No. 25-10114

In the

United States Court of Appeals

for the Eleventh Circuit

Brionté McCorkle, et al.,
Plaintiff-Appellants,

v.

Secretary of State for the 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 — William M. Ray II, *Judge*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, counsel for Defendant-Appellee hereby certifies that the following persons and entities may have an interest in the outcome of this case:

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STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee, Secretary of State for the State of Georgia, requests oral argument. The question whether a state legislature violates the federal Constitution when it schedules state elections for state office—which had been previously cancelled by an erroneous federal court injunction—is not difficult. Nevertheless, oral argument might be helpful in fleshing out some surrounding doctrinal issues (including, for example, standing, which Plaintiff-Appellants lack).

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STATEMENT OF ISSUES

1. Whether Plaintiff-Appellant Brionté McCorkle lacks standing to challenge a state law that schedules Georgia Public Service Commission elections (previously cancelled by an erroneous federal injunction) and affects her no differently than any other voter.

2. Whether Plaintiff-Appellants' federal substantive due process rights are violated by a state law that schedules Public Service Commission elections that were previously cancelled by a since-reversed federal injunction.

3. Whether rescheduling the Commission elections complies with the Georgia Constitution when the state constitution authorizes the legislature to set the time and manner of Commission elections and authorizes incumbents to stay in office until a successor can be elected and qualified.

INTRODUCTION

Plaintiff-Appellant Brionté McCorkle has done all she can to disrupt the Georgia Public Service Commission, a five-member state body with a core structural feature of staggered terms. *See* Ga. Const. art. IV, § I, ¶ I; O.C.G.A. §§ 46-2-1, 46-2-1.1. She first sued the State alleging the Commission's electoral structure was unconstitutional—and then she convinced a federal judge to enjoin *all* Commission elections. This Court eventually reversed that decision, *Rose v. Sec'y, State of Georgia*, 87 F.4th 469, 486 (11th Cir. 2023), but only after the injunction had forced the State to cancel multiple Commission elections and disrupted the Commission's staggered terms. To fix the damage McCorkle (and the federal judiciary) had wrought, Georgia passed HB 1312. This law schedules the previously cancelled Commission elections and, based on how different Commission seats were affected by the federal injunction, the law temporarily adjusts certain Commissioners' terms to maintain the body's staggered nature.

With no sense of irony, McCorkle now contends that HB 1312—which fixed a problem *she* created—violates her federal right to substantive due process. Incredibly, her theory is that HB 1312 (a state law that provides the schedule for state elections) violates the *federal* constitution because HB 1312 supposedly

violates the *Georgia* Constitution. So after having already thrown Georgia's elections off course, McCorkle now asks a federal court to intrude into Georgia's state elections *again*, now on the basis of a state law claim barely veiled in the clothes of a federal complaint.

Enough is enough, and this lawsuit is meritless from start to finish. McCorkle and her co-plaintiffs (two activist organizations) do not even have standing. HB 1312 causes McCorkle no concrete and particularized injury; it simply schedules elections for *all* voters without singling out her vote in any way. And her co-plaintiffs are interest groups who have not even tried to argue that they have standing.

Past that, Plaintiffs' attempt to alchemize a purely state law issue into a *federal* right should be discarded out of hand. They rely on a Fifth Circuit case that held there is a federal substantive due process right to vote in state elections that are free from "fundamental unfairness." *Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. 1981). Rescheduling elections that a plaintiff's own failed lawsuit cancelled can't possibly be "fundamentally unfair" to that voter, or to anyone else. HB 1312 certainly isn't. It does not implicate *Duncan*, even under that ruling's broadest reading. But it would hardly matter if it did because HB 1312 serves the State's

compelling interest in maintaining the Commission's staggered elections—which is enough to survive whatever scrutiny *Duncan* requires. *See Curry v. Baker*, 802 F.2d 1302, 1312 (11th Cir. 1986).

And even if Plaintiffs could somehow transform their state-law claim into a federal substantive due process claim, they are wrong about state law. The Georgia Constitution both explicitly permits election logistics legislation like HB 1312 and allows Commissioners to hold over their terms beyond six years when extenuating circumstances prevent a successor from being elected and qualified. *See, e.g.*, *Pittman v. Ingram*, 184 Ga. 255, 258 (1937). Of course, that is a purely state law question: if this Court even gets that far, the question should be certified to the Supreme Court of Georgia. But the necessity of certification only proves that this case should not be in federal court at all. And make no mistake: this case easily could be in state court, which could have expeditiously addressed Plaintiffs' claim. The only readily apparent difference is that Georgia state court would not provide the possibility of attorney's fees. So here we are.

At bottom, Plaintiffs ask a federal court to decide whether a state statute scheduling state elections for a state office violates a state constitution. Nothing about this case implicates federal

rights. The U.S. Constitution has nothing to say about Georgia's legislative fix for a scheduling difficulty of McCorkle's own making. The district court was right to stay out of it.

The Court should affirm.

STATEMENT OF THE CASE

Briontè McCorkle and two interest groups, the Georgia Conservation Voters Education Fund and the Georgia WAND Education Fund, sued the Secretary of State, alleging that HB 1312 (a statute scheduling elections for the Georgia Public Service Commission) violates their purported federal substantive due process right to vote in state elections. Doc. 1. They sought attorney's fees, declaratory relief, and injunctive relief blocking HB 1312's enforcement and directing the Secretary to hold three Commission elections "as soon as practicable." Doc. 1 at 10; Doc. 2 at 11. The district court dismissed the suit. Doc. 20 at 9–16.

A. Statutory and Constitutional Background

The Georgia Public Service Commission is a five-member body responsible for regulating the prices, services, and safety of most intrastate telecommunications, gas, and electric utilities. *An Introduction to Your Georgia Public Service Commission*, Ga. Pub. Serv. Comm'n, https://tinyurl.com/mpj3ynw7 (last visited Apr. 24,

2025). That includes, for example, setting the rates utilities like Georgia Power charge for their services. *Id.*

Commissioners are elected statewide to six-year terms, Ga. Const. art. IV, § I, ¶ I(a); O.C.G.A. § 46-2-1(a), and elections are staggered so that no more than two Commissioner seats are elected in any one election cycle, *An Introduction to Your Georgia Public Service Commission*, *supra*. Commissioners "shall serve until their successors are elected and qualified," Ga. Const. art. IV, § I, ¶ I(a), and the "manner and time of election of [Commissioners] shall be as provided by law," *id.* ¶ I(c).

By statute, Commissioners each represent one of five districts and must reside in the district to which they are elected. O.C.G.A. § 46-2-1(a); *Cox v. Barber*, 275 Ga. 415, 415–16 (2002). The district system "encourages [Commissioners] to become familiar with the problems, needs, and concerns" of their respective districts, *Cox*, 275 Ga. at 418, while ensuring that Commissioners "with statewide authority and statewide responsibilities … [are] elected on a statewide basis," *Rose*, 87 F.4th at 486.

Originally an appointed, three-member body regulating railroads, 1879 Ga. Laws 125, 125, the Commission became an elected body over a century ago, 1906 Ga. Laws 100, 100. The Commission gained constitutional status in 1943. Ga. Const. of

1877, art. IV, § II, ¶ VIII (1943 amended version). Its functions and duties persisted through each subsequent Georgia constitution. *See* Ga. Const. of 1945, art. IV, § IV, ¶ III; Ga. Const. of 1976, art. IV, § I, ¶ I; Ga. Const. art. IV, § I, ¶ I.

Commissioner terms have been staggered from the start. The first three Commissioners served different term lengths (two, four, and six years) so that only one Commissioner was chosen every two years. 1879 Ga. Laws at 125. After those first three terms expired, each Commissioner would serve six years, with one chosen every two years. *Id.* The General Assembly maintained staggered terms when it made the Commission an elected body. 1906 Ga. Laws at 100. And when it added the final two Commissioners in 1907, it extended each of the sitting Commissioners' terms and gave shortened terms to the two new Commissioners. 1907 Ga. Laws 72, 73–74. That schedule, which was established "[i]n order that there may be uniformity of expiration of the terms of all the … Commissioners," *id.* at 73, persisted through the present day, *see, e.g.*, 1998 Ga. Laws 1530 (preserving staggered elections upon creating Commissioner districts).

B. Factual Background

In 2020, McCorkle joined several other voters in a federal lawsuit alleging that the Commission's statewide election structure violates the Voting Rights Act. *Rose v. Raffensperger*, 1:20-cv-02921 (N.D. Ga. July 13, 2020), Doc. 1 at 1. They sought declaratory and injunctive relief forbidding the Secretary from administering statewide Commission elections. *Id.* at 10. The district court agreed and, three months before the 2022 general election (with two Commission seats scheduled for election), enjoined *all* statewide Commission elections until the General Assembly adopted some other electoral structure. *Rose*, 1:20-cv-02921, Doc. 151 at 63. The court acknowledged its order would force the Commissioners who were up for reelection to "holdover" until a satisfactory election could be administered, thus extending their terms. *Id.* at 61–62.

