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 FOR THE STATE OF GEORGIA,

Defendant – Appellee

Appeal from the United States District Court
For the Northern District of Georgia

REPLY IN SUPPORT OF TIME-SENSITIVE MOTION FOR AN INJUNCTION PENDING APPEAL

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Certificate of Interested Persons and Corporate Disclosure Statement

Pursuant to Eleventh Circuit Rule 26.1, 26.1-2, and 26.1-3, counsel for the plaintiffs-appellants certifies that the following persons and entities have or may have an interest in the outcome of this case:

Akin & Tate, PC

Carr, Christopher

Clark Hill PLC

Georgia Conservation Voters Education Fund, Inc.

Georgia WAND Education Fund, Inc.

Jacoutot, Bryan Francis

LaRoss, Diane Festin

McCorkle, Briontè

Petrany, Stephen

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Pursuant to Federal Rule of Appellate Procedure 26.1, the counsel below certifies that neither Georgia Conservation Voters Education Fund, Inc. nor Georgia WAND Education Fund, Inc. has a parent company and that no publicly held corporation owns 10 percent or more of their stock.

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Introduction

The Secretary insists that House Bill 1312 is good policy. He contends that it fixes the "disruption" caused by litigation over the Public Service Commission and serves "the longstanding state policy against having a majority of the Commission stand for election at the same time." (Appellees' Resp. 9, 19.) But any disruption is of the State's own making, and no amount of good policy authorizes the General Assembly to amend Georgia's Constitution by state statute.

Yet that's precisely what House Bill 1312 does. Georgia's Constitution provides that the terms of all members of the Commission "shall be for six years." Ga. Const. art. IV, §I, ¶1(a). But House Bill 1312 provides that the next commissioner from District 2 "shall serve a five-year term," and that the next commissioner from District 3 "shall serve a one-year term." (App. 1312 at 4.) It also extends the terms of all sitting commissioners from the original six years to at least eight. (*Id.*)

House Bill 1312 is a brazen violation of the Georgia Constitution, and it therefore also violates the United States

Constitution under a long-standing precedent of this Court. *See Kemp v. Gonzalez,* 310 Ga. 104, 113 (2020) (holding that the General Assembly may not, by statute, alter a term of office prescribed by Georgia's Constitution); *Duncan v. Poythress*, 657 F.2d 691, 704 (5th Cir. 1981) (holding that state officials violate the Due Process Clause if they disenfranchise voters in violation of state law). A unanimous panel of this Court recently reaffirmed that precedent in *Gonzalez v. Governor of Georgia*, 978 F.3d 1266 (11th Cir. 2020).

The Secretary barely mentions *Gonzalez* in his response, and the district court did the same in the opinion below. Perhaps that's because *Gonzalez* is squarely on point and can't be distinguished from this case. But *Gonzalez* is controlling authority in this circuit and must be followed or distinguished in some meaningful way. It can't simply be ignored.

I. Any "disruption" is of the State's own making.

When the district court in *Rose* enjoined the Secretary from conducting PSC elections using the at-large method of election in

August 2022, the General Assembly could have adopted an alternative method of election that would have allowed PSC elections to go forward while the State appealed. But it chose not to do so.

After the Eleventh Circuit reversed the district court in November 2023, the State could have asked this Court to stay the injunction while the plaintiffs sought a writ of certiorari. But it chose not to do so.

When this Court stayed the *Rose* injunction on its own motion on April 16, 2024, the Secretary could have immediately called a special election for three commissioners because the 2022 and 2024 elections had "fail[ed] to fill" them as required by Georgia law. O.C.G.A. § 21-2-504(a). But he chose not to do so.

Then the Governor signed House Bill 1312 two days later. The law became effective immediately and canceled the three PSC elections that would have otherwise been on the ballot in 2024.

The Secretary disputes none of this. He doesn't even cite O.C.G.A. § 21-2-504, which—but for House Bill 1312—would have required him to call a special election for three seats in 2024. He

claims that Georgia "*had* to do something," but there are no circumstances here that weren't already addressed by existing Georgia law. (Appellee's Resp. 15.) The only reason for the General Assembly to do anything was to change the number of seats up for election from three to two and to shift those elections from 2024 to 2025 and 2026.

Any disruption to PSC elections is thus a problem of the State's own making. It isn't McCorkle's fault for bringing *Rose*, nor is it the fault of other Georgia voters unlawfully disenfranchised by House Bill 1312.

II. The plaintiffs have standing.

The Secretary argues that the plaintiffs aren't likely to succeed on the merits of their claim because they lack standing. (Appellee's Resp. 11-14.) He contends that McCorkle's alleged injury—the loss of her right to vote in PSC elections that would have occurred but for House Bill 1312—is only a generalized grievance insufficient to support standing here.

