No. 25-10114-H

In the

United States Court of Appeals

for the Eleventh Circuit

Brionté McCorkle, *et al.*,
Plaintiffs-Appellants,

v.

Secretary of State of Georgia,
Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.
No. 1:24-cv-03137-WMR — William M. Ray, Jr., *Judge*

RESPONSE IN OPPOSITION TO TIME-SENSITIVE MOTION FOR INJUNCTION PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

INTRODUCTION

Georgia enacted a statute to correct the timing of elections for its Public Service Commission. That statute was necessary because a federal district court erroneously enjoined multiple elections—at Plaintiff-Appellant McCorkle's request. This Court reversed the district court and lifted the injunction, meaning that Georgia *had* to do something to address the situation. It chose the reasonable approach of re-aligning elections so that Commission members are once again elected on a staggered basis, as Georgia law calls for. McCorkle—who precipitated the need for this by pushing erroneous legal theories in the first place—now argues that this Court must grant emergency relief to enjoin a state statute that supposedly violates Georgia's Constitution. It does no such thing, but the more important point is that this Court certainly should not grant emergency relief.

In 2020, McCorkle sought to eliminate statewide elections for Georgia's Public Service Commission. When she succeeded at trial, the district court's injunction cancelled general elections for those offices in 2022 and 2024. After this Court reversed that decision, the Georgia General Assembly passed a law to ensure that Commission elections could resume on a schedule that protected state interests. The law sets a series of staggered

elections to replace the elections that were not held in 2022 and 2024: (1) elections in 2025 for seats that would have been up for election in 2022, (2) elections in 2026 for seats that would have been up for election in 2024, (3) elections in 2028 for the seats that would have been up for election in 2026. Under the provisions, elections then continue on the original six-year track after that.

McCorkle and a group of Plaintiffs filed this case, seeking to alter Georgia election laws again. They want to vote for *three* Commission seats in 2025 instead of the General Assembly's chosen solution of having an election for *two* seats in 2025. That is the sole issue on which McCorkle and the other Plaintiffs file this motion for injunction pending appeal. The district court carefully considered the arguments offered by Plaintiffs, including the impact of this Court's past decisions, and rejected their attempt to further amend Georgia election laws.

Even if there were something to Plaintiffs' case—and there decidedly is not—granting an appellate injunction mere months before early voting begins is nowhere close to justified. *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Simply put, there is no basis to grant the extraordinary relief Plaintiffs seek here. Plaintiffs' meritless appeal of the district court's motion to dismiss should proceed on a regular course.

FACTUAL BACKGROUND

A. Procedural background of the *Rose* case.

In *Rose v. Raffensperger*, Case No. 1:20-CV-02921-SDG (N.D. Ga.), in 2020, the plaintiffs (including McCorkle, a Plaintiff-Appellant here) claimed the statewide method of election for Georgia's Public Service Commission violated the Voting Rights Act. Following a trial on the merits, the district court found for the plaintiffs and enjoined the 2022 elections and all future elections for the Commission. *Rose v. Raffensperger*, 619 F. Supp. 3d 1241, 1272 (N.D. Ga. 2022).

This Court reversed in 2023. *Rose v. Raffensperger*, 87 F.4th 469 (11th Cir. 2023). But while Plaintiffs petitioned for certiorari, a judge of this Court withheld issuance of the mandate, so the district court's post-trial injunction remained in place through the start of the 2024 election cycle. *Rose* 11th Cir. (No. 22-12593) Docs. 64, 65. This Court later *sua sponte* lifted the district court's injunction. *Rose* 11th Cir., Doc. 68. After the U.S. Supreme Court denied Plaintiffs' petition for certiorari and this Court denied rehearing, the mandate issued to the district court. *Rose v. Raffensperger*, 144 S. Ct. 2686 (2024); *Rose v. Sec'y of State of Ga.*, 107 F.4th 1272 (11th Cir. 2024).

B. Election processes and the legislative changes.

While the court process was advancing, the State of Georgia acted in response to the various orders. The Georgia General Assembly passed legislation during its 2024 regular legislative session setting a new schedule to restart and re-stagger Commission elections, ensuring the state's policies of statewide elections and staggered terms were followed. *See* 2024 Ga. Laws Act 380 (HB 1312) (portions codified at O.C.G.A. § 46-2-1.1), Doc. 1-1; *see also* Doc. 1 at ¶¶ 29–34. The policy of staggered elections was longstanding: Georgia has not had an election in more than 30 years in which more than two Commissioners were on the general-election ballot at the same time. Doc. 13-1 at ¶ 19. The legislature chose to incur the significant cost of a statewide special election in 2025 to ensure that all Commission elections return to their normal six-year tracks by 2028. Doc. 13-1 at ¶¶ 16–18.

