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

APPELLANTS' REPLY

Samuel Lester Tate, III
Akin & Tate, PC
Post Office Box 878
11 South Public Square
Cartersville, Georgia 30120
(770) 382-0780
lester@akin-tate.com

Bryan L. Sells
The Law Office of
Bryan L. Sells, LLC
Post Office Box 5493
Atlanta, Georgia 31107-0493
(404) 480-4212
bryan@bryansellslaw.com

Attorneys for the Appellants

McCorkle v. Secretary of State for the State of Georgia
25-10114-H

Certificate of Interested Persons and Corporate Disclosure Statement

I certify 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

Mullinax, Zachary

O'Kelley, Elijah J.

Petrany, Stephen

Raffensperger, Brad

C-1 of 2

McCorkle v. Secretary of State for the State of Georgia
25-10114-H

Ray II, William

Sells, Bryan L.

Tate, Samuel Lester III

The Election Law Group

The Law Office of Bryan L. Sells, LLC

Tyson, Bryan P.

Webb, Bryan

Young, Elizabeth

I further certify 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.

/s/ Bryan L. Sells
Attorney for the Appellants
May 16, 2025

Table of Contents

Table of Citations

Cases

Constitutional Provision

Statutes

Rules

Other Authority

Argument

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 State's interest "in avoiding majority turnover on the Commission in one election cycle." (Appellee's Br. 16.) But no amount of good policy authorizes the General Assembly to amend Georgia's Constitution by state statute. *See Kemp v. Gonzalez,* 310 Ga. 104, 113 (2020) (collecting cases).

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." O.C.G.A. § 46-2-1.1(b). House Bill 1312 also extends the terms of all sitting commissioners beyond the original six years. *Id.* The General Assembly has thumbed its nose at the Georgia Supreme Court's clear and unanimous ruling on this very issue just five

years ago. *See Gonzalez,* 310 Ga. at 113 (holding that the General Assembly may not, by statute, alter a term of office prescribed by Georgia's Constitution).

Because of that unconstitutional statute, the Secretary failed to call a special election for three seats on the Public Service Commission that would have otherwise occurred in 2024. That failure violated the United States Constitution under binding authority in this circuit. *See Duncan v. Poythress*, 657 F.2d 691, 704 (5th Cir. 1981) (holding that the Secretary of State violated the Due Process Clause by failing to call a special election required by state law to fill a seat on the Georgia Supreme Court).[1] A unanimous panel of this Court recently reaffirmed that precedent in *Gonzalez v. Governor of Georgia*, 978 F.3d 1266 (11th Cir. 2020) (Branch, J.) (holding that the Secretary of State violated the Due Process Clause by canceling an election pursuant to a state statute that violated the Georgia Constitution).

[1] The Eleventh Circuit has adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

The Secretary barely mentions *Gonzalez* in his brief, and his attempts to distinguish *Duncan* and *Gonzalez* fall short. None of the Secretary's arguments have any merit, and this Court should reject them.

I. *Polelle* controls on standing.

The Secretary first argues that McCorkle lacks standing because the harm caused by House Bill 1312 is neither concrete nor particularized. (Appellee's Br. 20-25.) The injury isn't concrete, he says, because House Bill 1312 "just means McCorkle does not get to vote until later than she would prefer." (*Id.* at 20.) And the injury isn't particularized because McCorkle's stake in voting for PSC members "is no different than every other voter." (*Id.* at 22.) But this Court's recent decision in *Polelle v. Florida Secretary of State*, 131 F.4th 1201 (11th Cir. 2025), which was issued two weeks after the appellants filed their opening brief, forecloses the Secretary's arguments.

Polelle addressed an unaffiliated voter's claim that Florida's closed primary system violated his rights under the First and

Fourteenth Amendments by denying him the ability to vote in primary elections for partisan public offices. 131 F.4th at 1205-06. The district court dismissed the voter's claim for lack of standing, but this Court reversed, holding (among other things) that the voter's alleged injury was both concrete and particularized. *Id.* at 1208-16.

An injury is sufficiently concrete for standing purposes if it constitutes an "invasion of a legally protected interest." *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). In *Polelle*, this Court held that the voter's alleged injury was sufficiently concrete both because he had alleged a violation of his constitutional rights and because voting claims "are the 'kind' of injury for which Americans have always sued to seek redress." 131 F.4th at 1209-10.

