be fair to say that would be for both black and
19 white voters; correct?

20 A. Yes.

21 Q. You talked about that you historically voted in primaries and in
22 those primaries you've never voted for a Republican; correct?

23 A. Correct.

24 Q. And certainly you've never voted for a Republican in races for
25 the Public Service Commission; correct?

1 A. Correct. Now, I have voted for a Republican not in a primary.
2 I think the last Republican I voted for was Paul Coverdell who was
3 running for the Fifth District Congress. He's now deceased. Yeah, I
4 voted for him.

5 Q. Uh-huh, yeah. And I think your testimony was earlier, though,
6 typically you vote for folks that are Democrats?

7 A. Yeah. And that's not related to party. It's related to their
8 messaging. If their messaging is racist, whether they're black or
9 white they would not get my vote and that's what we see in Georgia's
10 political climate. They make it clear as some of these -- the
11 commercials we just saw -- they make it clear that they have a racist
12 message, a racist intent in their politics of racism and so of course
13 I would not vote for them.

14 Q. Right. So what you've just explained, then, your vote wouldn't
15 be dependent necessarily on the race of the candidate as much as the
16 messaging and what you perceive to be racially discriminatory
17 messaging; is that correct?

18 A. Yes, and that -- because now, you know, we know the history of
19 Republican -- Lincoln was a Republican, I mean, we understand that.
20 But from a black perspective, that becomes a defensive decision of how
21 to vote. From the white perspective it is racial that turns into a
22 political party and so from the -- so when white Republicans give a
23 racist appeal, the defense is blacks vote against them. So from the
24 black side it's not party. It is defense against racism.

25 Q. Right. Yeah, a defense against what is perceived as racial

1 appeals in a white candidate's campaign, correct, and how that impacts
2 the black voter and the black voters that you have experienced with
3 that you testified about today?

4 A. Yeah. That perception is our reality, yeah.

5 Q. So yeah. Okay. Better said than I could ask a question.

6 It's fair to say that you would personally like to be
7 represented by a Democratic member of the Public Service Commission;
8 correct?

9 A. Not necessarily. Again, I look at -- and blacks tend to look at
10 what the candidates represent, what they purport to represent, what
11 their record has been and, you know, racism is a disqualifier when you
12 look at -- I mean, it's like you wouldn't hire a bank president who
13 was a thief, it would be a disqualifier.

14 Q. So then it would be voting along the lines of the perception of
15 racism; correct?

16 A. That would be -- that would be a disqualifier. Yeah, that would
17 be a disqualifier.

18 Q. Okay. All right. It's fair to say that you believe that none of
19 the current Public Service Commissioners represent your views on
20 utility rate regulation; is that correct?

21 A. That is correct. As demonstrated by the testimony of Chairman
22 Pridemore, I mean, what I heard from her is basically a position of
23 denial and deflection when it comes to racial issues. You know, she
24 said she didn't understand that racism has affected black families and
25 black citizens, you know, which is preposterous to me. But, you know,

1 she uses denial and deflection to deny that racism has had an impact
2 on black families and that seems to be the posture of the current
3 Public Service Commission.

4 MS. LaROSS: I'd just move to strike to the extent that
5 his testimony misrepresents the testimony of Commissioner Pridemore.
6 So to that extent I would have an objection, Your Honor.

7 THE COURT: Overruled.

8 BY MS. LaROSS:

9 Q. Do you believe that any of the commissioners currently sitting on
10 the Public Service Commission represent your views on utility
11 regulations, for example?

12 A. I don't - I don't know. I don't know the answer to that. I've
13 heard that Tim Echols, for example, has made some good remarks about
14 solar power, except that he doesn't extend it to households so I think
15 that -- I think a different perspective, a different conversation,
16 would help the entire Commission to better serve black Georgians.

17 Q. You spoke a bit earlier in your testimony about Senate Bill 202.
18 You're aware, are you not, that SB 202 actually expanded the number of
19 mandatory early voting days by adding a mandatory Saturday to the
20 early voting period; correct?

21 A. Well, that's not quite correct. It did for some counties, but
22 it reduced the days in Fulton County where I live and it reduced the
23 opportunity in Fulton County, also DeKalb, and other metro counties
24 so, you know, your characterization is not true.