This Court reversed, rejecting the district court's unprecedented conclusion that the Voting Rights Act requires single-member districting of statewide election systems. *Rose*, 87 F.4th at 477, 486. But a judge of this Court withheld the mandate, so the district court's already-repudiated injunction remained in effect for five more months. *Rose v. Sec'y, State of Georgia*, 22-12593 (11th Cir. Aug. 8, 2022), Doc. 65; Doc. 68. In

the meantime, McCorkle and the other *Rose* plaintiffs petitioned the Supreme Court for certiorari. *Rose*, 22-12593, Doc. 67. When this Court finally stayed the injunction in April of 2024, Commission elections had been frozen for almost two years. The Supreme Court then denied certiorari in June of 2024. *Rose*, 22-12593, Doc. 71.

The district court's misguided injunction was in place from August 5, 2022, until this Court stayed it on April 16, 2024, well after qualifying for the 2024 elections was complete. For that entire time, the Secretary could not conduct Commission elections as required by Georgia law. Two days after this Court stayed the district court's erroneous injunction, the Governor signed HB 1312, the legislature's solution "to address the delayed 2022 and 2024 elections for [C]ommissioners." 2024 Ga. Laws 36, 36. It aimed to resume the suspended elections and "maintain staggered elections and terms on the [C]ommission." *Id.*

HB 1312 created O.C.G.A. § 46-2-1.1, which adjusts terms and election dates in a targeted way to respond to the *Rose* injunction's consequences. *Id.* § 46-2-1.1(b). The seats for Districts 2 and 3 should have had an election in 2022, so HB 1312 provides those elections will be held soonest: qualification for a June 2025 special primary is already complete, and the general

election will occur this November. *Id.* § 46-2-1.1(b)(2)–(3), (c). And because the injunction extended Districts 2 and 3's terms, their next terms are shortened to counteract the effect of the erroneous *Rose* injunction. *Id.* § 46-2-1.1(b)(2)–(3). HB 1312 then reschedules the remaining seats based on the *Rose*-fueled delay. Thus, District 5 will be elected in 2026 rather than 2024, and Districts 1 and 4 will be elected in 2028 rather than 2026. *Id.* § 46-2-1.1(b)(1), (4)–(5). Of course, statewide special elections are "unusual and very expensive," running "into the millions of dollars." *McCorkle*, 1:24-cv-03137, Doc. 13-1 at 7. But the General Assembly nevertheless scheduled them to preserve the Commission's staggered structure.

One additional adjustment stems from a Commissioner's retirement. Governor Kemp appointed the District 3 Commissioner upon the former Commissioner's 2021 retirement. An appointee holds office until the next general election, and the winner of that election finishes the rest of the retired Commissioner's original term. O.C.G.A. § 46-2-4. Thus, the District 3 Commissioner would have stood in the 2022 general election, and the winner would have served a one-year term until the end of 2023, when the retired Commissioner's term would

originally have ended. HB 1312 uses a one-year term for District 3's upcoming election to approximate that situation.

Thus, HB 1312 reschedules Commission elections as follows:

Next Election	District	Original Term End	New Term End	Extension Length	Next Term Length	Following Election
Nov. 2025	2	12/31/22	12/31/25	3 years	5 years	Nov. 2030
Nov. 2025	3	12/31/22 (12/31/24)	12/31/25	3 years	1 year	Nov. 2026
Nov. 2026	5	12/31/24	12/31/26	2 years	6 years	Nov. 2032
Nov. 2028	1	12/31/26	12/31/28	2 years	6 years	Nov. 2034
Nov. 2028	4	12/31/26	12/31/28	2 years	6 years	Nov. 2034

After the special 2025 elections for Districts 2 and 3, each elected Commissioner's term will be six years, no more than two Commission seats will face election in the same year, and at least one seat will face election every two years. O.C.G.A. § 46-2-1.1(b).

C. Proceedings Below

McCorkle and two interest groups sued the Secretary, claiming that HB 1312 "revis[ing]" the Commissioners' terms "violates the Georgia Constitution and thereby deprives them of due process of law" under the U.S. Constitution. *McCorkle*, 1:24-

cv-03137, Doc. 1 at 1–2. Plaintiffs claimed that HB 1312 offends *federal* substantive due process because the Georgia Constitution says Commissioners' terms "shall be for six years." *Id.* at 1–2, 3 (quoting Ga. Const. art. IV, § I, ¶ I). In other words, their core contention is that Georgia violated the federal Constitution by violating the Georgia Constitution.

In addition to attorney's fees, they sought a declaratory judgment that HB 1312 violates the federal Constitution, an injunction against HB 1312's enforcement, and an injunction barring the Secretary "from failing to conduct elections for the Public Service Commission in accordance with Georgia law." *Id.* at 10. McCorkle and the organizations also sought an allegedly "preliminary" injunction directing the Secretary to immediately call three special elections (preceded by three special primaries) so that they could vote for three Commissioners in 2024. Doc. 2 at 10–11. They claimed, in mid-July, that the Secretary could hold those elections along with the November general election or in early 2025. *Id.* at 11 n.3.

The Secretary moved to dismiss, Doc. 12-1, and the district court granted his motion, Doc. 20. The court concluded that McCorkle and the organizations lacked standing because they suffered no concrete and particularized injury; and that the claims

failed on the merits anyway. *Id.* at 9–13. It reasoned that HB 1312 rescheduling elections is an "[a]dministrative detail[]" unmotivated by an intent to disenfranchise, causing no fundamental unfairness, and not implicating federal constitutional rights. *Id.* at 13–14. The court alternatively reasoned that HB 1312 is constitutional because it furthers Georgia's compelling interest in avoiding "rapid, simultaneous turnover" of all Commission members. *Id.* at 15.

Plaintiffs appealed and moved for an emergency injunction pending appeal. *McCorkle*, 25-10114, Doc. 1; Doc. 7. This Court denied the motion. Doc. 20.

D. Standard of Review

The Court reviews *de novo* the grant of a motion to dismiss. *Julmist v. Prime Ins. Co.*, 92 F.4th 1008, 1016 (11th Cir. 2024).

SUMMARY OF ARGUMENT

I. As a threshold matter, McCorkle and the interest groups lack standing to challenge HB 1312. A litigant cannot invoke a federal court's power without a "concrete and particularized" injury that is traceable to the defendant's conduct and is likely redressable by a favorable decision. *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020). An "undifferentiated,

generalized grievance" is not a cognizable injury. *Id.* at 1315. And the plaintiffs bear the burden of establishing standing. *Ga. Republican Party v. Securities & Exchange Comm'n*, 888 F.3d 1198, 1201 (11th Cir. 2018). The interest group plaintiffs don't even try to carry their burden, failing to allege any harm to themselves or their members. *See generally McCorkle*, 1:24-cv-03137, Doc. 1. Nor do they allege that McCorkle is a member of either organization, so they cannot rely on any injury to her. *See generally id.*

And it wouldn't matter if McCorkle was a member, because HB 1312 doesn't harm her, either. It doesn't dilute or extinguish her right to vote, *see Wood*, 981 F.3d at 1314–15, and while she may not like that her own actions delayed Commission elections, "[her] allegation, at bottom, remains that the law has not been followed," *id.* at 1315 (quotation omitted and alteration adopted). That's not concrete harm. Nor is her concern that HB 1312 violates the Georgia Constitution a particularized harm. Even if she were right about Georgia law, that hypothetical injury "do[es] not affect [her] differently from any other person." *Id.* None of the plaintiffs have standing.

II. Even if some plaintiff had standing, HB 1312 doesn't implicate (much less violate) federal substantive due process

rights. Substantive due process excludes rights created only by state law, *Doe v. Valencia College*, 903 F.3d 1220, 1235 (11th Cir. 2018), including state voting laws, *Johnson v. Hood*, 430 F.2d 610, 612 (5th Cir. 1970). To be sure, this Court's predecessor identified a federal substantive due process right to vote in state elections that are not "fundamentally unfair." *Duncan*, 657 F.2d at 704. But *Duncan* and its (extremely limited) progeny concern state officials' intentional efforts to *disenfranchise* voters. *See Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir. 1995). *Duncan* doesn't apply when a federal court, at the plaintiff's own behest, erroneously cancels elections and that plaintiff then complains about the State's rescheduling of those elections. Georgia *had* to do something to address the mess McCorkle created, and she doesn't like the solution. That is light years away from substantive due process concerns.