Under the legislation, the terms are handled as follows, showing a mix of election dates to ensure the state interest of staggered terms and avoiding a majority of the Commission on the ballot at the same time:

District	Incumbent	Most recent prior election	Next general election without *Rose* injunction	Next general election under HB 1312	Next general election after election set by HB 1312
1	Jason Shaw	2020	2026	2028	2034
2	Tim Echols	2016	2022	2025	2030
3	Fitz Johnson	Appointed 2021	2022 (special)/ 2024 (regular)	2025 (special) / 2026 (regular)	2032
4	Lauren "Bubba" McDonald	2020	2026	2028	2034
5	Tricia Pridemore	2018	2024	2026	2032

Plaintiffs disagree with this approach and proposed modifying the terms in a way more to their liking, which results in three incumbents standing election at the same time in 2025. *See* Doc. 2 at 10. And Plaintiffs' proposal to the district court would result in the individuals elected to Districts 2 and 5 serving terms shorter than six years from the date of their next election—which is precisely what HB 1312 addresses for Districts 2 and 3. Their proposal also failed to address the fact that the Commissioner from District 3 was originally appointed to an unexpired term.

C. Proceedings below.

Plaintiffs filed this case on July 17, 2024, including a motion for preliminary injunction. Docs. 1, 2. In less than a week, the district court scheduled a status conference to discuss the case. Doc. 6.

The district court then held the status conference on July 30, 2024, less than two weeks after Plaintiffs filed their Complaint. The district court immediately recognized that the case contained "irony" because "it is the delay caused by the litigation brought by Ms. McCorkle and her colleagues that … resulted in the election not occurring in 2022." Doc. 17 at 5.

The district court set a schedule that was agreeable to Plaintiffs on briefing a motion to dismiss and response to the preliminary injunction that would result in complete briefing by early September 2024. *See* Docs. 11, 17 at 41–45. The district court also advised Plaintiffs that they had the option to request an evidentiary hearing after they reviewed the Secretary's briefs responding to their motion for preliminary injunction. Doc. 17 at 44. Plaintiffs never did so.

At the status conference, the district court also flagged Plaintiffs' delay in bringing this case, because they had known since the spring of 2024 (when the General Assembly passed HB

1312) about the Commission election schedule, but waited to seek emergency relief for the 2024 election until July. Doc. 17 at 27–30.

Following the status conference, the briefing continued until the final reply was filed on September 9, 2024. Doc. 16. Plaintiffs never requested an evidentiary hearing. Instead, they waited until November 25, 2024 (the Monday before Thanksgiving), to make their first request to the district court regarding the status of the ruling on their motion for preliminary injunction. *See* Motion, Tab E. The courtroom deputy responded that the district court would rule in either December 2024 or January 2025. *Id.*

The district court then granted the Secretary's motion to dismiss on January 13, 2025, and denied the motion for preliminary injunction as moot. Doc. 20. Plaintiffs appealed and this motion followed.

D. Standard of review.

As Plaintiffs recognize, "[a]n injunction pending appeal is an 'extraordinary remedy.'" *State of Fla. v. Dep't of Health & Hum. Servs.*, 19 F.4th 1271, 1279 (11th Cir. 2021) (quoting *Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000) (en banc)); Motion at 9. And due to the "drastic" nature of this remedy—especially after the district court denied the requested

injunction—this Court "may not enter one 'unless the movant clearly establishe[s] the burden of persuasion as to each of the four prerequisites.'" *Id.* (quoting *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc)):

> [T]he petitioners must show: (1) a substantial likelihood that they will prevail on the merits of the appeal; (2) a substantial risk of irreparable injury to the [movants] unless the injunction is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest.

Touchston, 234 F.3d at 1132.

And this is not an easy task. For the first prong, "[i]t is not enough that the chance of success on the merits be better than negligible." *State of Fla.*, 19 F.4th at 1279 (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). When evaluating whether Plaintiffs can show a likelihood of success on the merits, they must be "likely to be able to show that the district court *abused its discretion* in denying a preliminary injunction." *Id.* (emphasis added). And on the second prerequisite, "it is not enough simply to 'show[ ] some possibility of irreparable injury.'" *Id.* (quoting *Nken*, 556 U.S. at 434–35).