25 MS. LaROSS: Okay. Excuse me one moment, Your Honor.

1 BY MS. LaROSS:

2 Q. And you'll agree that SB 202 was in effect, Mr. Rose, during the
3 2022 primary race; correct?

4 A. Correct.

5 Q. And that election had --

6 A. Well, no, that's not true. It also affected local races in
7 2021.

8 Q. Okay. Okay. If we look at the 2022 primary particularly, that
9 election had record voter turnout; did it not?

10 A. Record voter turnout particular in white communities.

11 Q. But overall there was a record voter turnout, you'd agree with
12 that; correct?

13 A. Yeah. Except my focus is on what happens in nonwhite
14 communities and so I've read the reports that there were record voter
15 turnouts, but my problem with SB 202 is that it adversely affected
16 black and brown voters and their access to the polls.

17 Q. So it's your testimony that black and brown voters -- that the
18 number of voters that participated in the 2022 primary did not
19 increase at all; is that right?

20 A. Well, the increase was based on the increase of voters in total,
21 but the percentage of turnout was not increased, and I look at voter
22 turnout in terms of percentage of voters.

23 Q. Okay. So you're looking at percentages, not just numbers?

24 A. Right.

25 Q. So if I told you that the numbers of minority voters that turned

1 out and voted in the primary increased from prior primary elections
2 you wouldn't necessarily disagree with that since you were focusing on
3 percentages; correct?

4 A. Correct.

5 Q. And you would agree that one of the things the Public Service
6 Commission does is sets rates for electricity; correct?

7 A. Correct.

8 Q. As well that the Public Service Commission sets rates for other
9 utilities; correct?

10 A. Correct.

11 Q. I believe you discussed the rates in Georgia and the rates that
12 have been set by the Public Service Commission and that those rates
13 are -- when rates get raised, that's particularly difficult for people
14 of low-income; is that correct?

15 A. Correct.

16 Q. And that's going to impact low-income families regardless of
17 race; correct?

18 A. Correct.

19 Q. And you discussed also access to education, healthcare, even
20 voting, that low-income families have to make a decision about how to
21 distribute or engage their income resources. Have I got your
22 testimony at least a little bit correct?

23 A. Yeah, it's close.

24 Q. It's close, okay. As I said, you may say it better than I. So
25 in that regard the behavior and those issues related that you've

1 discussed in your testimony, one of the primary factors is how much
2 income a family, a household, an individual would have; correct?

3 A. Correct. And, of course, the income is also affected by what it
4 takes to earn that income. As I mentioned, black families, routinely
5 somebody's working two jobs, you know, or even a job and two part-time
6 jobs and so it consumes more than the 168 hours that each of us has in
7 a week.

8 Q. Sure. And you'd agree that for a white family that has the same
9 income level that you're discussing they would be challenged as well;
10 correct?

11 A. Could be, yes.

12 Q. I think you mentioned this in your testimony, but I believe you
13 said that you don't have any specialized knowledge or training about
14 utility rate regulation; correct?

15 A. I do not.

16 MS. LaROSS: Let me just take a moment here.

17 BY MS. LaROSS:

18 Q. You talked about Plant Vogtle as well in your testimony. Do you
19 remember that testimony?

20 A. Yes.

21 Q. Okay. You would agree, would you not, that ratepayers benefit
22 from the production of energy from that plant; correct?

23 A. I wouldn't make that assessment.

24 Q. So your testimony is that ratepayers don't benefit from the
25 energy that's produced by the plant, if I got that correct?

1 A. I mean, obviously it produces electricity, but whether that is a
2 benefit is more of a - more of a difficult question to -- or
3 conclusion to reach.

4 Q. Sure. And have you done any scientific study or studies of the
5 impact of the production of energy from the plant?

6 A. No.

7 Q. You mentioned about Mr. Burgess when he won his election for the
8 Public Service Commission and he was elected as a Democrat; is that
9 correct?

10 A. Correct.

11 Q. Do you recall that Commissioner McDonald used to be a Democrat?

12 A. I don't.

13 Q. Okay.

14 A. But, you know, I tend to -- party policies change, people change
15 parties. It is the candidate that I look at and that voters look at.

16 Q. Sure.

17 A. It's messaging, a candidate's history, the candidate's actions.
18 You know, a lot of -- there have been a lot of party switching. You
19 know, Governor Deal was a Democrat, went to Congress as a Democrat and
20 changed over so that happens.

21 Q. Right. And you've testified with respect to the races for Public
22 Service Commission that you never voted for a Republican; correct?