Even if *Duncan* somehow applied, Plaintiffs' claim would still fail. *Duncan* concerns only "fundamental unfairness," expressly excluding from federal protection any "garden variety" issues like how state officials count ballots. 657 F.2d at 703. Wherever the amorphous line between fundamental unfairness and garden variety challenges is, HB 1312 falls far to the garden variety side. The few times this Court has recognized state election law

violations as implicating substantive due process rights, a state official either intentionally deprived voters of the ability to vote *at all*, *id.* at 693, or changed an election's rules *after the election occurred*, *Roe*, 43 F.3d at 578. By contrast, a law prospectively rescheduling state elections (again, in response to a federal court's disruption of those elections) is nowhere near "fundamental unfairness." HB 1312 is purely logistical, having even less to do with an election's substance than the wording of a ballot referendum, *Burton v. Georgia*, 953 F.2d 1266, 1267 (11th Cir. 1992), or a political party's standard for validating primary votes, *Curry*, 802 F.2d at 1305. Scheduling elections for 2025, 2026, and 2028 (instead of whatever McCorkle prefers), Opening.Br.16, causes no unfairness, fundamental or otherwise. HB 1312 is plainly constitutional.

Setting all that aside, *Duncan* requires—at most—that a state have no substantial interest supporting the challenged conduct. *Curry*, 802 F.2d at 1317. HB 1312 necessarily satisfies that test, too. Georgia's compelling interest in avoiding majority turnover on the Commission in one election cycle forecloses Plaintiffs' claim. *Id.* Commission elections have always been staggered. *Supra* at 7; Doc. 13-1 at 7. That is what makes the Commission a "continuing body," *McGrain v. Daugherty*, 273 U.S.

135, 181 (1927), allowing stability and encouraging members to "deliberate measures over time," *About the Senate & the U.S. Constitution*, United States Senate, https://tinyurl.com/fzfwskc8 (last visited Apr. 24, 2025). That far outweighs Plaintiffs' interest, even if HB 1312 did somehow implicate a federal substantive due process right.

It is also worth pointing out that *Duncan* was simply wrong, isn't good law, and at the very least should not be extended beyond its facts. *Duncan* flouts the bedrock principle that state law doesn't create federal substantive due process rights. *Doe*, 903 F.3d at 1235. And it unpersuasively contradicted an earlier panel holding that "an improper denial of the right to vote for a candidate for a state office … is not a denial of a right of property or liberty secured by the due process clause." *Johnson*, 430 F.2d at 612. *Duncan* also defined the "right" at an improper level of generality: the question is not whether there is a right to vote in fair elections but whether there is a federal right to vote in state elections that do not violate state law. There isn't: "[T]he right to vote for the election of state officers … is a right or privilege of state citizenship, not of national citizenship." *Snowden v. Hughes*, 321 U.S. 1, 7 (1944). The Court should not extend *Duncan* one iota further.

III. On top of everything else, Plaintiffs' theory collapses unless Georgia has somehow violated state law. *See Curry*, 802 F.2d at 1313–14. But HB 1312 *doesn't* violate state law. The Georgia Constitution empowers the General Assembly to set the manner and time of Commission elections, Ga. Const. art. IV, § I, ¶ I(c), and Commissioners "shall serve until their successors are elected and qualified," *id.* ¶ I(a). When a federal court prevents a state election, Georgia law provides that an officeholder remains in office until his successor is elected and qualified. *Garcia v. Miller*, 261 Ga. 531, 531–32 (1991). The current Commissioners are doing exactly that, and HB 1312 permissibly addresses the situation by setting the time and manner of their elections.

Of course, nothing is stopping Plaintiffs from bringing their state-law challenge in *state* court to obtain a definitive resolution of these state law questions—except, perhaps, the unavailability of attorney's fees in that forum. Ga. Const. art. I, § II, ¶ V(b)(1), (4) (waiving sovereign immunity for declaratory judgment actions but prohibiting attorney's fees). If there were any doubt, the Court should certify the question to the Georgia Supreme Court, because that issue "resolve[s] a question at the core of the state's authority"—interpreting state law. *Gonzalez v. Governor of Ga.*,

969 F.3d 1211, 1212 (11th Cir. 2020). But that would only prove the point: This case has no place in *federal* court.

The Court should affirm.

ARGUMENT

I. None of the Plaintiffs have standing to challenge HB 1312 because it merely schedules elections and causes no particularized harm to anyone.

Federal courts have limited jurisdiction. *Wood*, 981 F.3d at 1313. And the plaintiff bears the burden of proving she presents a case or controversy falling within that limited jurisdiction. *Id.* At the pleading stage, the plaintiff must "clearly allege facts demonstrating" (1) a concrete and particularized injury in fact, (2) that the injury is fairly traceable to the defendant's conduct, and (3) that a favorable ruling would redress the injury. *Thankkar v. DCT Sys. Grp., LLC*, 955 F.3d 874, 877 (11th Cir. 2020).

As an initial matter, the interest groups do not even try to argue that they have standing. *See* Opening.Br.25–28; Doc. 1 at 2–3. For good reason. They've alleged no facts that would support standing, whether in their own right or through association with McCorkle, as neither group claims she's a member. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1249 (11th Cir. 2020). They have thus forfeited any standing argument. *United States v.*

Campbell, 26 F.4th 860, 873 (11th Cir. 2022); *see also Wood*, 981 F.3d at 1316.

McCorkle at least asserts standing but she is mistaken. A plaintiff must allege a concrete injury, among other things. *E.g.*, *Wood*, 981 F.3d at 1314. Concreteness requires infringement of a legally protected interest, such as facing barriers to vote, *Jacobson*, 974 F.3d at 1246, having one's vote diluted, or being denied all meaningful participation in the political process, *see Polelle v. Fla. Sec'y of State*, 131 F.4th 1201, 1209 (11th Cir. 2025). In contrast, there is no concrete injury when someone's preferred candidate simply loses an election, *Jacobson*, 974 F.3d at 1246, or when a voter simply dislikes an election's general logistics, *Wood*, 981 F.3d at 1312, 1316.

The way in which HB 1312 sets Commission election dates does not concretely harm McCorkle. It does not affect McCorkle's ability to vote for Commissioners, neither denying nor diluting her vote. At most, HB 1312 just means McCorkle does not get to vote until later than she would prefer. But McCorkle has no cognizable interest in the precise timing of an election. Merely preferring an election be held sooner is on par with merely preferring that one candidate wins over another, which is not a concrete harm. *See*

Jacobson, 974 F.3d at 1246. That is fatal: "No concrete harm, no standing." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 417 (2021).

McCorkle also failed to allege a *particularized* injury. Particularized voting harms affect a specific voter's personal inability to participate in the political process or to cast a meaningful vote. *Polelle*, 131 F.4th at 1209. An "undifferentiated" interest "common to all members of the public" is, by definition, not a personal harm. *Wood*, 981 F.3d at 1314. Under that principle, a voter lacks standing to challenge, for instance, absentee ballot processing rules that allegedly allow unlawful votes to be counted. *See id.* at 1312. The interest in having only lawful ballots counted is no different from any other person's, making it a mere generalized grievance. *Id.* at 1314. Even though any unlawfully counted ballot would mathematically dilute the voter's vote, that is also true for every other voter. Undifferentiated grievances do not count.

McCorkle relies on an undifferentiated grievance insufficient for standing. She contends she "lost her right to vote in … elections that would have occurred but for … [HB] 1312," and that HB 1312 is unlawful because it violates the Georgia Constitution. Opening Br.25. Even assuming that's right (and it is not), McCorkle complains *only* that "the law has not been

followed." *Wood*, 981 F.3d at 1315 (alteration adopted). Indeed, her request for relief is literally that the law be followed: she demands that the Secretary be enjoined from "failing to conduct elections … in accordance with Georgia law." Doc. 1 at 10. But that's the opposite of a particularized harm. HB 1312 schedules Commissioner elections for the entire electorate, and McCorkle's hypothetical stake in that is no different than *every other voter*. Like the voter in *Wood*, McCorkle is on the same footing as everyone else, both in terms of her electoral participation and how her vote is counted.

This Court's recent decision in *Polelle* illuminates McCorkle's standing deficiencies by comparison. There, the Court held that an unaffiliated voter suffers a particularized injury-in-fact when state law restricts primaries to only party affiliates, yet one party is so dominant that its primary effectively determines the outcome of the general election. *Polelle*, 131 F.4th at 1206, 1208–09. The unaffiliated voter is thus forced to either associate with an undesired political party or functionally have no say in the general election's outcome and be excluded from the political process. *Id.* at 1213. The voter suffers a particularized harm because she is placed at a unique disadvantage compared to others—that is, members of the party. *Id.* But unlike the voter in *Polelle*,

McCorkle is not part of a disfavored group, not excluded from any particular election, faces no impediment or any Catch-22 to vote in any election, and her vote will be treated exactly like any other vote. She lacks standing.

McCorkle's counter-arguments fail. She first relies heavily on this Court's decision in *Gonzalez v. Governor of Georgia*, Opening.Br.25, but *Gonzalez* didn't even address standing, *see* 978 F.3d 1266, 1268–73 (2020), and there are no "drive-by jurisdictional rulings," *Kondrat'Yev v. City of Pensacola*, 949 F.3d 1319, 1325 n.2 (11th Cir. 2020). *Gonzalez* proves nothing about standing.