So too here. McCorkle has alleged that House Bill 1312 violates her constitutional rights by unlawfully cancelling PSC elections in which she would have otherwise been able to vote. (App. 1 at 3-8.) Under *Polelle*, that's sufficiently concrete for standing purposes.

The Secretary's argument that McCorkle's injury isn't concrete because she has no legally protectable interest in the timing of an election lacks merit. He cites no authority and merely asserts that McCorkle's alleged injury is "on par" with alleging injury based on the outcome of an election. (Appellee's Br. 20.) But this Court has repeatedly held that voters have a legally cognizable interest in their ability to vote, and that's what McCorkle alleges. *Polelle*, 131 F.4th at 1212; *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1246 (11th Cir. 2020). McCorkle alleges that House Bill 1312 has deprived her of her ability to vote in PSC elections in which she would have otherwise been able to vote. (App. 1 at 3-8.) That's nothing like an injury based on the outcome of an election, but it's indistinguishable from the injury that this Court described as "undoubtedly" concrete in *Polelle*. 131 F.4th at 1209.

The Court also described the voter's alleged injury in *Polelle* as "certainly particularized." *Id.* at 1208. That's because the Eleventh Circuit and the Supreme Court "have long recognized that voters assert a 'particular injury' when they allege *their* 'inability to vote in a particular election.'" *Id.* at 1209 (quoting

Memphis Cnty. Sch. Dist. v. Stachara, 477 U.S. 299, 312 n.14 (1986)). And just like the voter in *Polelle*, McCorkle alleges that a state statute limits *her* "ability to vote" in particular elections. *Jacobson*, 974 F.3d at 1246. So her complaint "adequately identifies disadvantage to [herself] as an individual" to satisfy the particularity requirement of the standing doctrine. *Polelle*, 131 F.4th at 1209 (cleaned up).

The Secretary's counterarguments fail. First, he claims that "McCorkle complains *only* that 'the law has not been followed.'" (Appellee's Br. 21-22 (quoting *Wood v. Raffensperger*, 981 F.3d 1307, 1315 (11th Cir. 2020).) Not so. McCorkle complains that she has been denied the ability to vote in specific PSC elections that would have been held if not for the unconstitutional state statute that canceled them. That's a far cry from an undifferentiated request that existing law be followed.

Second, the Secretary tries to distinguish *Polelle,* arguing that the unaffiliated voter there suffered a particularized injury only because the challenged statute put him "at a unique disadvantage compared to others." (Appellee's Br. 22.) The voter there brought an

equal-protection claim in addition to a substantive due-process claim like the one here. 131 F.4th at 1206. So of course he alleged a comparative disadvantage. But that allegation played no role in the Court's determination that the voter had alleged a particularized, rather than generalized, injury to his due-process rights. What mattered was that the voter alleged that Florida's closed primary system limited his ability to vote in certain elections. *Id.* at 1209. And that's what McCorkle alleges here.

Third, the Secretary tries to distinguish *Gonzalez* on the ground that one of the plaintiffs there "*was a candidate for the office* affected." (Appellee's Br. 23.) One of the plaintiffs had "unsuccessfully" tried to become a candidate, but that makes no difference for standing purposes. *Gonzalez*, 978 F.3d at 1268. As the Supreme Court explained in *Anderson v. Celebrezze*, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical correlative effect on voters." *Anderson v. Celebrezze,* 460 U.S. 780, 786 (1983) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). Candidates aren't the only people directly

affected by the inability to participate in an election. *Cf. Polelle*, 131 F.4th at 1210 (rejecting Florida's argument that only a political party has standing to challenge a state's party-primary system).

Finally, the Secretary argues that the appellants misread *Wood*. (Appellee's Br. 24.) He claims that *Wood* requires McCorkle to allege an injury that is "unique to her versus other voters." (*Id.*) But that *vastly* overstates *Wood*. A plaintiff's injury must be "particularized," but it need not be unique. *Wood*, 981 F.3d at 1314. An injury is particularized if it "affect[s] the plaintiff in a personal and individual way." *Id.* (quoting *Spokeo*, 578 U.S. at 339). Wood lacked standing not because he failed to allege a unique injury but because he alleged no particularized injury to his own ballot. *Id.* at 1313-16. McCorkle, by contrast, has been personally affected here because she has been denied the ability to vote in certain PSC elections. That's a widespread injury, to be sure, but one that affects her personally. *See Polelle*, 131 F.4th at 1209.