Not so. "[T]he Supreme Court has made clear that 'a person's right to vote is individual and personal in nature,' so 'voters who allege facts showing disadvantage to themselves as individuals have standing to sue.'" *Jacobson v. Fla. Sec'y of State,* 974 F.3d 1236, 1246 (11th Cir. 2020) (quoting *Gill v. Whitford*, 585 U.S. 48, 65-66 (2018)). McCorkle alleges that she's a Georgia voter who wants to vote for PSC members but can't because House Bill 1312 delays those elections. This is precisely the injury alleged by the plaintiffs in *Gonzalez*, who were denied the right to vote for a district attorney because of a statute that delayed the election for that office. 978 F.3d at 1268 n.1; *see also Gonzalez v. Kemp*, 470 F. Supp. 3d 1343, 1346 (N.D. Ga. 2020) (the plaintiffs "are all residents and registered voters … and intended to vote" for district attorney). McCorkle thus has standing for the same reason that the *Gonzalez* plaintiffs had standing: she alleges a denial of her right to vote in a specific election delayed by an unconstitutional statute.

These allegations are nothing like the plaintiff's complaint in *Wood v. Raffensperger*, 981 F.3d 1307 (11th Cir. 2020). There, Wood alleged that Georgia's absentee-ballot and recount procedures

violated state law and, as a result, his federal constitutional rights as a voter who had cast a ballot in the 2020 election. But this Court found that Wood alleged only a generalized grievance because he alleged no particularized injury to his own ballot. *Id.* at 1313-16. Wood had not been personally affected by the procedures at issue, and his interest in ensuring that only lawful ballots be counted could not support standing.

McCorkle, by contrast, has been personally affected here because she has been denied the right to vote in elections to which she is entitled under the state and federal constitutions. This injury is likely shared by millions of Georgia voters, but it is not "common to all members of the public." *Id.* at 1314. It's a widespread injury, to be sure, but a specific one.

The Secretary also argues that the two organizational plaintiffs lack standing because "neither organization alleged any injury to itself or any members." (Appellee's Resp. 12.) But as long as at least one plaintiff has standing, the court "need not consider whether the other individual and corporate plaintiffs have standing

to maintain the suit." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977).

III. *Duncan* and *Gonzalez* are controlling.

The Secretary concedes that *Duncan* held that "the disenfranchisement of a state electorate in violation of state election law" violates the Due Process Clause. (Appellee's Resp. 14 (quoting *Duncan*, 657 F.2d at 699).) Even so, he argues that *Duncan* isn't controlling here because House Bill 1312 "involves *when* elections will be held for *particular* seats on the PSC after an injunction canceled elections—not whether those elections will be held at all." (Appellee's Resp. 15.) The Secretary tries to distinguish *Gonzalez* on a different ground: that case involved a vacancy in the office at issue "[b]ut there are no vacancies on the Commission today." (*Id.* at 20.)

These are distinctions without a difference. Both *Duncan* and *Gonzalez* involved delayed elections. In *Duncan*, the Secretary of State's refusal to call a special election to fill a position on the Georgia Supreme Court didn't mean that no election would be held.

It meant only that the election would be delayed from 1981 to 1982. 657 F.2d at 707 n.7. In *Gonzalez,* the Secretary of State's cancellation of the 2020 election for district attorney meant only that the election would be delayed until 2022. 978 F.3d at 1269. And in both cases, the courts of appeals held that delaying the elections disenfranchised voters in violation of the Due Process Clause.

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

And it doesn't matter that there's no vacancy on the PSC. The Secretary's obligation to call a special election here arose not because of any vacancy but because the 2022 and 2024 elections "fail[ed] to fill" those offices as required by Georgia law. O.C.G.A. § 21-2-504(a).

The district court disagreed with the holdings of *Duncan* and *Gonzalez*, and it chose not to follow them. It didn't even try to distinguish those cases, and the Secretary's attempts fall short. The

plaintiffs are thus likely to succeed on their claims because *Duncan* and *Gonzalez* are controlling.[1]

IV. The remaining factors favor an injunction.

The Secretary's main argument on the remaining injunction factors is that "[h]aving to vote on a different timeline than you wish" doesn't pose a threat of irreparable injury. (Appellee's Resp. 22.) But *Gonzalez* forecloses that argument.

There, as here, the State argued that failing to call a special election deprived no one of the right to vote. *Gonzalez,* 978 F.3d at 1272. But this Court rejected that argument, holding that "missing the opportunity to vote in an election is an irreparable harm for purposes of a preliminary injunction." *Id.* (quoting *Jones v. Governor of Fla.*, 950 F.3d 795, 828 (11th Cir. 2020)). And because the law at issue there deprived the plaintiffs of their right to vote

[1] The Secretary's suggestion that this Court should also decline to follow *Duncan* and *Gonzalez* because the district court didn't discuss them has no merit. (Appellee's Resp. 16-17.) While the district court didn't mention those cases at length, its order dismissing the case effectively decided the issues presented by the plaintiffs' motion.

for district attorney in the 2020 election, this Court held that they had established irreparable harm.