Regardless, *Gonzalez* undercuts McCorkle's argument as it concerned alleged harm entirely unlike McCorkle's hypothetical injury. That decision involved a governor appointing a replacement to a vacancy despite state law requiring a special election. *Gonzalez*, 978 F.3d at 1268. Cancelling the election would have completely denied the plaintiff voters the ability to choose the replacement. What is more, one of the plaintiffs *was a candidate for the office* affected. *See id.* The concrete and particularized harms associated with an unlawfully cancelled election and the inability to run for office stand in stark contrast

to McCorkle's disagreement with the *scheduling* of an election. *Gonzalez* does not help her.

McCorkle also fails to distinguish *Wood*. She argues that HB 1312 affects her individual right, whereas the disputed policy in *Wood* had no effect on that plaintiff's vote. Opening Br.26–27. That misreads *Wood*. The policy challenged there, which allowed more absentee ballots to be counted than in prior elections, did affect the plaintiff's vote by supposedly mathematically diluting it. *Wood*, 981 F.3d at 1314–15. But that was not enough to show a particularized injury because the alleged dilution harm affected all voters equally. *Id.* McCorkle doesn't even face a mathematical dilution harm, much less one unique to her versus other voters. And it is not enough to respond that the "right to vote is individual and personal in nature." Opening.Br.26. That's true, but it doesn't follow that everything affecting how and when a vote is cast is an individual and personal harm. It can't be, otherwise *any* policy or practice prescribing administrative procedures for how all votes are cast would be subject to challenge in federal court. And we know that is wrong. *See Wood*, 981 F.3d at 1315.

At bottom, McCorkle does not like that the State re-staggered elections that her own lawsuit cancelled. But she asserts no more than a generalized disagreement indistinguishable from any other

voter's interest. It's concrete only in that she doesn't like the solution, and particularized only in that she caused the problem. Article III requires more.[1]

II. Setting the schedule for Georgia Public Service Commission elections doesn't violate any federal right.

Plaintiffs also fail on the merits. Their claim is a straight-up state-law claim disguised (barely) as a federal constitutional claim. Literally, their claim is that Georgia supposedly violated its *own* constitution and that means it violated the *federal* constitution. That is nonsense. Plaintiffs rely on *Duncan*, which created a substantive due process right to "fundamental fairness" in state elections, but even under the most expansive reading of *Duncan*, there's no federal substantive due process right to dictate a state election schedule for purely state offices. And *Duncan* is of questionable validity itself; it certainly should not be extended to McCorkle's shoot-yourself-in-the-foot-and-sue situation.

[1] Plaintiffs repeatedly claim that the Secretary conceded various points below. *See, e.g.*, Opening.Br.26 (claiming Secretary conceded McCorkle suffered injury); *id.* at 23 (claiming Secretary conceded Plaintiffs' warped view of *Duncan*). A quick review of the relevant briefs shows the Secretary did not.

A. *Duncan*'s substantive due process test does not apply and wouldn't change the result if it did.

Plaintiffs' claim is that Georgia failed to follow its *own* constitution. Opening.Br.4. This is supposedly transformed into a federal constitutional violation because they assert a federal substantive due process right to "fundamental fairness" in state elections, *see Duncan*, 657 F.2d at 700. But no court has ever held federal substantive due process rights are implicated by a state restoring its staggered elections after a federal court wrongfully upended those elections (at the plaintiff's own request). Even if federal rights were implicated, the test under *Duncan* would be "fundamental unfairness," *id.*, and HB 1312's rescheduling of Commission elections is nowhere near fundamentally unfair. Setting all that aside, HB 1312 would be constitutional anyway because it serves the State's compelling interest in staggered Commission elections.

1. *Duncan*'s substantive due process test is inapplicable here, where Georgia adopted an electoral scheduling fix to resolve a problem created by McCorkle's mistaken federal injunction.

"[F]ederal court intrusion into state electoral processes is disfavored without a compelling justification." *Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997). McCorkle previously convinced

a federal district court to intrude into Georgia's state electoral process with an erroneous injunction that cancelled multiple elections and left the scheduling process in disarray. Now she and the organizations seek to have *another* federal court intrude yet again to disrupt Georgia's efforts to clean up a mess of McCorkle's own making. That is hardly a compelling justification.

Plaintiffs' only argument that federal courts have any say-so whatsoever is that HB 1312 implicates unenumerated federal substantive due process rights. And their only support for that argument is the Fifth Circuit's ruling in *Duncan*. *See* Opening.Br.22–25. In that case, this Court's predecessor addressed a governor's collusion with a state supreme court justice to time the justice's retirement so that the Governor could fill the vacancy by appointment. *Duncan*, 657 F.2d at 693. The Governor sought to cancel the upcoming election *entirely*. *Id.* at 694. And he did so despite an unmistakably clear state law requirement that the vacancy be filled by special election. *Id.* at 693. The plaintiffs asked this Court to enforce as a federal right their ability to vote in a state election, required by state law. *Id.* at 703.

The Court held that totally disenfranchising the electorate in violation of state law implicates the U.S. Constitution. *Id.* at 693. It reasoned that the right to vote is important enough that the

Fourteenth Amendment provides substantive due process protection from "action by state officials which seriously undermine[s] the fundamental fairness of the electoral process." *Id.* at 700. On the other hand, "garden variety" election challenges do not implicate federal rights at all. *Id.* at 701. Absent state action "jeopardiz[ing] the integrity of the election process," *id.* at 702, substantive due process doesn't come into play. So *Duncan*, at most, recognizes an extremely narrow federal substantive due process right in the state elections context—one going to "fundamental fairness" and "the integrity of the election process." *Id.* at 700, 702.

This Court has recognized a *Duncan*-style substantive due process right in only one other circumstance, and in equally limited fashion. *See Roe*, 43 F.3d at 577. In that case, Alabama law imposed certain signature and notarization requirements for absentee ballots. *Id.* at 577–78. *After* the conclusion of voting, a state court ordered a possibly outcome determinative number of noncompliant absentee ballots be counted. *Id.* at 578. And Alabama law provided no judicial remedy to challenge the policy change. *Id.* at 582–83. This Court concluded that counting noncompliant votes would implicate fundamental fairness because this *post-election* policy change would dilute the votes of voters

who cast compliant ballots and disenfranchise those who would have voted but for the compliance standards. *Id.* at 581.

Duncan does not even apply here because HB 1312 is not in the same universe as *Duncan* and *Roe*. After the federal injunction, Georgia *had* to do something to fix the scheduling mess of McCorkle's creation. And that is all HB 1312 does: it reschedules and re-staggers elections that were cancelled by a federal court's since-reversed injunction. Doc. 1 at 6; Doc. 20 at 5 (candidate qualifying period for November 2024 elections ended before *Rose* injunction lifted). Unlike *Duncan* and *Roe*, which involved executive and judicial actions, HB 1312 is a legislative act—something this Court has never concluded violates the state voting substantive due process "right." And unlike *Duncan* and *Roe*, HB 1312 neither attempts to disenfranchise an entire electorate (or even a slice of it) nor changes election rules after the fact in a way that dilutes votes or disenfranchises voters. Actually, quite the opposite from cancelling elections or retroactively changing electoral outcomes, HB 1312 *schedules* elections that were cancelled by a federal court.

There's another reason *Duncan* doesn't apply: a "fundamental unfairness" standard makes no sense when the plaintiff herself invited the supposed "unfairness" she challenges. For instance, in

Curry, this Court rejected a primary candidate's claim that his party violated federal substantive due process rights by statistically approximating rather than individually verifying the number of illegal "crossover" votes—registered Republicans who voted in the Democratic primary. 802 F.2d at 1304–08. The primary candidate had himself openly solicited illegal crossover voting. *Id.* at 1306. This Court easily rejected the candidate's *Duncan* claim because he had "created the situation" he then claimed violated substantive due process. *Id.* at 1306–07, 1316.

The same reasoning applies to Plaintiffs. McCorkle is the one who procured the erroneous injunction that suspended Commission elections and forced the State to either adopt new election schedules or lose the Commission's key structural feature of staggered elections. *Supra* at 7–9. She cannot now argue that the U.S. Constitution requires Georgia to hold those elections sooner and to sacrifice the Commission's staggered structure on the altar of her misguided litigation.

2. HB 1312 satisfies *Duncan*'s "fundamental unfairness" standard.

Even if *Duncan* had some application, HB 1312 would easily pass muster. HB 1312 causes no unfairness of any kind, so Plaintiffs' challenge is at most a "garden variety" claim that does

not implicate substantive due process, even under *Duncan*'s framework.

a. State election issues implicate substantive due process only when they "reach[] the point of patent and fundamental unfairness." *Duncan*, 657 F.2d at 703. Everything else is a "lesser legal wrong," *id.*, on which the U.S. Constitution is silent. This "deferential due process test" keeps federal courts from becoming "superlegislature[s]" and properly leaves almost all state election issues to the States. *Burton*, 953 F.2d at 1270–71.