II. The complaint states a well-established federal claim.

The Secretary acknowledges, as he must, that every federal circuit to consider the issue—including this one—has recognized that a plaintiff can state a federal due-process claim arising from alleged violations of the right to vote in state elections. (Appellee's Br. 31-32.) That's more than one can say for the district court, which concluded that the plaintiffs had failed to state a claim only "because it believes that Georgia courts are best suited to be the 'final arbitrators' of this state constitutional challenge." (App. 20 at 9.)

Still, the Secretary argues that the plaintiffs here failed to state such a claim for three main reasons. First, the Secretary argues that House Bill 1312 doesn't implicate due process because it complies with state law. (Appellees' Br. 50-61.) Second, the Secretary argues that, even if House Bill 1312 violates state law, it still doesn't implicate due process because the State had to do something to restart PSC elections. (*Id.* at 26-30.) And, third, the Secretary argues that even if House Bill 1312 is both unlawful and unnecessary, it still doesn't implicate due process because it's not

unfair to one of the three plaintiffs here. (*Id.* at 30-37.) Those arguments all fall short.

A. House Bill 1312 violates state law.

Just five years ago, in response to a certified question from this Court, the Georgia Supreme Court made clear that the General Assembly cannot by statute change the term of a public official that is in the Georgia Constitution. *Gonzalez*, 310 Ga. at 113. Doing so, as the General Assembly has done here, "is violative of the Georgia Constitution and may not be enforced." *Id.*

And there's no question that House Bill 1312 changes a term that is prescribed by the constitution. Georgia's Constitution provides that the terms of Public Service Commissioners "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." O.C.G.A. § 46-2-1.1(b). The term-shortening provisions of House Bill 1312 are such brazen violations

of the Georgia Constitution that the Secretary doesn't even try to defend them in his brief.

House Bill 1312 also extends the terms of all sitting commissioners beyond the original six years. *See id.* The Secretary argues that the term-lengthening provisions don't violate state law because "[t]he Georgia Constitution explicitly contemplates holdovers on the Commission." (Appellee's Br. 56.) *See* Ga. Const. art. IV, §I, ¶1(a) (providing that commissioners "shall serve until their successors are elected and qualified"). But that argument can't save the statute because the current commissioners from Districts 1 and 4 aren't holdovers. They were duly elected to six-year terms in the 2020 election, and their constitutional terms don't end until December 31, 2026. (*See* Appellee's Br. 11.) Still, House Bill 1312 purports to extend their terms until December 31, 2028. (*Id.*) The commissioners from Districts 3 and 5 were duly elected in 2018 and weren't holdovers until House Bill 1312 canceled the 2024 elections. (*Id.*) Their terms are extended to the end of 2025 and 2026, respectively. (*Id.*) No holdover provision could justify those four extensions.

The Secretary also argues that the General Assembly could lawfully move "the two elections occurring this year" (for the commissioners from Districts 2 and 3) from 2024 to 2025 either under its specific power to regulate the time and manner of PSC elections or under its plenary power to make laws it deems necessary and proper. (Appellee's Br. 51.) But those arguments are beside the point because the rest of House Bill 1312 remains "violative of the Georgia Constitution and may not be enforced." *Gonzalez*, 310 Ga. at 113.[2]

[2] The Secretary suggests that this Court "should certify the question of HB 1312's validity to the Georgia Supreme Court." (Appellee's Br. 59.) Certification is appropriate "[w]hen substantial doubt exists about the answer to a material state law question upon which the case turns." *Forgione v. Dennis Pirtle Agency, Inc.*, 93 F.3d 758, 761 (11th Cir. 1996). But certification isn't warranted when "the question isn't close" or when there are sufficient sources of state law to allow the court to reach a principled conclusion. *Matamoros v. Broward Sheriff's Office*, 2 F.4th 1329, 1336 n.4 (11th Cir. 2021). The state-law question here isn't close because of the obvious conflict between the text of House Bill 1312's term-altering provisions and the text of Georgia's Constitution. And there's a readily available source of state law to confirm the conclusion that the text already demands: the Georgia Supreme Court's unmistakable holding in *Gonzalez*. This Court should therefore decline the Secretary's invitation to ask the Georgia Supreme Court whether it meant what it said just five years ago.