23 A. Correct.

24 MS. LaROSS: May I take a moment, Your Honor?

25 THE COURT: Yes.

1 MS. LaROSS: Mr. Rose, thank you so much for your time
2 today. We appreciate it.

3 And, Your Honor, I have no further questions.

4 THE COURT: All right. Any redirect?

5 MR. MORRISSETTE: Quickly.

6 REDIRECT EXAMINATION

7 BY MR. MORRISSETTE:

8 Q. Mr. Rose, do you recall opposing counsel asking about your
9 reasoning for voting Democrat?

10 A. Yes.

11 Q. In the last decade has one party in Georgia been associated with
12 preservation of confederate monuments?

13 A. Yes.

14 Q. Which party is that?

15 A. Republican.

16 Q. Do you recall opposing counsel asking you whether low-income
17 whites are just as likely as low-income blacks to be affected by
18 certain issues?

19 MS. LaROSS: Objection, Your Honor. I don't think that
20 characterized my question or his testimony accurately.

21 THE COURT: Overruled.

22 BY MR. MORRISSETTE:

23 Q. In your experience, are white Georgians equally as likely as
24 black Georgians to be low-income?

25 A. No. The poverty rate in black communities is almost 19 percent

1 versus 8 percent for white families.

2 MR. MORRISSETTE: Thank you for being here today.

3 No further questions.

4 THE COURT: All right. Thank you.

5 Mr. Rose, leaving aside the merits of this case, I
6 really appreciate your perspective growing up in the segregated south.
7 Thank you very much.

8 THE WITNESS: Thank you.

9 THE COURT: Let's take our break. Be back at 11:50.

10 (recess taken from 11:35 a.m. until to 11:50 a.m.)

11 THE COURT: Ready for your next witness?

12 MR. SELLS: We do, Your Honor. We are going to call
13 Commissioner Jason Shaw by video deposition. We have the excerpts of
14 his deposition. It's about a half an hour.

15 THE COURT: All right.

16 (deposition of Jason Shaw played)

17 THE COURT: Was he sworn in? Was he sworn in?

18 MR. SELLS: He was, Your Honor.

19 THE COURT: Is that part of the designated transcripts
20 we have here? If not, let's look at that later.

21 MR. SELLS: Okay. We'll confirm.

22 THE COURT: Go ahead.

23 (deposition of Jason Shaw played)

24 MR. SELLS: That's the end, Your Honor. I want to
25 confirm for the record that Commissioner Shaw was sworn. The full

1 deposition appears on the docket at ECF 83-1 and the swearing appears
2 on PDF Page 4 of that deposition.

3 THE COURT: Okay.

4 MR. SELLS: I apologize for not including that in the
5 video snippet.

6 THE COURT: No, that's okay. That raises a good
7 question. For purposes of the record in this trial, I presume is it
8 the entirety of the depositions that you're submitting or is it only
9 the designations?

10 MR. SELLS: My understanding is that it's only the
11 designations because we've only had really an opportunity to argue
12 about objections and so on of the designated portions.

13 THE COURT: Is that your understanding as well,
14 Mr. Tyson?

15 MR. TYSON: It is, Your Honor, and I might suggest one
16 thing. I know that for the Fair Fight Action case when we had videos
17 and designations the clip report that I know the plaintiffs put
18 together that had the kind of relevant sections, we just marked those
19 as exhibits, they were easier to refer to in the record since there
20 wouldn't be a transcript of that. That's something that we could do
21 here that may make it easier for the written record. It's just a
22 thought. I haven't talked about that with Mr. Sells. If we're
23 concerned about the record, that may be the way to handle it.

24 MR. SELLS: Why don't we talk about that over the lunch
25 break. That sounds like a good idea, but I'm not sure exactly what he

1 has in mind.

2 THE COURT: Why don't you talk about that. I think it
3 is a good idea to have something marked that can be referred to in the
4 record and even if it means that, you know, cumulatively the entire
5 designation is one exhibit, that would be fine, too, but it probably
6 makes sense to have that identified in some way.

7 Now, along those lines, though, is it just the
8 transcript and not the actual video that's being submitted or do you
9 wish the video clips to be part of the record as well?

10 MR. SELLS: I think we've been talking about how to get
11 you the video of the designations, but I don't know that we've come up
12 with a solution for that yet. We'll talk about that over lunch as
13 well.