Finally, "preliminary injunctions of legislative enactments" like HB 1312 are only granted "reluctantly and only upon a clear

showing that the injunction before trial is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts." *United States v. Alabama*, 443 F. App'x 411, 420 (11th Cir. 2011) (quoting *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir.1990)).

SUMMARY OF ARGUMENT

McCorkle's failed efforts to alter the statewide character of the Commission directly led to the cancellation of multiple elections. After this Court reversed the erroneous district court injunction, the Georgia General Assembly set about designing a solution to re-stagger elections, recognizing the longstanding state policy against having a majority of the Commission stand for election at the same time. Plaintiffs do not like this chosen solution and seek to impose their preferred policy to undo the problems she created. But they can satisfy none of the required factors.

Plaintiffs are not likely to succeed on the merits. Indeed, Plaintiffs cannot show they have a legally cognizable injury for purposes of Article III—the organizations do not claim any injury and all McCorkle can point to is a generalized grievance common to all Georgia voters. Even if they had an injury, Plaintiffs cannot

turn a state-law claim into a federal one by relying on substantive due process, because there is no violation of the U.S. Constitution when a state reschedules elections in response to a federal court injunction. And even if this Court considers the state law issues, Plaintiffs are wrong there too: HB 1312 complies with the Georgia Constitution and precedent regarding vacancies. None of the cases Plaintiffs rely on, which involved *state officials* cancelling elections, apply when a *federal court* cancels elections.

The remaining factors also weigh against granting the extraordinary remedy of an injunction pending appeal. There is no irreparable harm to any Georgia voter, all of whom will be able to vote in 2025 and 2026 for positions on the Commission. And the equities and public interest both favor following the General Assembly's chosen solution to a unique situation created by a federal court injunction.

Finally, despite the nearness of the upcoming elections, Plaintiffs do not attempt to address the impact of *Purcell*, 549 U.S. at 1. There is no justification for upending Georgia's election laws at this late hour.

ARGUMENT

I. Plaintiffs are not likely to succeed on the merits of their appeal.

A. Plaintiffs have failed to state a claim for relief because the district court correctly determined it lacked jurisdiction to hear Plaintiffs' claims in the first place.

"Federal courts are not 'constituted as free-wheeling enforcers of the Constitution and laws.'" *Wood v. Raffensperger*, 981 F.3d 1307, 1313 (11th Cir. 2020) (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (en banc)). Federal courts require that plaintiffs demonstrate "(1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision.'" *Id.* at 1314 (quoting *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020)). The district court correctly decided that Plaintiffs failed to satisfy even the first element of this standard because "the impact on [Plaintiffs] is plainly undifferentiated and common to all members of the public." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575 (1992) (quoting *United States v. Richardson*, 418 U.S. 166, 176-77 (1974) (internal alterations and quotations omitted)); Doc. 20 at 10.

1. The district court correctly found the organizational plaintiffs make no allegations of an injury.

There are three plaintiffs listed in the complaint: McCorkle and two organizations. Doc. 1 at ¶¶ 5–7. But the district court correctly found that neither organization alleged any injury to itself or any members, and thus neither had organizational or associational standing. Doc. 20 at 12; *see* Doc. 1 at ¶¶ 6–7. Plaintiffs do not assert the organizations have standing. Motion at 21–22.

2. The district court correctly determined that McCorkle alleged only a generalized grievance.

That leaves McCorkle, whom the district court found failed to allege she had been injured in a particularized way. Doc. 20 at 10–11. This is correct because an injury in fact is "an invasion of a legally protected interest that is both concrete and particularized…" *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020). Plaintiffs double down on that argument here—explaining the nature of their grievance as "McCorkle and *millions of Georgia voters*… will miss an opportunity to vote in a special election for one [Commission] seat in 2025." Motion at 24 (emphasis added).

Contrary to Plaintiffs' claims, this was not enough to invoke the district court's jurisdiction because "a generalized grievance, 'no matter how sincere,' cannot support standing." *Wood*, 981 F.3d at 1314 (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013)); Doc. 20 at 10–11. In that case about election administration, the plaintiff alleged only a generalized grievance, which was "undifferentiated and common to all members of the public." *Id.* at 1314 (quoting *Lujan*, 504 U.S. at 575). Ultimately, this Court held that "Wood cannot explain how his interest in compliance with state election laws is different from that of any other person." *Id.* That was enough to defeat Wood's claim of standing and it is no different than McCorkle here, especially when she admitted that Commission elections affect "all Georgia voters." Doc. 1 at ¶ 11; Motion at 24 (referring to "millions of Georgia voters" affected by HB 1312); *see also Food and Drug Administration v. Alliance for Hippocratic Medicine,* 602 U.S. 367, 382 (2024) ("Article III standing screens out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular government action."). The district court correctly determined that it lacked jurisdiction to hear McCorkle's claim because she has no particularized injury. Doc. 20 at 10–11. And *Gonzalez* does not change that outcome because there is no fundamental unfairness

involved. *See* Section I. E. *below*. This Court can deny Plaintiffs' motion on that basis alone.