B. House Bill 1312 was unnecessary.

The lynchpin of the Secretary's policy argument is that "Georgia *had* to do something" to restart PSC elections once this Court lifted the district court's injunction against the existing method of electing PSC members. (Appellee's Br. 29.) But that argument holds no water.

As the appellants pointed out in their opening brief, there are no circumstances here that weren't already addressed by existing Georgia law. (Appellants' Br. 16.) In the absence of House Bill 1312, it would have been the Secretary of State's duty under O.C.G.A. § 21-2-504 to call a special PSC election as soon as this Court lifted the district court's injunction:

> **Whenever any primary or election shall fail to fill a particular nomination or offic**e and such failure cannot be cured by a run-off primary or election, whenever any person elected to public office shall die or withdraw prior to taking office, or whenever any person elected to public office shall fail to take that office validly, the authority with whom the candidates for such nomination or office file notice of candidacy shall call a special primary or election to fill such position.

O.C.G.A. § 21-2-504(a) (emphasis added). An election might fail to fill a nomination or office because of a natural disaster or because no

candidates qualified to run, for example, but here the 2022 general election failed to fill the offices of the commissioners from Districts 2 and 3 because the Secretary of State removed the offices from the ballot after the district court's injunction. *See, e.g.*, Richard H. Pildes, State Legislatures Threaten Fair Elections, N.Y. Times, Dec. 11, 2020, at A27 (discussing the failed-elections provision in the now-repealed version of the Electoral Count Act).

The Secretary responds that he would have had "no such duty" because O.C.G.A. § 21-2-504(a) only requires a special election "upon a *vacancy* at the Commission." (Appellee's Br. 58.) But the Secretary offers no authority for his interpretation of the statute, and it's foreclosed by *Duncan*, which construed the same statute. There, the Court held that, under the plain meaning of the statute's text, "a special election is required when an officeholder withdraws from a future term." 657 F.2d at 698; *see also id.* at 705. That duty arose even though the office at issue wasn't vacant at the time because the incumbent's resignation hadn't yet taken effect. *See id.* at 693. The Secretary's interpretation is thus inconsistent with *Duncan*, which remains binding on this Court. *See Kerrivan v. R.J. Reynolds Tobacco Co.*, 953 F.3d 1196, 1212 (11th Cir. 2020) (observing that the court of appeals is bound by an earlier decision

of the court interpreting state law unless overruled en banc or unless decisions of the Supreme Court or state courts cast doubt on that interpretation).

The Secretary's interpretation also departs from the statute's plain text, which doesn't expressly require a vacancy, and it would lead to absurd results. Consider the following hypothetical:

> Abel is the sitting commissioner from District 1 whose term ends on December 31, 2026. Abel chooses not to run for re-election. Baker is elected to be the next commissioner from District 1 but dies on December 1, 2026, before taking the oath of office.

Under the appellants' interpretation of the special-election statute, the Secretary would have a duty to call a special election to fill Baker's seat, and Abel would hold over only until a successor is elected and qualified. Under the Secretary's interpretation, he would have no duty to call a special election because there would be no vacancy on the commission, and Abel would then serve indefinitely—or at least until the General Assembly steps in to restart elections. That's both atextual and absurd.

The Secretary's interpretation also conflicts with O.C.G.A. § 46-2-4, which provides that "[a]ny vacancy in the commission shall be filled by the Governor." Because of this provision, O.C.G.A. § 21-2-504(a) *never* requires a special election upon a vacancy on the commission. A

gubernatorial appointment requires a vacancy, but any failure to fill a seat by election requires a special election whether there's a vacancy or not.

The Secretary's policy argument also fails for a completely different reason. Even if Georgia had to do *something*—and it did not—it certainly didn't have to violate the state constitution. Restarting elections didn't require shortening or lengthening terms. The General Assembly could have simply provided for the time and manner of electing a successor to the lone holdover commissioner. The State had lawful policy options, but it chose an unconstitutional option that disenfranchised the entire electorate. That choice implicates due process.