"Fundamental unfairness" requires clear state law violations, *Gonzalez*, 978 F.3d at 1268, harm not attributable to the plaintiff, *see Curry*, 802 F.2d at 1316, and the absence of adequate state law remedies to challenge the purported unlawful behavior, *Roe*, 43 F.3d at 582. And it requires egregious usurpations such as using the executive appointment power to fill a position the electorate is entitled to fill, *Duncan*, 657 F.2d at 693, collusion between state officials to disenfranchise voters, *id.* at 709–12, or post-election rule changes to dilute and disenfranchise voters, *Roe*, 43 F.3d at 582.

"Garden variety" election challenges, on the other hand, often involve legislative acts, *Burton*, 953 F.3d at 1267, procedural or logistical complaints, *id.*, the reasonable application of state law,

Curry, 802 F.2d at 1314, or the availability of state remedies, *id.* at 1316–17. So a state legislature's allegedly deceptive wording on a ballot referendum, *Burton*, 953 F.3d at 1267, or a statutory committee's allegedly improper method of verifying primary votes, *Curry*, 802 F.2d at 1311, aren't substantive due process issues.

Other Circuits similarly hold that logistical disputes, legislative acts, and harm caused by the plaintiff do not give rise to any federal rights. So, for example, challenging a ballot's appearance and form, even when state law requires a different format, hardly "erodes the democratic process." *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983). *But see, e.g.*, *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994) (fundamentally unfair for county officials to conspire with candidate to procure illegal votes); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (fundamentally unfair for state court to retroactively invalidate dispositive number of ballots).

HB 1312 shares no qualities with anything any court has ever considered fundamentally unfair. HB 1312 reschedules elections that a *federal court erroneously cancelled*. HB 1312 also temporarily shortens two Commissioners' terms to account for the fact that the *Rose* injunction delayed the elections for those seats, thus lengthening their terms in the first place. *Supra* at 8–11.

That is all. McCorkle and the organizations contend the U.S. Constitution *requires* the Secretary to hold three—not just two—Commission elections this year. Opening.Br.16. And she originally argued, in July of 2024, that those elections *had* to be held by the end of that year. Doc. 2 at 10–11; Doc. 1 at 10. And McCorkle has made those demands unironically, not even acknowledging that HB 1312 exists only because of the scheduling fiasco her own failed lawsuit caused. *Supra* at 8–11. The only thing that would be fundamentally unfair here is faulting the State of Georgia for *addressing* an electoral mess created by activists.

HB 1312 says nothing about who's eligible to run for the Commission, nothing about how Commissioners are elected, nothing about who's eligible to vote for them, nothing about how eligible voters choose their preferred candidate. HB 1312 doesn't change any election rules after votes have been cast. There is no improper motive or intent to disenfranchise. No state officials colluded to cancel an election. And no one is attempting to fill a vacancy by appointment that should be filled by the voters. Before and after HB 1312, votes are weighed exactly the same, and all Georgians are just as able to vote as before. Plus, adequate state law remedies remain available to Plaintiffs. *See*

Ga. Const. art. I, § II, ¶ V(b)(1) (waiving sovereign immunity for actions seeking to declare acts of the State unconstitutional—but prohibiting attorney's fees). HB 1312 concerns only "the administrative details of a local election." *Curry*, 802 F.3d at 1314. It doesn't even cause "regular" unfairness, much less fundamental unfairness requiring yet more federal intervention into Georgia's state elections.

And if all that weren't enough, it's worth repeating the futility of McCorkle's requested relief and the likelihood of inevitable mootness. She demands a third Commission election be held this year. *See* Doc. 2 at 10–11; Doc. 1 at 10. But it is now late April. Qualifying has already taken place for the two seats this year, and voting in the special primaries begins next month. This appeal will not be resolved until it is far too late to practically organize a third election, which would include candidate qualification, primaries, and so on. And if the completion of the 2025 elections does not somehow moot McCorkle's claim, it is not clear what McCorkle's claim would even transform into. McCorkle seeks a forever-cycle of unjustified disruption.

b. Plaintiffs' contrary arguments rely on a bare invocation of precedent, but precedent doesn't help them. This case involves completely different actors, motives, and results than *Duncan*.

Duncan involved a Governor's appointment power; Plaintiffs challenge a legislatively enacted statute. *Duncan* involved a Governor's attempt to take power reserved to the voters; Plaintiffs challenge a logistical remedy necessary to address the problem created by a wayward federal court injunction. And *Duncan* involved the "total abrogation of a statutorily-mandated special election," *Welch v. McKenzie*, 765 F.2d 1311, 1317 (5th Cir. 1985); Plaintiffs challenge a law scheduling one Commission election one year later than she'd prefer (and scheduling it that way to maintain a core feature of the Commission's structure). They are dissimilar in every material way.

Plaintiffs next rely on the more recent *Gonzalez* decision, but it, too, does them no good. *See* Opening.Br.22–25. There, just as in *Duncan*, a Governor again attempted to fill a vacant office by appointment rather than election, entirely cancelling a statutorily required contest. *Gonzalez*, 978 F.3d at 1268. The plaintiff obtained a preliminary injunction requiring the state to hold the election, and this Court affirmed after the state supreme court held that cancelling the election violated state law. *Id.* at 1268, 1270–71.

Plaintiffs say their claim is "precisely the same federal Due Process claim that this Court upheld in *Gonzalez*," Opening.Br.22,

but that is utter nonsense. First, *Duncan* and *Gonzalez* didn't involve "delayed elections." *Id.* at 23. They involved *cancelled* elections. That's nothing like HB 1312 scheduling elections that *are going to happen*. Indeed, that is the whole point of HB 1312—to make sure the elections McCorkle convinced a federal court to cancel now actually happen.

Second, the parties in *Gonzalez* did "not dispute that if [the cancelled election] violate[d] the Georgia Constitution, … then it also" constituted a substantive due process violation. 978 F.3d at 1271. There was thus no meaningful holding on that point. *See, e.g.*, *Johnson v. Terry*, 119 F.4th 849, 855 (11th Cir. 2024).

Third, it would not make a difference even if the Court had reached a holding on that issue. *Gonzalez*'s facts are virtually identical to *Duncan*'s, *see Gonzalez*, 978 F.3d at 1268; *Duncan*, 657 F.2d at 693, so at most *Gonzalez* just follows *Duncan*'s narrow holding, which does nothing for Plaintiffs, *see supra* at 26–34.

Fourth, *Gonzalez* did not involve elections cancelled by a federal court at the behest of a Plaintiff—*erroneously*, at that. Even if it would be "fundamentally unfair" for Georgia to reschedule its Commission elections in the abstract (and it would not be), it cannot be unfair where the State is merely addressing a known problem it did not create.

This Court's substantive due process voting cases don't provide a shred of support for Plaintiffs' (state law) claim. HB 1312 does not implicate, much less violate, anyone's substantive due process rights.

3. Alternatively, HB 1312 satisfies whatever federal constitutional scrutiny applies.

Even if all of that is wrong, Plaintiffs would still lose. When a plaintiff "ha[s] demonstrated a federally protected right," a substantive due process claim still fails if the challenged action or policy is a "permissible means of protecting a substantial state interest." *Curry*, 802 F.2d at 1314. In *Curry*, for example, this Court rejected a voter's claim that a party committee (created by statute) violated substantive due process by arbitrarily using survey and polling data to approximate the number of illegal primary votes. *Id.* This Court held that, even if federal substantive due process was implicated, there was no constitutional violation. *Id.* at 1316–17. The state had not only a substantial but "compelling" interest in "[e]nsuring honest and fair elections and preserving the rights of its voters and political parties." *Id.* at 1317. With tens of thousands of possibly illegal votes, the state couldn't vindicate those interests by assessing

each ballot individually. *Id.* Given that substantial state interest, the U.S. Constitution required nothing more. *Id.* at 1318.

So too here. Plaintiffs' purported substantive due process right to vote for three rather than two Commissioners this year, Doc. 2 at 10–11, is irrelevant given Georgia's interest in a crucial regulatory body's continuity. Staggered elections ensure that no single election cycle replaces a majority of the political body. That, in turn, avoids "upset[ting] the operation of" that body, *Common Cause Ind. v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 927 (7th Cir. 2015), and "impede[s] fleeting factions" from seizing control, *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 997 (D.C. Cir. 2021) (Walker, J., concurring and dissenting in part), *rev'd on other grounds*, *West Virginia v. EPA*, 597 U.S. 697 (2022). Plus, staggered elections mean voters have the chance to vote more often and maintain political accountability. U.S. Senate elections are staggered for those same reasons: they make the Senate a "continuing body," *McGrain*, 273 U.S. at 181, preserving institutional knowledge and competence and "bring[ing] stability … while encouraging [members] to deliberate measures over time," *About the Senate & the U.S. Constitution*, *supra*.

The Public Service Commission has always been a continuing body, with staggered appointments or elections from inception.