14 THE COURT: All right. And that could be just a thumb
15 drive or some portable media that is submitted to the clerk's office?

16 MR. SELLS: Absolutely.

17 MR. TYSON: Your Honor, I think the only notation on
18 that is we did have objections to certain portions of the designations
19 in the filing. I think the way we did that -- basically Judge Jones
20 is going to rule -- if he needed to rely on a part that was objected
21 to, basically, for his order he would just note that he was overruling
22 the objection and whatever the order was.

23 THE COURT: That was my intent as well and that's what
24 I'll do here.

25 Now, with respect to Mr. Shaw, if you can please amend

1 the designations to include the swearing in portion. I believe the
2 others we have played included that so if we can clean that up as
3 well.

4 MR. SELLS: I think we can do that.

5 THE COURT: All right.

6 MR. SELLS: Thank you.

7 THE COURT: All right. Call your next witness.

8 MR. MARTINEZ: Plaintiffs call Ms. Wanda Mosely.

9 THE COURT: All right.

10 THE CLERK: Please raise your right hand.

11 (witness sworn)

12 THE CLERK: Thank you.

13 THE COURT: Please have a seat, ma'am. Please state
14 your name and spell your last name.

15 THE WITNESS: My name is Wanda Mosely, M-O-S-L-E-Y.

16 DIRECT EXAMINATION

17 BY MR. MARTINEZ:

18 Q. Good morning, Ms. Mosely.

19 A. Good afternoon.

20 MR. MARTINEZ: Your Honor, may I approach with the
21 binder of the exhibits?

22 THE COURT: Yes.

23 MR. MARTINEZ: Ms. Holland, when you have a chance can
24 we switch the system back? Thank you.

25 BY MR. MARTINEZ:

1 Q. Ms. Mosely, what is the name of the organization where you work?

2 A. Black Voters Matter.

3 Q. Is that the same thing as Black Lives Matter?

4 A. No, it is not.

5 Q. Have you ever worked for Black Lives Matter?

6 A. I have not.

7 Q. Have you been a plaintiff in this case since it was first filed
8 in July of 2020?

9 A. Yes.

10 Q. Has Black Lives Matter ever been a plaintiff?

11 A. No.

12 Q. And we'll come back to your work at Black Voters Matter Fund in a
13 minute. Ms. Mosely, where do you live?

14 A. I live in the city of South Fulton.

15 Q. Which county is that in?

16 A. Fulton County.

17 Q. How long have you lived in South Fulton?

18 A. Since 2006.

19 Q. Can you please tell the Court about your educational background
20 after high school.

21 A. Yes. I attended a few colleges while I was trying to figure out
22 what I wanted to be when I grew up. I started at Southern Methodist
23 University in Dallas, Texas. I then transferred back home to the
24 University of Washington for one year and then returned to Texas
25 attending Texas Christian University where I graduated in 1993.

1 Q. What was your degree in at TCU?

2 A. I graduated from the Bob Schieffer School of Journalism majoring
3 in advertising and PR with a minor in English.

4 Q. Were you active in any student groups while you were on campus?

5 A. Yes. I was a member of Delta Sigma Theta sorority as well as
6 President of the Black Student Caucus.

7 Q. What is the Delta Sigma Theta?

8 A. It is a historical African American sorority that is steeped in
9 service and sisterhood.

10 Q. Are you still involved with that sorority today?

11 A. Yes. I'm member of the East Point College Park chapter of the
12 Delta Sigma Theta sorority.

13 Q. You mentioned, Ms. Mosely, the Black Student Caucus?

14 A. Correct.

15 Q. Can you tell the Court what that was.

16 A. It was an organization for black students to gather in
17 fellowship to just create a space for us because we were such a small
18 population at Texas Christian University. We also, from time to time,
19 addressed various issues that we saw happening on campus, as well as
20 worked to create some just fun activities.

21 Q. About what percentage of the student body at TCU was African
22 American when you were there?

23 A. Less than 10, and the majority of that percentage were athletes.

24 Q. Ms. Mosely, do you have any advanced degrees?

25 A. I have a certificate in screenwriting from UCLA and I just

1 recently received an executive certificate from Babson College in the
2 area of entrepreneurial leadership.

3 Q. We talked briefly about your work -- or the fact that you work at
4 Black Voters Matter Fund. Can you please tell the Court what Black
5 Voters Matter Fund is.