C. *Duncan* and *Gonzalez* are dispositive.

There's nothing fair about violating the state constitution to cancel elections that didn't have to be canceled. It's especially unfair when those elections otherwise would have been on the ballot during a presidential election after the largest electricity rate increase in United States history and when canceling them reeks of a discriminatory effort to shield incumbents of the legislature's majority party from accountability. But the plaintiffs here didn't have to prove unfairness in order to state a federal due-process claim, because *Duncan* and *Gonzalez*

established that "the due process clause of the fourteenth amendment affords protection against the disenfranchisement of a state electorate in violation of state election law." *Duncan*, 657 F.2d at 708; *accord* *Gonzalez*, 978 F.3d at 1271. (*See also* Def.'s Opp. Mot. Prelim. Inj. 16-17 (ECF No. 13) (conceding that "the disenfranchisement of a state electorate in violation of state election law" violates the Due Process Clause) (quoting *Duncan*, 657 F.2d at 699).) The plaintiffs' complaint plausibly alleges a federal due-process claim under both cases.

The Secretary offers four arguments aimed at distinguishing this case from *Duncan* and *Gonzalez*. (Appellee's Br. 25-49.) All miss their mark.

1. The Secretary claims that "[u]nlike *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'." (*Id.* at 29.) But that isn't right. *Gonzalez* involved a legislative act: the plaintiffs claimed that "O.C.G.A. § 45-5-3.2 violates the Georgia Constitution and the Due Process Clause of the Fourteenth Amendment," and this Court

concluded that they had established a substantial likelihood of success on that claim. *Gonzalez*, 978 F.3d at 1271.

2. The Secretary claims that "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." (Appellee's Br. 29.) But as the appellants pointed out in their opening brief, that's a distinction without a difference because, as in this case, both *Duncan* and *Gonzalez* involved delayed elections. (Appellants' Br. 23-24.) 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.

3. The Secretary argues that *Duncan* isn't controlling here because McCorkle's ongoing litigation over the method of electing the PSC "forced the State to either adopt new election schedules or lose the Commission's key structural feature of staggered elections." (Appellee's Br. 30.) The Secretary relies on this Court's decision in *Curry v. Baker*, 802 F.2d 1302 (11th Cir. 1986), which he claims rejected a *Duncan*-like claim "because [the plaintiff] had

'created the situation' he then claimed violated substantive due process." (Appellee's Br. 30 (quoting *Curry*, 802 F.2d at 1316).) But that argument has several flaws.

First, the Secretary misstates *Curry*'s holding. The Court didn't reverse the district court's judgment because the plaintiff had contributed to the alleged violation, but because "Plaintiffs' claims are, in truth, 'the ordinary dispute over the counting and marking of ballots.'" 802 F.2d at 1316 (quoting *Duncan*, 657 F.2d at 703). "Such a dispute does not rise to the level of a constitutional deprivation." *Id.* This case is not a dispute over the counting and marking of ballots but over "the violation of the entire electorate's right to participate in an election." *Id.* (describing *Duncan*).

Second, McCorkle's litigation didn't force the State to adopt House Bill 1312. As discussed in the previous section, the State could have done nothing. Existing provisions of Georgia law would have restarted PSC elections and retained staggered elections. And if the State wanted to do something for policy reasons, it had lawful options. It didn't have to violate the constitution.

Third, even if McCorkle's ongoing litigation contributed to delaying the 2022 PSC elections, that's no justification for violating her constitutional rights, the rights of the other plaintiffs, or the rights of the approximately seven million other voters in Georgia who are also affected by House Bill 1312. The Secretary has identified no authority suggesting that a plaintiff's good-faith effort to vindicate her federal voting rights requires her to forfeit other rights guaranteed to her by the Fourteenth Amendment, and the appellants are aware of none.

4. The Secretary argues that the complaint alleges only a garden-variety election dispute because "HB 1312 shares no qualities with anything any court has ever considered fundamentally unfair." (Appellee's Br. 32.) But that's just hyperbole. *Duncan* held that "the disfranchisement of a state electorate in violation of state election law" violates the Due Process Clause because doing so is fundamentally unfair. 657 F.2d at 708; *see also id.* at 704. *Gonzalez* reiterated that holding. 978 F.3d at 1271. Canceling elections in violation of the state constitution is thus fundamentally unfair under both cases. That's what House Bill 1312 does. And that's what the complaint alleges.