1879 Ga. Laws at 125; *supra* at 7. A majority of Commissioners have apparently never been on the ballot at the same time, and certainly not in the past 30 years. Doc. 13-1 at 7. Stability and institutional competence are essential for the body tasked with critical decisions such as whether to construct a multi-billion-dollar nuclear power plant. *See* Anastaciah Ondieki, *Georgia PSC votes to continue construction at Plant Vogtle*, Atlanta Journal-Constitution (Dec. 21, 2017), https://tinyurl.com/45ktkdds. And such weighty decisions are subject to regular political oversight because staggered elections put one or two Commissioners up for election every two years. That balance—continuity and stability plus political accountability—is a state interest of the highest order.

How McCorkle thinks her own desire to accelerate or suspend Commission elections negates the State's interest is anyone's guess. Plaintiffs don't even argue as much. Instead of making—much less substantiating—the claim that HB 1312 doesn't advance a substantial state interest, they revert to a procedural argument wholly unmoored from any authority or basic logic. Plaintiffs assert that the district court could not even reach the question of scrutiny because doing so somehow meant the court improperly granted judgment on the pleadings (as opposed to

granting a motion to dismiss). Opening.Br.28. In other words, by alternatively ruling that HB 1312 satisfies scrutiny, Plaintiffs say, the court went beyond a Rule 12(b) ruling and issued a Rule 12(c) judgment on the pleadings.

Plaintiffs' argument fails on every level. To start, the State moved to dismiss, and that's the motion the district court granted. The court concluded (correctly) that Plaintiffs' claim failed as a matter of law, with one alternative rationale being the State's compelling interest. Doc. 20 at 14–15, 16. The court addressed an "alternative ground[] to reach the conclusion that [Plaintiffs] had failed to state a claim." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 679 (11th Cir. 2014). And that alternative ruling was based on a legal rule not requiring any factual record. *See Dana's R.R. Supply v. Att'y Gen. of Fla.*, 807 F.3d 1235, 1241 (11th Cir. 2015) (whether law satisfies applicable constitutional scrutiny is purely legal question); *United States v. Alfonso*, 104 F.4th 815, 820 (11th Cir. 2024) (constitutionality of statute is question of law). The Secretary's answer wouldn't have changed the district court's analysis, so the district court had no need to grant judgment on the pleadings. It was a Rule 12(b) ruling.

Plaintiffs retreat to arguing, without citing any supporting authority, that the district court's scrutiny analysis was somehow

improper because they were not given notice and an opportunity to be heard on it. *See* Opening.Br.29. That is preposterous. The Secretary specifically argued that "even if this Court were to ultimately conclude that there is some kind of fundamentally unfair process in HB 1312 (which is plainly not the case), the state's 'substantial state interests' require this Court to uphold Georgia's process." Doc. 13 at 17 (quoting *Curry*, 802 F.2d at 1317). And HB 1312 explicitly identifies the government interest justifying the regulation: "ensuring that [Commissioners] are elected in staggered elections and serve staggered terms." O.C.G.A. § 46-2-1.1(a). That interest has been an integral part of this case from the start, so if Plaintiffs were not heard on this issue, that is their fault for not speaking.

But suppose the Secretary had not made the argument: so what? This Court can affirm for any correct reason—even one that no party argued and the district court didn't address. *United States v. Gill*, 864 F.3d 1279, 1280 (11th Cir. 2017). It could hold HB 1312 is constitutional because it satisfies scrutiny, even if nobody addressed it in the district court.

On top of everything else, Plaintiffs have the opportunity *right now* to be heard on the scrutiny issue. They have again declined to do so, not making any substantive argument on the

point. *See* Opening.Br.28–30. Plaintiffs' failure to take their own claims seriously is a basis for forfeiture, not vacatur, and this Court should affirm.

B. *Duncan*'s substantive due process test should be limited to its facts.

The Court need go no further, but Plaintiffs should also lose because their entire legal theory rests on a 44-year-old substantive-due-process decision that is irreconcilable with an earlier (correct) panel precedent—not to mention contradicted by this Court's more recent decisions. *Duncan*'s view that a mere state law violation is sufficient to establish a substantive due process violation is mistaken in nearly every way, and this Court should not accept Plaintiffs' invitation to extend that wayward ruling any further. Rather than expand the mistake, it's "best to stop digging." *Littlejohn v. Sch. Bd. of Leon Cnty., Fla.*, 132 F.4th 1232, 1287 (11th Cir. 2025) (Newsom, J., concurring).

Whatever else one can say about substantive due process's flaws—and judges of this Court and the Supreme Court have said much[2]—it is well established that the doctrine is narrow. It

[2] *See, e.g.*, *Eknes-Tucker v. Governor of Ala.*, 114 F.4th 1241, 1243–47 (11th Cir. 2024) (Pryor, C.J., respecting denial of rehearing en banc); *Littlejohn*, 132 F.4th at 1285, 1287 (Newsom, J.,

covers only those rights that are "deeply rooted in our history and tradition and essential to our Nation's scheme of ordered liberty." *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1220 (11th Cir. 2023).

Those rights are "created *only* by the [U.S.] Constitution," not state law. *Doe*, 903 F.3d at 1235 (emphasis added). "[A]reas in which substantive rights are created only by state law … are not subject to substantive due process protection." *Id.*; *Beach Blitz Co. v. City of Miami Beach*, 13 F.4th 1289, 1303 (11th Cir. 2021) (same). Infringement of rights created by state tort or employment laws, for example, do not implicate substantive due process. *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994), *abrogated on other grounds*, *Littlejohn*, 132 F.4th at 1239–40. So just like there's no substantive due process right to run for state office, *Williams v. Bd. of Regents*, 629 F.3d 993, 998 n.9 (5th Cir. 1980), the "right to vote in a state election, in itself, is not a right secured by the Constitution or by federal law," *Johnson*, 430 F.2d at 612.

That makes sense: "the right to vote in state elections is nowhere expressly mentioned" in the U.S. Constitution. *Harper v.*

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concurring); *Timbs v. Indiana*, 586 U.S. 146, 159 (2019) (Thomas, J., concurring).

Va. State Bd. of Elections, 383 U.S. 663, 665 (1966). And neither this Court nor the Supreme Court has held that holding state elections (much less at one's desired time) is "deeply rooted" in the nation's history and tradition and "essential to … ordered liberty." *Eknes-Tucker*, 80 F.4th at 1220. The Supreme Court has actually said the opposite: "[T]he right to vote for the election of state officers … is a right or privilege of state citizenship, not of national citizenship." *Snowden*, 321 U.S. at 7. Indeed, Georgia could simply decide that Public Service Commissioners are not elected at all, and the U.S. Constitution would have nothing to say about it. Most states have governor-appointed utility commissions. The U.S. Constitution doesn't confer a substantive due process right to state elections for state offices, and Georgia law couldn't create that federal right. *See Doe*, 903 F.3d at 1235.

It also makes no sense to recognize a substantive due process right because the First Amendment and Equal Protection Clause have been interpreted to protect the right to vote. *See, e.g.*, *Wilson v. Brinberg*, 667 F.3d 591, 598–99 & n.1 (5th Cir. 2012) (concluding "narrow substantive right" to vote, grounded in First Amendment and Equal Protection Clause, precluded substantive due process claim). And litigants can't rely on a "generalized notion" of substantive due process when an enumerated right

covers the relevant conduct. *Davis v. Waller*, 44 F.4th 1305, 1317 (11th Cir. 2022). If a state does take some kind of action to arbitrarily deny the ability to vote in a state election, federal sources of law already provide the basis for vindicating any infringed *federal* right.

But a mere state law violation isn't enough to justify a federal court's intrusion into state elections. The question is whether there is *inherent* unfairness, not a putative state law violation. That's how other circuits understand this concept. *See, e.g.*, *Welch*, 765 F.2d at 1312, 1316–17 (no due process violation despite numerous state law violations regarding absentee ballots); *Hendon*, 710 F.2d at 182 (no due process violation even though ballot form didn't meet statutorily prescribe form); *Pettengill v. Putnam Cnty. R-1 Sch. Dist.*, 472 F.2d 121, 122 (8th Cir. 1973) (no fundamental unfairness when school board counted illegal votes in local election); *Powell v. Power*, 436 F.2d 84, 85, 88 (2d Cir. 1970) (no due process violation even though state election officials counted possibly determinative number of illegal primary votes). These decisions likely should have been grounded in equal protection or First Amendment principles, but their focus on electoral integrity—rather than whether a state supposedly violated its own law—is correct.

Duncan disregarded these principles. This Court's predecessor concluded that substantive due process "protects against the disenfranchisement of a state electorate *in violation of state election law*." *Duncan*, 657 F.2d at 693 (emphasis added). It held, in other words, that a state law violation can itself be a federal constitutional violation. The court then drew an arbitrary line around this supposed federal right, determining that only "fundamental unfairness" in state elections implicates substantive due process, while mere "garden variety" election challenges do not. *Id.* at 700, 701.