B. There is no substantive due process violation here, regardless of any provision of Georgia's constitution or laws.

Plaintiffs wildly overstate existing law when they claim that state officials violate the U.S. Constitution when they violate state laws related to elections. Motion at 19. And this Court should emphatically reject Plaintiffs' attempt to transform a purely state-law claim into a federal case.

This Court has held that a federal due process claim under the Fourteenth Amendment can arise from "the *disenfranchisement* of a state electorate in violation of state election law." *Duncan v. Poythress*, 657 F.2d 691, 699 (5th Cir. 1981) (emphasis added). But there is no federal due process violation for "garden variety" claims relating to the administrative details of an election that do not result in patent and fundamental unfairness. *See Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1986).

When dealing with substantive due process, the "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115,

125 (1992). But whatever standard is applied, the district court correctly held that Plaintiffs failed to state a claim; their claims do not rise to the level of a federal claim at all, much less a constitutional violation. Doc. 20 at 12–15. Unlike *Duncan*, this is not a situation where "public officials [] disenfranchise[d] voters in violation of state law so that they may fill the seats of government through the power of appointment." 657 F.2d at 704; *see also* Doc. 20 at 14 (distinguishing *Duncan*). Nor is it a situation of a "total and complete disenfranchisement of the electorate as a whole." *Bonas v. Town of North Smithfield*, 265 F.3d 69, 75 (1st Cir. 2001). Instead, it is far more like a challenge to the "counting and marking of ballots," *Curry*, 802 F.2d at 1316 (quoting *Duncan*, 657 F.2d at 703), because it involves *when* elections will be held for *particular* seats on the Commission after a federal court cancelled elections—not whether those elections will be held at all. Doc. 20 at 13–14.

Remember: Georgia *had* to do something to fix the problems created by the erroneous injunction that McCorkle herself sought. That Plaintiffs would simply like a different solution is the furthest thing from a federal constitutional violation.

The district court correctly concluded that the legislature's response to the highly unusual situation involving Commission

elections—which was only brought about thanks to a federal court's error—"does not constitute a deprivation of the right to vote." Doc. 20 at 14. As a result, Plaintiffs' motion does not implicate any fundamental unfairness in Georgia elections. Instead, Plaintiffs are attempting to take a claim about the proper application of a *state* constitution to *state* law and turn it into a violation of the U.S. Constitution. Even if Plaintiffs are correct about Georgia law—and they are not—they cannot manufacture a federal claim merely by invoking substantive due process. As a result, Plaintiffs cannot show any likelihood of success on the merits.

C. This Court should not consider the state-law issues on which there is no ruling from the district court.

In their effort to force a state claim in federal court, Plaintiffs root their likelihood-of-success analysis in the concept that voters will be "disenfranchise[d]" under the current schedule of elections and that HB 1312 violates Georgia law. Doc. 2 at 6–7, Motion at 19–20. But the district court refused to consider the questions of state law presented by Plaintiffs here. Doc. 20 at 8–9. As a result, there is no decision on those issues and this Court "generally 'will not consider issues which the district court did not decide.'" *MSP Recovery Claims, Series LLC v. Metro. Gen. Ins.*

Co., 40 F.4th 1295, 1306 (11th Cir. 2022) (quoting *McKissick v. Busby*, 936 F.2d 520, 522 (11th Cir. 1991)).

The district court was correct to refuse to consider the state-law questions raised by Plaintiffs. Not only did it lack jurisdiction, as discussed above, but it correctly recognized that there is no substantive due process violation when a State must act in response to a federal court injunction prohibiting the holding of elections—especially when McCorkle caused the elections to be cancelled in the first place. Doc. 20 at 12–15.

D. If this Court considers the state law questions at issue, HB 1312 complies with the Georgia Constitution.

If the district court had reviewed the state law issues Plaintiffs raise, it would have concluded that HB 1312 complies with the Georgia Constitution. The Georgia Constitution provides that the "manner and time of election of members of the [Public Service C]ommission shall be as provided by law." Ga. Const. Art. IV, § I, Para. 1(c).