6 A. At our core we are a power-building organization. We work with
7 black-led organizations primarily in rural areas to help build
8 infrastructure.

9 Q. When you say that Black Voters Matter Fund is a power-building
10 organization, what do you mean by that?

11 A. We believe that in this day and time black people, black voters,
12 need to have an opportunity to build power to gain self governance, to
13 reduce harm reduction, to have a say in the political process, to have
14 a say in how our communities are governed and we believe that all of
15 those things are, you know, under the umbrella of power and we believe
16 that voting is one way to build power and electoral power is needed at
17 this time for black people.

18 Q. Is Black Voters Matter Fund involved in educating members of the
19 community about certain issues?

20 A. Yes, that is correct.

21 Q. And what are those sorts of issues that your organization is
22 involved in educating members of the community?

23 A. It's a variety of issues, most of which are raised by the
24 community. So it can be voting rights, it could be criminal justice
25 reform, access to healthy food, high utility bills, environmental

1 justice.

2 Q. How does Black Voters Matters Fund educate issues in the
3 community it serves?

4 A. All types of ways. We sometimes hold community forums, town
5 halls, sometimes we engage folks through social media, ads, texting.
6 There are any number of ways that we engage black voters. I think
7 it's important to note that we directly engage, but for the most part
8 we work with members of the community. These are folks who are
9 considered to be parts of grassroots organizations, which means
10 they're very local, low-level, not necessarily sophisticated, big
11 organizations, but just a group people in the community who gather
12 together to work to better their circumstances in their community.

13 Q. In what city is Black Voters Matter Fund based?

14 A. Atlanta.

15 Q. Is it a nonpartisan organization?

16 A. Yes. Nonpartisan nonprofit.

17 Q. Does it ever endorse political candidates for office?

18 A. The Black Voters Matter Fund does not endorse candidates.
19 However, Black Voters Matter Action PAC works to create independent
20 expenditures in support of candidates, but not in coordination with a
21 candidate or a candidate committee.

22 Q. How long have you worked at Black Voters Matter Fund?

23 A. Since 2018.

24 Q. And what is your -- well, I'll ask you. What titles have you
25 held at that organization over the years?

1 A. When I started in 2018 I was the State Coordinator in Georgia.
2 The following year promoted to Senior State Coordinator in Georgia and
3 in 2021 promoted to National Field Director.

4 Q. Can you tell the Court what your responsibilities were as the
5 Senior State Coordinator for the state of Georgia at Black Voters
6 Matter Fund.

7 A. Yeah. Simply put, to organize Georgia, which meant to outreach
8 black voters, black communities, primarily in rural areas, again, with
9 the goal in mind to build power through electoral spaces and build
10 infrastructure and provide an outlet for organizations and community
11 leaders to work in these spaces that maybe they hadn't worked in
12 before or they desire to work in in terms of voter registration, voter
13 education, community types of events, yeah.

14 Q. So you were involved as Senior State Coordinator for the state of
15 Georgia in organizing communities and doing outreach throughout the
16 whole state?

17 A. Correct. I had a very specific targeted area, but there are
18 times when folks in areas that weren't in the target would contact us
19 and we never turned people down.

20 Q. I think you mentioned that your work was primarily in rural
21 communities?

22 A. Correct.

23 Q. What are some of those communities?

24 A. Oh, there are a lot of them. In the eastern part of the state
25 areas around Richmond County, which is Augusta, Savannah area; south

1 coastal area, Brunswick, Glynn County; central middle Georgia, Macon,
2 Bibb, down through areas like Lawrence, Coffee, Lanier; southwest
3 Georgia from Muscogee County down through Randolph, Carroll, Dawson;
4 counties that border Florida, Thomas, Grady, Lowndes. So a good part
5 of the state. I would say I-20 south.

6 Q. Are many of those counties and communities you just mentioned
7 heavily African American in population?

8 A. Yes. The majority of the work are in heavily populated by
9 African American citizens.

10 Q. Has your work at Black Voters Matter Fund helped provide you an
11 understanding of the issues that are important to the black community
12 in the state of Georgia?

13 A. Yes.

14 Q. What were some of those issues that you're hearing from the black
15 communities that you were serving?

16 A. A desire to have true criminal justice reform, access to
17 healthcare, affordable living wages, affordable housing, environmental
18 justice, and specifically high utility bills.