The same is true here. House Bill 1312 has deprived McCorkle of the right to vote for three PSC commissioners in 2024. It deprives her of the opportunity to vote for one commissioner in 2025. It deprives her of the opportunity to vote for two commissioners in 2026. And it compounds those injuries in perpetuity by re-staggering every PSC election that follows according to a cycle that doesn't follow the term set out in the Constitution. *See Kemp,* 310 Ga. at 108-09 (holding that "the timing of the election for a successor to an office is tied to the specific term for the office as measured by the Constitution"). That constitutes irreparable harm.

As to the balance of equities and public interest, the Secretary asserts that the governmental interest here "is immense." (Appellee's Resp. 22.) But *Gonzalez* forecloses that argument, too. The Court held there that the State suffers no harm when state officials are enjoined from enforcing an unconstitutional

statute. 978 F.3d at 1272. The State will suffer no harm here for the same reason.

The Secretary also argues that the State will be harmed if three commissioners are up for election in a single year. (Appellee's Resp. 22-23.) But that is a problem of the State's own making, and the State cannot be said to suffer harm if it's required to hold elections according to preexisting state law, which, under these unique circumstances, happens to require elections for three PSC commissioners in one year.[2]

V. The *Purcell* principle doesn't foreclose relief.

The Secretary's final argument is that the plaintiffs' proposed injunction would violate the *Purcell* principle. (Appellee's Resp. 23-25.) Named after the Supreme Court's decision in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), the *Purcell* principle holds that "lower federal courts should ordinarily not alter the election rules on the

[2] Consider also what could happen if this Court denies the injunction now and the plaintiffs ultimately prevail on the merits in this Court or elsewhere. If a court determines that the 2025 elections were unlawful, it could order an election for all five seats in 2026.

eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (per curiam). But that principle doesn't foreclose relief here for several reasons.

First, the plaintiffs here don't seek to alter the election rules. The requested injunction would merely require the Secretary to call an additional election under the preexisting election rules. And the qualifying period for the first two PSC elections under House Bill 1312 hasn't even started. None of the concerns about cost, confusion, or hardship that animate the *Purcell* principle apply here.

Second, the plaintiffs didn't wait until the eve of an election to seek the injunction. They filed their motion on July 17, 2024—exactly 11 months before the first elections under House Bill 1312—and they requested expedited consideration. The district court declined to expedite briefing on the motion because of the judge's planned three-week summer vacation, and the judge apparently hadn't even read the plaintiffs' motion as of late November, when the plaintiffs contacted the court to express concern about further delay. (App. 17 at 44-45; App. E at 2-3.) The

Secretary hasn't identified any case where the *Purcell* principle applied to a motion filed so long before the election or where a court's own delay so clearly dictated the timing.

Third, *Gonzalez* is controlling on this issue, too. The plaintiffs there moved for an injunction on May 18, 2020. 470 F. Supp. 3d at 1346. The district court granted it on July 2. *Id.* at 1352. On appeal, the State argued that the injunction violated the *Purcell* principle. *See* Appellants' Br. 39, *Gonzalez v. Kemp*, No. 20-12649 (July 31, 2020). This Court nevertheless affirmed the injunction on October 27. *Gonzalez*, 978 F.3d at 1273. While the panel's opinion doesn't discuss the *Purcell* principle by name, the affirmance necessarily decided the issue and thus constitutes part of the holding of the case. *See* Bryan A. Garner et al., *The Law of Judicial Precedent* § 4, at 44 (2016); *accord Powell v. Thomas*, 643 F.3d 1300, 1304–05 (11th Cir. 2011).

Here, the plaintiffs sought an injunction much longer before the election than did the plaintiffs in *Gonzalez*. And even now, there's more time remaining before the election than when the district court issued its injunction in *Gonzalez* and much more time

remaining than when this Court affirmed. *Purcell* is thus no bar to relief here.

But even if *Purcell* applied, the plaintiffs here could satisfy this Court's four-factor test for overcoming the *Purcell* principle with respect to an injunction that changes election rules on the eve of an election: "(i) the underlying merits are entirely clearcut in favor of the plaintiff[s]; (ii) the plaintiff[s] would suffer irreparable harm absent the injunction; (iii) the plaintiff[s] have 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." *Grace, Inc. v. City of Miami*, No. 23-12472, 2023 WL 5286232, at *2 (11th Cir. Aug. 4, 2023) (quoting *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring)).

Here, the merits are clear because of *Duncan* and *Gonzalez*. The plaintiffs would suffer irreparable harm for the reason stated in *Gonzalez*. The plaintiffs did not delay in bringing their action—they brought it just 23 days after the Supreme Court denied certiorari in *Rose*. And the Secretary doesn't even suggest that the

requested injunction would be infeasible. So even if *Purcell* applied, the plaintiffs could overcome it here.

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Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Rule 27 of the Federal Rules of Appellate Procedure because, excluding parts of the brief exempted by Rule 32(f), it contains 2,594 words. This brief also complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook font using Microsoft Word for Mac.

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