Duncan is wrong from start to finish. *Duncan* dismissed the Supreme Court's unmistakably clear statement that substantive due process does not cover state-created voting rights. *See id.* at 704; *see also Snowden*, 321 U.S. at 7. The purported basis for *Duncan*'s substantive due process right to vote in state elections was *Reynolds v. Sims*, 377 U.S. 533 (1964), a case about the Equal Protection Clause—not substantive due process. *Duncan*, 657 F.2d at 700. And *Duncan* ultimately concluded that, since voting rights are "the essence of a democratic society," the right to vote in state elections free of fundamental unfairness simply *must* be "federally protected." *Id.* But even assuming that a state election must be conducted fairly (and that the First Amendment and

Equal Protection Clause are insufficient to protect that interest), that says nothing about whether a state must hold an election *at all* or whether it must comply with state law.

In a case where it matters, this Court should hold that *Duncan* is not good law because it disregarded binding panel precedent. Over a decade before *Duncan*, this Court's predecessor held in *Johnson v. Hood* that "the right to vote in a state election, in itself, is not a right secured by the Constitution or federal law." 430 F.2d at 612. *Duncan* rejected that clear holding, purporting to recast it as limited to "garden variety" election challenges. 657 F.2d at 704. But *Johnson* considered a claim that a dispositive number of votes were arbitrarily discarded after an election, changing the outcome and denying those voters the franchise. 430 F.2d at 611. Assuming those allegations were true, that is exactly *Duncan*'s vision of "fundamental unfairness." Illegally changing an election's winner—by disenfranchising certain voters—is *worse* than cancelling the election altogether. *Duncan* failed to distinguish *Johnson* and reeks of outcome-first reasoning. *See also, e.g.*, *Jones v. Governor of Fla.*, 975 F.3d 1016, 1048 (11th Cir. 2020) (en banc) (favorably citing *Johnson*). *Duncan* violated the prior panel precedent rule—it effectively overruled a decision to the contrary. And the earlier precedent should control. *In re*

Lambrix, 776 F.3d 789, 794 (11th Cir. 2015) (prior panel's holding binds subsequent panels unless overruled or abrogated by Supreme Court or en banc court).

Nor can *Duncan* be reconciled with this Court's and the Supreme Court's more recent substantive due process decisions. "[G]uideposts for responsible decisionmaking in this unchartered area are scarce and openended," *A.W. v. Coweta Cnty. Sch. Dist.*, 110 F.4th 1309, 1317 (11th Cir. 2024), so courts addressing substantive due process claims must begin with a "careful description of the asserted right," *Waldman v. Ala. Prison Commn'r*, 871 F.3d 1283, 1292 (11th Cir. 2017). Courts then "engage in a careful analysis of the history of the right at issue and [are] reluctant to recognize rights not mentioned in the Constitution." *Eknes-Tucker*, 80 F.4th at 1220 (alteration adopted and quotation omitted). And even then, the narrowly defined right is protected only if it's "deeply rooted" in the Nation's "history and tradition" and "essential to [the] scheme of ordered liberty." *Id.*

Duncan did none of this. It defined the alleged right at the *highest* level of generality: the "right to vote." *Duncan*, 657 F.2d at 700. But the right it actually recognized isn't even a right to vote in state elections; it's a supposed right to vote in state

elections as defined and conducted by state law. And *Duncan* doesn't purport to analyze whether that's deeply rooted in the Nation's history or essential to its scheme of ordered liberty. *See id.* at 700–05. *Duncan* instead baldly claims that "[n]o right is more precious in a free country" than the right to vote. *Id.* at 700. Say that's true at the highest level of abstraction: it says nothing about whether state compliance *with state voting laws* is so intrinsic to the Nation's fabric that it's implicit in the U.S. Constitution. Everything this Court and the U.S. Supreme Court have since held about substantive due process eviscerates *Duncan*'s analysis and result. It has no jurisprudential leg left to stand on.

Duncan is irreconcilable with controlling precedent both before and after it was decided, and it should not control here, even if it were directly on point (which, of course, it is not). At the very least, *Duncan*'s fundamental flaws demonstrate that the Court should not extend it one iota toward new contexts, especially in a case where the supposed "unfairness" is a plaintiff disliking a legislature's solution to a problem she created.

III. Regardless, there can be no federal law violation because HB 1312 is consistent with Georgia law.

Lastly, HB 1312 does not violate the Georgia Constitution, even if that could somehow support a federal substantive due process claim. The legislature's scheduling fix for elections that McCorkle derailed is well within its power to set the manner and time of Commission elections. Ga. Const. art. IV, § I, ¶ I(c). Plaintiffs don't explain how HB 1312 supposedly violates the Georgia Constitution, even though that's their *whole case*.

A. HB 1312 complies with Georgia's constitutional and statutory voting laws.

1. The Georgia Constitution affirmatively authorizes the legislature to set the manner and time of Public Service Commission elections. And even if the Georgia Constitution didn't affirmatively authorize laws like HB 1312, the legislature has plenary power to legislate on lawful subjects: fixing a scheduling fiasco created by a mistaken federal court injunction is certainly within those powers. HB 1312 does not violate Georgia law.

Paragraph I says the "filling of vacancies and manner and time of election of members of the commission shall be as provided by law." Ga. Const. art. IV, § I, ¶ I(c). That plainly and ordinarily means the legislature decides when and how Commission elections are held. HB 1312 does exactly that. Its operative

provisions do nothing more than set the "manner and time of election[s]" for the next two cycles of Commission elections. *See* O.C.G.A. § 46-2-1.1(b). And for the two elections occurring this year, it sets the time and manner of special primary elections so that those seats can be filled in short order. *Id.* § 46-2-1.1(c). HB 1312 is a purely logistical statute, the sort that Paragraph I clearly authorizes.

HB 1312 would be lawful even without that specific constitutional authorization. The General Assembly has "power to make all laws not inconsistent with [the Georgia] Constitution … which it shall deem necessary and proper for the welfare of the state." Ga. Const. art. III, § VI, ¶ I. Fixing a federal court's mistake, prompted by McCorkle, is certainly within those powers. HB 1312 serves the State's (and the public's) interest in staggered, regular Commission elections. S*upra* at 37–39. And it's necessary in the strictest sense of the word: without HB 1312, no other Georgia law tells the Secretary what to do under these unprecedented circumstances. The Georgia Constitution affirmatively allows HB 1312 several times over; the legislature did nothing unlawful by rescheduling improperly delayed Commission elections.

That's not to say the legislature could pass a law setting the next Commission elections for the year 2095. Georgia law considers the reasons justifying a rescheduled election, *see Pittman*, 184 Ga. at 258; *Garcia*, 261 Ga. at 531–32, so that sort of extension would almost certainly not pass muster. But—it should go without saying—HB 1312 isn't about gamesmanship. It corrects a mistake McCorkle convinced a federal judge to make—and it corrects that mistake in a way that allows orderly elections to maintain integral features of a Georgia public body. It doesn't violate state law, much less federal law.

2. Plaintiffs, amazingly, make no argument to the contrary. A party forfeits any argument they fail to make in their initial brief on direct appeal. *Campbell*, 26 F.4th at 872–73. Despite its importance to their case, Plaintiffs make no effort to explain how HB 1312 violates the Georgia Constitution. They just declare it, as if that's enough to resolve this case. *See, e.g.*, Opening.Br.20. Their failure to brief that argument at all—much less "adequately," *King v. Warden*, 69 F.4th 856, 877 (11th Cir. 2023)—is fatal. And any argument they might raise in their reply brief will be "too late." *Buckley v. Sec'y of the Army*, 97 F.4th 784, 799 n.9 (11th Cir. 2024).

Plaintiffs do assert that the legislature *could* have done things differently, *e.g.*, Opening.Br.16–17, 20, 24, but so what? That's not a legal argument (or even a good non-legal argument). The legislature doesn't have to do what Plaintiffs want. Indeed, their argument that the legislature should have done something different acknowledges that *someone* had to do *something*. A federal court broke Georgia's Commission election schedule, and somebody had to fix it. Plaintiffs dislike the solution the legislature chose. But there had to be a response.

3. To the extent Plaintiffs rely on the Georgia Constitution's Commissioner term length provision, that is a non-starter. Although they don't explain the purported "brazen" state law violation, Opening.Br.4, Plaintiffs' concern is presumably that the Georgia Constitution provides that "terms of [Commission] members shall be for six years," Ga. Const. art. IV, § I, ¶ I(a); *see* Opening.Br.12, while HB 1312 sets some elections that allow sitting Commissioners to remain in office past six years. This gets Plaintiffs nowhere.