19 Q. You mentioned high utility bills. Can you give me an example of
20 some of the discussions or outreach that you did over that issue?

21 A. Yes. The work with high utility bills first came to my
22 attention in early 2019 on a Zoom call with these partisan
23 organizations, these grassroots leaders just talked about the
24 different, you know, things that we would focus on in a municipal
25 election here and someone in Albany, the city of Albany, named Pinky

1 Modesti (phonetic) is her name, she mentioned high utility bills. I
2 live in Atlanta so, relatively speaking, I asked her to provide me
3 more details. I have an idea of what a high bill in Atlanta is, but
4 not necessarily Albany. She said people have utility bills that
5 sometimes can get up to a thousand dollars.

6 Q. A thousand dollars a month?

7 A. A thousand dollars a month.

8 MR. JACOUTOT: Your Honor -- I'm sorry, go ahead. It
9 looked like you were about to say something.

10 THE COURT: No.

11 MR. JACOUTOT: I'd move to strike that portion of the
12 answer, it relies on hearsay.

13 THE WITNESS: I have copies of bills.

14 THE COURT: Overruled.

15 MR. MARTINEZ: It's okay.

16 BY MR. MARTINEZ:

17 Q. Why were you doing outreach in Albany about issues related to
18 high utility bills?

19 A. So the outreach in Albany was again to build infrastructure and
20 also to expand the electorate and also to build power and so the way
21 that our organization works is we don't just go to neighborhoods
22 asking people to vote. We talk about the issues that are important
23 and the changes they want to see in their community and so that's how
24 the issue of the high utility bills was raised.

25 Q. Did you organize any town halls in Albany where the issue of high

1 utility bills was discussed?

2 A. I did. The first town hall I attended, I believe it was in
3 March of 2019, I did not organize. I was invited to attend. During
4 that event, that's where residents brought their actual utility bills.
5 A few folks actually gave me their bills and asked me to take them
6 back to Atlanta to show to other people because they felt that, you
7 know, no one cared, no one, you know, responded to their pleas for
8 assistance in reducing these bills. And then subsequently after that
9 event I was involved with other residents in the area to organize
10 events and town halls.

11 Q. What was the racial makeup of the town hall you attended in
12 March 2019?

13 A. It was 100 percent black.

14 Q. Ms. Mosely, I heard you use the phrase "expand the electorate" as
15 part of the work that you do. What does that mean?

16 A. So our organization does a lot of work in civic engagement and
17 we know that there are concerted efforts, we believe, to suppress
18 votes of black voters in this state and so as part of our work we want
19 to make sure that everybody, every black voter especially, has access
20 to be able to vote free of barriers, free of systemic issues.

21 Q. And briefly can you describe what sorts of measures, in your
22 view, amount to voter suppression against the black community in
23 Georgia?

24 A. There's a lot. There are laws that are passed that we believe
25 specifically target black voters. There's a fair amount of

1 intimidation that exists when we talk about elections throughout our
2 state. And then, you know, there's just sort of a culture, a belief
3 that, you know, stokes fear amongst black voters, but specifically the
4 voter suppression we believe to be systemic in nature and also appears
5 in actual legislation in our state.

6 Q. I believe you mentioned that you have since been promoted to
7 National Field Director. In that role, are you still involved with
8 the state of Georgia?

9 A. I am still involved in the state of Georgia, yes.

10 Q. And in that role have you engaged with the black community about
11 issues relevant to the 2022 election cycle?

12 A. Yes, that is correct.

13 Q. What are some of the those issues you've engaged the community
14 on?

15 A. So there is a concern since the passing of Senate Bill -- was it
16 202? I lose track of all the numbers. We just refer to it as the
17 voter suppression bill. There are concerns about the elimination of,
18 you know, Sunday voting in some places. There are concerns about the
19 removal of drop boxes and the change in the timeframe by which
20 citizens can access those drop boxes. There are concerns about
21 criminalizing volunteers at polling precincts. So things, like, you
22 know, being able to offer comfort to people who are standing in line
23 in the form of a snack or a bottle of water. There are just concerns
24 about the disparities between, you know, the polling precincts on the
25 north side of town and the polling precincts on the south side of town

1 that is predominantly black.

2 Q. Do these voting practices you just described enhance the
3 opportunity for discrimination against black citizens in Georgia?