Under Georgia law, when a federal-court injunction prevents the holding of elections for a state office, there is no vacancy created in the office when no election is held. *Garcia v. Miller*, 261 Ga. 531, 531–32 (1991). Like *Rose*, *Garcia* involved the

cancellation of elections during VRA litigation. 261 Ga. at 531. A voter filed a *quo warranto* action, claiming a judge had served beyond his four-year term under the Georgia Constitution, but the Supreme Court of Georgia concluded there was no vacancy. *Id.* at 532.

The Georgia Constitution likewise provides that Commission "[m]embers shall serve until their successors *are elected and qualified*." Ga. Const. Art. IV, § I, Para. 1(a) (emphasis added). And as a matter of state law, state officers "shall discharge the duties of their offices until the successors are commissioned and qualified." O.C.G.A. § 45-2-4; *see also Kanitra v. City of Greensboro*, 296 Ga. 674, 676 (2015); *Clark v. Deal*, 298 Ga. 893, 897 (2016).

Thus, under Georgia law, there is currently no vacancy in any position on the Commission that would require the immediate elections Plaintiffs claim are necessary. With two general elections cancelled and the injunction lifted, the State of Georgia had to find a solution that "preserve[d] the state's interest in ensuring that members of the commission are elected in staggered elections and serve staggered terms." O.C.G.A. § 46-2-1.1(a). That solution was HB 1312, which fully complies with Georgia law.

Commissioners serve staggered terms and have for decades. Doc. 1 at ¶ 11, Motion at 21; Doc. 20 at 2; Doc. 13-1 at ¶ 19. HB 1312 preserves staggered terms, treats incumbent commissioners similarly, and restores the regular rhythm of six-year-term elections, at the price of expensive statewide special elections in 2025. Doc. 13-1 at ¶¶ 16–18. That is consistent with the Georgia Constitution's grant of power to set the manner and time of elections for the Commission to the Georgia General Assembly. Ga. Const. Art. IV, § I, Para. 1(c); *see also* Doc. 20 at 11 (noting goal of re-staggering terms).

HB 1312 does not alter the Georgia Constitution as Plaintiffs suggest. Motion at 20. Rather, HB 1312 provides a one-time fix for the disruption caused in Commission election cycles by the judicial cancellation of elections in 2022 and 2024, and it provides a path for the restoration of six-year, staggered terms for Commissioners. And even if this Court were to ultimately conclude that there is some kind of fundamentally unfair process in HB 1312, the State's "substantial state interests" require this Court to deny Plaintiffs' motion and uphold Georgia's chosen process. *Curry*, 802 F.2d at 1317. Thus, there is no basis to grant Plaintiffs' motion and override the interests of State because they are not likely to succeed on the merits of their claim that HB 1312

violates Georgia law—even if this Court had jurisdiction and could hear a state law issue as a federal claim.

To illustrate how far Plaintiffs have to reach to manufacture a federal claim—especially when McCorkle created the problem HB 1312 solved—they rely on cases involving *state officials* cancelling elections after appointments that have no bearing here. For instance, *Kemp v. Gonzalez*, 310 Ga. 104, 113 (2020), dealt with the question whether appointees to vacant positions for district attorney begin a new term or fulfil the remainder of an unexpired term. But there are no vacancies on the Commission today—and there is no similar question for this Court to answer, because there is no conflict between a general and specific provision of Georgia law. *Id.* As a result, *Kemp* has no relevance to a situation with no vacancies and a federal-court injunction—not an appointment—resulted in the changes.

Similarly, *Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1269 (11th Cir. 2020), involved a cancellation of an election based on an understanding of the effect of a gubernatorial appointment, not the continuation of the term of a currently serving state official. Even *Duncan* involved the cancellation of an election after an attempted appointment to an office. 657 F.2d at 693; *see* Doc. 20 at 14.

And of course, none of these cases involved a situation where a state was merely correcting its election schedule to address a problem erroneously *created by a federal court*. This case simply has nothing material in common with the cases Plaintiffs cite.