The Secretary responds that *Duncan* and *Gonzalez* are distinguishable because "[t]hey involved *cancelled* elections" whereas

House Bill 1312 merely delays them. But the Secretary doesn't explain why this distinction matters. It isn't any fairer to *delay* elections for two years in violation of state law than it is to cancel an election in violation of state law. The distinction also doesn't hold up under scrutiny. 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 held a year later. 657 F.2d at 707 n.7. In *Gonzalez,* the Secretary's cancellation of the 2020 election for district attorney under O.C.G.A. § 45-5-3.2 meant only that the election would be held in 2022. 978 F.3d at 1269.

The common thread among *Duncan*, *Gonzalez,* and this case is that public officials "disenfranchise[d] voters in violation of state law." *Duncan*, 657 F.2d at 704. Voters were denied the opportunity to vote in elections that would have been held in the absence of that violation. Doing so, as the plaintiffs have alleged here, "is fundamentally unfair and constitutionally impermissible." *Id.*; *accord Gonzalez*, 978 F.3d at 1271.

D. The Secretary's attacks on *Duncan* fail.

Perhaps recognizing *Duncan*'s controlling force, the Secretary also asks this Court to overrule the case or limit it to its facts. (Appellee's Br. 42-49.) He begins by mischaracterizing *Duncan*'s holding, suggesting that it held "that a mere state law violation is sufficient to establish a due process violation." (*Id.* at 42.) Then the rest of his argument attacks that straw man.

Of course, that's not what *Duncan* held. In fact, the Court carefully distinguished between "lesser" violations of state law—which aren't sufficient to establish a due process violation—and "those rare, but serious violations of state election laws that undermine the basic fairness and integrity of the democratic system." 657 F.2d at 699, 704. And it held that the Secretary of State's failure to call a special election required by state law falls into that latter category: "[W]e hold that the due process clause of the fourteenth amendment affords protection against the disenfranchisement of a state electorate in violation of state election law." *Id.* at 708.

That holding isn't "irreconcilable with controlling precedent both before and after it was decided." (Appellee's Br. 49.) The Secretary points to the Fifth Circuit's prior panel decision in *Johnson v. Hood*, 430 F.2d 610 (5th Cir. 1970), but he mischaracterizes the holding of that case, too. The plaintiffs there challenged the rejection of ten ballots as "arbitrary and capricious and without reasonable basis" but didn't allege "any violation of State law." *Id.* at 611. And the panel held that the "plaintiffs' allegations read in the light of the stipulated evidence showed no basis for asserting a deprivation of any rights secured by the Constitution or federal law." *Id.* at 612. The panel didn't hold that the right to vote in state elections never implicates due process, as the Secretary claims. (Appellee's Br. 47.) *Johnson* is readily distinguishable from *Duncan*, and the *Duncan* court was careful to do so. *See Duncan*, 657 F.2d at 704.

The Secretary also points to recent cases that have laid out a framework for determining whether an asserted right is protected by substantive due process, and he claims that the right to vote recognized in *Duncan* isn't one of them. (Appellee's Br. 48-49.) The

first step in that framework is to "determine whether a right is 'fundamental.'" *Henry v. Sheriff of Tuscaloosa Cnty.*, __F. 4th __, 2025 WL 1177671, at *8 (11th Cir. Apr. 23, 2025) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997)). Rights are fundamental if they are "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington*, 521 U.S. at 720-21. The Secretary argues that *Duncan* is irreconcilable with this framework because *Duncan* "doesn't purport to analyze whether [the right to vote] is deeply rooted in the Nation's history or essential to its scheme of ordered liberty." (Appellee's Br. 49.)

But *Duncan* isn't irreconcilable with this framework because Supreme Court precedent, both before and after *Duncan*, has stressed many times that the right to vote is "fundamental." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also, e.g., Bush v. Gore*, 531 U.S. 98, 104 (2000) ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental"); *Ill. State Bd. of*

Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *id.* at 561-62. The *Duncan* court wasn't free to disregard those precedents, and neither is this one.