4 A. I believe they do, yes.

5 Q. Ms. Mosely, where did you work prior to Black Voters Matter Fund?

6 A. I worked at the New Georgia Project.

7 Q. What is the New Georgia Project?

8 A. It is a nonprofit nonpartisan civic engagement organization
9 aimed to register voters and increase voter turnout amongst
10 communities of color.

11 Q. When did you start at the New Georgia Project?

12 A. I began as a contractor in late 2014, which that contract ended
13 with the election that year, and then I returned working full time in
14 2015, the beginning of the year.

15 Q. So is it fair to say that you spent the last seven or eight years
16 of your career working for civic engagement nonprofits?

17 A. That is correct.

18 Q. Where did you work prior to doing civic engagement work full
19 time?

20 A. I worked for a company called R my Cointreau USA.

21 Q. Was that in the private sector?

22 A. It is private sector.

23 Q. So what made you leave the private sector to do the type of work
24 that you do today?

25 A. A number of reasons. You know, sales and marketing can be fun,

1 but after a while it gets a little tiresome, I guess. It definitely
2 wasn't a challenge. I just felt like there was, I don't know, a
3 greater calling, something, you know, for me to do that would be more
4 fulfilling and so that's when I actually went to school and got the
5 degree in screenwriting.

6 Q. Do you have leadership roles with any other nonprofit
7 organizations?

8 A. I am the founder of a nonprofit organization called My Vote
9 Matters.

10 Q. What is My Vote Matters?

11 A. It's a nonpartisan organization that I started in 2017. During
12 my work at the New Georgia Project we did a lot of get-out-the-vote
13 work and I noticed that some of my neighbors weren't registered and
14 weren't voting and so I wanted to create an outlet so that I could
15 focus more on my own neighborhood and increasing civic awareness.

16 Q. You mentioned that increasing black voter registration in Georgia
17 is an important focus of the work you have done. Why do you think it
18 is important to increase black voter turnout in Georgia?

19 A. I think it's important to increase civic engagement all across
20 our state. I think that everybody should have an opportunity to
21 participate in this democracy if it is truly going to be a democracy.
22 If a large or even small portion of the population is denied that
23 opportunity, then I don't think that democracy is working as it was
24 intended.

25 Q. Because of the work that you do with voter registration, are you

1 familiar with the turnout rates of voters by race in the state of
2 Georgia?

3 A. Somewhat, yes.

4 Q. Okay. How does black voter turnout in Georgia statewide compare
5 to white voter turnout?

6 A. It's lower.

7 Q. Do you have a view as to why that is?

8 A. I think there are a number of reasons why. I think one that
9 isn't talked about as much, but my colleague Richard Rose did touch on
10 it earlier, are the economic impacts. We live in a state where I
11 guess, depending on who you ask, the minimum wage is \$7.50 an hour or
12 \$5.15 an hour. So when you overlay that with the circumstances that
13 create long lines at polling precincts, things like not having enough
14 poll workers at a precinct, not having power cords, not having the
15 keycards to activate the machines, having workers who haven't
16 adequately been trained, these long lines of seven, six, five, nine
17 hours are literally creating a barrier where some voters cannot afford
18 to vote because if I'm in line for seven hours, I traveled 20 or
19 30 minutes to and then another 30 minutes from, I've missed a whole
20 day's worth of wages, in addition to the economics, you know, my
21 quality time with family just being home doing other things. So it's
22 a tremendous burden on a big portion of our population, in my opinion.
23 MR. MARTINEZ: I see we have about 5 minutes until
24 lunch.

25 THE COURT: Is this a good time to break?

1 MR. MARTINEZ: I think this is probably a good time to
2 break.

3 THE COURT: All right. Let's do that and we can take a
4 few minutes extra, since you told me that we're okay on time, and be
5 back at 2:00 o'clock.

6 (recess taken at 12:55 p.m.)
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

RETRIEVED FROM DEMOCRACYDOCKET.COM

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF GEORGIA

3 CERTIFICATE OF REPORTER

4
5 I do hereby certify that the foregoing pages are a true and
6 correct transcript of the proceedings taken down by me in the case
7 aforesaid.

8
9
10 This the 29th day of June, 2022.

11
12
13 /S/ Alicia B. Bagley
14 ALICIA B. BAGLEY, RMR, CRR
15 OFFICIAL COURT REPORTER
16 (706) 378-4017
17
18
19
20
21
22
23
24
25