To start, "context is king" in questions of interpretation, *United States v. Hernandez*, 107 F.4th 965, 969 (11th Cir. 2024), and context demolishes the argument that HB 1312 is in tension with Paragraph I. Paragraph I says Commissioners "shall serve

until their successors are elected and qualified." Ga. Const. art. IV, § I, ¶ I(a). It would be superfluous for the "shall serve" language to merely reiterate that terms end after six years. *See Lucas v. Beckman Coulter, Inc.*, 303 Ga. 261, 263 (2018) (rule against surplusage). The language instead means a Commissioner remains in office if a successor cannot be chosen and qualified before the six-year term expires. And a successor becoming "qualified" happens only once the new officer has satisfied the legal requirements to hold an office, like taking a judicial oath and receiving a judicial commission. *Pittman*, 184 Ga. at 258. Which is to say, Paragraph I(a) expressly allows a Commissioner to "hold over" beyond six years when a successor is unable to take office. *Id.* at 257. That was the known consequence here of the federal injunction erroneously cancelling elections.

Were there any doubt about the meaning of the "elected and qualified" language, the Georgia Supreme Court has long interpreted materially similar language to authorize holding over in exceptional circumstances. When a statute or constitutional provision "creates an office and provides for the election of an officer to fill it for a given term of years," yet also says the incumbent serves "until his successor is commissioned and

qualified," the "incumbent will hold over and beyond the fixed term until his successor is elected, qualified, and commissioned." *Id.* So, for example, when a judicial election winner died before taking office, thus never able to become "qualified," the incumbent judge remained in office until a replacement could be elected. *Id.* at 258. Paragraph I means the same: extenuating circumstances that prevent a successor's qualification mean a Commissioner remains in office until a successor can replace her. And the Georgia Supreme Court has specifically held that a federal injunction delaying a state election is the kind of extenuating circumstance that authorizes a state official to stay in office under Georgia's hold over provisions. *See Garcia*, 261 Ga. at 531 (superior court judge would hold over after federal injunction suspended election). All the same here.

Moreover, Plaintiffs' apparent, unexplained position—that any Commission term other than six years violates the Georgia Constitution—would also mean that every Commissioner appointed to fill a vacancy violates the Georgia Constitution. An appointee serving the rest of an unfinished term necessarily serves for less than six years—and would "violate" Plaintiffs' view of the law. But the Georgia Constitution specifically entrusts vacancy filling to the General Assembly, Ga. Const. art. IV, § I,

¶ I(c), which has determined that an appointed Commissioner serves out what's left of the retired Commissioner's term, O.C.G.A. § 46-2-4. That's what would have happened with one of the current Commissioners, who was appointed but, thanks to McCorkle's suit, has yet to participate in an election.

The Georgia Constitution explicitly contemplates holdovers on the Commission. It says nothing that limits the legislature's ability to get elections *back* on schedule. At most, it is utterly silent about how the legislature is supposed to fix problems like the one created by McCorkle, where any response requires some temporary measure which the Georgia Constitution doesn't expressly contemplate. Plaintiffs' state law "argument" fails at every level.

4. Instead of actually arguing that HB 1312 violates the Georgia Constitution, Plaintiffs make tangential arguments that are wrong, irrelevant, or both. They assert, for example, that this Court and the Georgia Supreme Court have held that rescheduling elections for fixed-term offices violates state law. *See* Opening.Br.4 (citing *Gonzalez*, 978 F.3d 1266; *Kemp v. Gonzalez*, 310 Ga. 104 (2020)). But, as already noted, *supra* at 27–30, the circumstance Plaintiffs rely on involved state actors intentionally *cancelling* an election and attempting to appoint someone to an

elected office. *Kemp*, 310 Ga. at 105. Plaintiffs, without explanation, assert that this is a "distinction[] without a difference." Opening.Br.23. But Georgia *fixing* a problem McCorkle caused is quite different from Georgia *creating* an electoral problem on purpose. *Compare Pittman*, 184 Ga. at 258; *Garcia*, 261 Ga. at 531–32, *with Kemp*, 310 Ga. at 105. Not to mention that *Gonzalez* did not even involve the Public Service Commission, which has its own constitutional and statutory backdrop.

Plaintiffs have also previously argued that any disruption to Commission elections is "of the State's own making." Mot. for Injunction Pending Appeal Reply at 7. They say Georgia "could have adopted an alternative method of elect[ing]" Commissioners while it appealed the *Rose* injunction. *Id.* at 9. And that it "could have asked this Court to stay the injunction" while the *Rose* plaintiffs petitioned for certiorari. *Id.* And they say that when this Court finally stayed the injunction, the Secretary "could have immediately called a special election for three [C]ommissioners." *Id.*

This argument proves that irony is dead, but it has nothing to do with whether HB 1312 violates state law (much less the U.S. Constitution). And it is risible. Had McCorkle not filed the

original suit, none of this would have happened. Had she not tried to convince this Court to hold—although no other court ever had, *Rose*, 87 F.4th at 477 n.8—that the Commission's statewide elections violated federal law, none of this would have happened. McCorkle obtained an injunction indefinitely cancelling Commission elections, even though the obvious and predicted result would be holding over Commissioners that *she herself said were illegally elected*. *Rose*, 22-12593, Doc. 5-1 at 25 (arguing that the injunction should be stayed pending appeal because if plaintiffs prevailed on appeal the court could simply order special elections, but if the Secretary prevailed, the elections would be pointlessly cancelled). *All of this* is McCorkle's fault.

Plaintiffs also assert, without any support, that the Secretary was obligated to "immediate[ly]" call three special elections as soon as this Court lifted the *Rose* injunction. Opening.Br.16. Notwithstanding that there was still a pending petition for certiorari, Georgia law imposes no such duty on the Secretary. The statutes Plaintiffs cite for this supposed duty require special elections upon a *vacancy* at the Commission. O.C.G.A. §§ 21-2-504(a), 21-2-540(a)(2). But in Georgia, a federal court order delaying an election does not create a vacancy. *Garcia*, 261 Ga. at 532; *see also Pittman*, 184 Ga. at 256–57; *Shackelford v. West*, 138

Ga. 159, 161 (1912). Unsurprisingly, Georgia law doesn't specifically contemplate a federal court cancelling state elections. HB 1312 fills that gap. And if it were enjoined, no other state law would tell the Secretary what to do. That means Georgia would need *yet another* new law to fix yet another intervention in its elections. McCorkle claims she wants elections sooner but everything she has done for years has delayed them, and now she is trying to delay them yet again.

Plaintiffs can't rewrite history to manufacture some allegedly improper motive on Georgia's part. McCorkle and her fellow activists bear all the responsibility for the situation HB 1312 was required to fix. Plaintiffs cannot establish a state law violation, so HB 1312 can't possibly violate the U.S. Constitution—even under the most imaginative substantive due process theories.

B. The Court should at minimum certify a question to the Georgia Supreme Court.

If the Court makes it this far, there shouldn't be any doubt that Georgia's law complies with Georgia law. But if this Court determines it is necessary to decide the case—an extraordinary irony—the Court should certify the question of HB 1312's validity to the Georgia Supreme Court.

"[C]ertification is appropriate" when a case "requires [this Court] to resolve a question at the core of the state's authority: whether a Georgia statute concerning elections of [state] officials violates the Georgia Constitution." *Gonzalez*, 969 F.3d at 1212 (citing *Forgione v. Dennis Pirtle Agency, Inc.*, 93 F.3d 758, 761 (11th Cir. 1996)). Declining to do so "risks friction-generating error when [a federal court] endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Id.* (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997)).

The risk of misreading state law is a serious concern. If this Court gets the state law issue wrong, the consequences would be egregious. It would mean a federal court used federal substantive due process to enjoin one state law because it violates some other state law—all while being wrong about state law. That would convert *Duncan*'s woebegone substantive due process theory into a borderline coup d'etat by the federal judiciary.

Of course, this Court should get nowhere near certification, as there are multiple dispositive off-ramps before then. (The Georgia Supreme Court would likely decline even to answer the question where it is not necessary to the resolution of the case, *see, e.g.*, *GEICO Indem. Co. v. Whiteside*, 311 Ga. 346, 346 n.1 (2021)). But it does further underline the point: that ruling for Plaintiffs would

require certification proves they filed a state law claim in federal court. The district court correctly tossed it out, and this Court should too.[3]

[3] Remarkably, Plaintiffs ask this Court to reassign the case to a different district court judge. *See* Opening.Br.31 n.4. Their argument in support of that notion is little more than "because the court ruled against us." They fault the district judge for not expediting this case—even though this Court, too, denied Plaintiffs' request for emergency relief and has not expedited this appeal. They fault the district judge for calling the *Rose* case "misguided"—but this Court *held* that Plaintiffs' case was misguided. (And not that it matters, but the district court already rejected Plaintiffs' attempt to resurrect their meritless claims. *Rose*, 1:20-cv-02921, Doc. 204.) They assert that the district judge declined to follow "binding authority," which is wrong but, in any event, just a claim of error. Their "request borders on the frivolous, if it doesn't step over the border into the land of frivolity." *Ala. Aircraft Indus., Inc. v. Boeing Co.*, 2025 WL 1009087, at *12 (11th Cir. Apr. 4, 2025). Nothing the district judge did warrants reassignment.

CONCLUSION

For the reasons set out above, this Court should affirm the district court's judgment.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 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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