II. The equitable factors lean heavily against an injunction pending appeal.

Plaintiffs spend barely three pages on the remaining factors necessary for an injunction on appeal. Those factors weigh *heavily* against Plaintiffs. McCorkle does not claim she is unable to vote or that voting will be more difficult if an injunction is not entered. Instead, her sole basis for irreparable harm is that she will not be able to vote for the particular Commissioners she wants to at the particular times she wishes to do so. Doc. 2 at 8; Motion at 22, 24. Or more specifically, under HB 1312, McCorkle will be able to vote for two Commissioners in 2025 and two in 2026, rather than three Commissioners in 2025. With no sense of irony, McCorkle claims she "missed the opportunity to vote in a special election" in 2024, Motion at 24, when it was her own actions that led to the cancellation of the 2024 elections.

There is nothing irreparable about the supposed injury that McCorkle wants to vote on a different timeline than the one selected by the General Assembly. *See* Doc. 2 at 10–11. "Although

the right to vote is fundamental, '[i]t does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute.'" *Gwinnett Cty. NAACP v. Gwinnett County Bd. of Registration and Elections*, 446 F. Supp. 3d 1111, 1122 (N.D. Ga. 2020) (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). Having to vote on a different timeline than you wish is not a threat to constitutional rights nor a restriction on the right to vote, and this is particularly true when the timeline change was the result of your own failed litigation strategy.

The governmental interest here, however, is immense. When a government opposes a preliminary injunction, "its interest and harm merge with the public interest." *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020). The district court correctly found that the equities did not favor McCorkle because she faces relatively little harm compared to the State of Georgia and its voters, who have been denied their right to vote for Commissioners for years as a direct result of her actions in *Rose*. Doc. 20 at 17. The district court also found the public interest is served by the passage of HB 1312. *Id.* Without that legislation, Georgia would face the situation of having a majority of the seats on the Commission up for election at the same time in 2025—a

result Georgia wanted to avoid—after *winning* the case that cancelled the elections. Doc. 20 at 15.

The State's chosen solution to the injunction's disruption of the staggered schedule for Commission election achieves the most equitable outcome for Georgia voters and members of the Commission when dealing with elections moving forward—while also balancing the important state interests identified by the General Assembly. Doc. 20 at 14–15, 17; O.C.G.A. § 46-2-1.1(a).

And it is worth repeating: McCorkle *caused this problem*, so to claim that the equities now favor her makes no sense whatsoever.

III. Plaintiffs' proposed injunction violates the *Purcell* principle.

When a state is near an election, "the 'traditional test for a stay' likewise 'does not apply.'" *League of Women Voters of Fla. v. Fla. Sec. of State*, 32 F.4th 1363, 1370 (11th Cir. 2022) (quoting *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring)). This is because the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (citing *Purcell*, 549 U.S. at 1).

Plaintiffs request this injunction less than four months before early voting begins for the election of the two Commissioner seats in 2025. *See League of Women Voters*, 32 F.4th at 1371 (noting the *Purcell* principle applied when injunction issued less than four months before election); O.C.G.A. § 46-2-1.1(c) (setting special primary for June 17, 2025); O.C.G.A. § 21-2-385(d)(1) (setting early voting for the fourth Monday prior to the election, or May 26, 2025).

This Court considers Justice Kavanaugh's four factors when evaluating whether a plaintiff can overcome the *Purcell* principle close to an election: "(i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring); *see also League of Women Voters of Fla.*, 32 F.4th at 1372 n.8 (citing four factors favorably); *Grace, Inc. v. City of Miami*, No. 23-12472, 2023 WL 5286232, at *2 (11th Cir. Aug. 4, 2023) (adopting Justice Kavanaugh's framework in *Merrill*).

None of the four factors apply here. As discussed above, HB 1312 is not a violation of substantive due process and (if this Court considers a state law claim as a federal one) it is consistent with the Georgia Constitution and Georgia law, so the merits are not "entirely clearcut" in Plaintiffs' favor. *League of Women Voters of Fla.* 32 F.4th at 1374 (quoting *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring)). McCorkle will not suffer any irreparable harm because she will still be entitled to vote in all Commission elections. *Merrill*, 142 S. Ct. at 881. Plaintiffs delayed in bringing this action, because they knew about HB 1312 since the Governor signed it on April 18, 2024, Doc. 2 at 4–5, and have still not explained their delay in filing this case. *Merrill*, 142 S. Ct. at 881. And Plaintiffs presented no evidence about whether their proposed change is feasible. As a result, Plaintiffs have failed to overcome the application of the *Purcell* Principle to the injunction they seek.

CONCLUSION

For the reasons set out above, this Court should deny the motion for injunction pending appeal.

Respectfully submitted.

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This document complies with the type-volume limitation of Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure because it contains 5,131 words as counted by the word-processing system used to prepare the document.

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2025, I served this brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

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