Duncan's actual holding—not the Secretary's caricature of it—isn't even controversial. A unanimous panel of this Court reaffirmed it just five years ago. *See Gonzalez*, 978 F.3d at 1271. It has been cited with approval by at least five other federal circuits. *See, e.g., Bonas v. Town of N. Smithfield*, 265 F.3d 69, 75 (1st Cir. 2001) (citing *Duncan* with approval); *Afran v. McGreevy*, 115 F. App'x 539, 544 (3d Cir. 2004) (same); *Bodine v. Elkhart Cnty. Election Bd.*, 788 F.2d 1270, 1272 (7th Cir. 1986) (same); *Robins v. Ritchie*, 631 F.3d 919, 926 (8th Cir. 2011) (same); *Election Integrity Project Cal., Inc. v. Weber,* 113 F.4th 1072, 1096-97 (9th Cir. 2024) (same); *see also, e.g., Welch v. McKenzie*, 765 F.2d 1311, 1317 (5th Cir. 1985) (same). And neither the Supreme Court nor any federal circuit court has cast doubt on *Duncan's* original holding or its continuing vitality.

Overruling *Duncan* or limiting it to its facts, as the Secretary asks, would be the outlier. It would create a circuit split. And this Court should reject the Secretary's request to do so.

III. The district court's alternative holding was procedurally improper and wrong on the merits.

The Secretary concedes that the district court's alternative holding on strict scrutiny was a ruling on the merits of the plaintiffs' claim. (Appellees' Br. 40.) And he doesn't dispute that such a ruling would be reversible error if it were a judgment on the pleadings because, as the appellants argued in their opening brief, judgment on the pleadings was premature. (Appellants' Br. 28-30.) Instead, the Secretary argues that the district court's application of strict scrutiny was a determination under Rule 12(b)(6) that the complaint failed to state a claim upon which relief could be granted. (Appellee's Br. 40.) And the Secretary claims that, because he raised the strict-scrutiny argument in his response to the plaintiffs' motion for a preliminary injunction, it was proper for the district court to dismiss the plaintiffs' complaint on that basis. (*Id.* at 41.)

To start, the Secretary didn't raise the issue of strict scrutiny in the district court. The words "strict," "scrutiny," "compelling," and "continuity" appear nowhere in any of the Secretary's briefs. (ECF Nos. 12-1, 13, 16) None of those words were uttered during the court's only status conference before issuing judgment. (App. 17.) The Secretary claims that one sentence in his response to the plaintiffs' motion for a preliminary injunction that doesn't even mention strict scrutiny or identify any compelling state interests was sufficient to put the plaintiffs on notice—not only on notice that the Secretary was raising the issue of strict scrutiny in his motion to dismiss but also on notice of which state interests he was asserting and why House Bill 1312 was narrowly tailored to serve those interests. (Appellee's Br. 41 (citing ECF No. 13 at 17).) That stretches the concept of fair notice too thin.

Now, in an effort to defend the district court's strict-scrutiny holding, the Secretary relies on "matters outside the pleadings." Fed. R. Civ. P. 12(d). In fact, he relies on materials that are completely outside the record and that were never presented to the

district court.[3] (*See* Appellee's Br. 38-39.) He relies on a state interest in "continuity" on the PSC that he never presented to the district court. (*Id.* at 38.) And he invites this Court to decide the issue of strict scrutiny on the basis of that interest and those new materials even if it would have been improper for the district court to do so. (*Id.* at 41-42.) The Court should decline the Secretary's invitation and simply vacate the district court's alternative holding. All parties should have the opportunity to present materials and to contest the issue on remand. That's what a trial court is for.

If this Court wants to reach the issue anyway, it should reverse. When, as here, a challenged action burdens a fundamental right, "the government action that burdens the right is presumptively wrongful, and the government bears the burden to show that its action is narrowly tailored to serve a compelling state interest." *Henry,* 2025 WL 1177671, at *8. The district court failed to apply the required presumption of wrongfulness, and it didn't

[3] As a result, it no longer matters whether the district court's ruling was under Rule 12(b)(6) or Rule 12(c), because "[a]ll parties must be given a reasonable opportunity to present all material that is pertinent to the motion." Fed. R. Civ. P. 12(d).

hold the government to its burden. (App. 20 at 15.) And even if the state interest upon which the district court relied ("address[ing] the specific uncertainty surrounding the upcoming election and the requisite procedure") were compelling—which seems doubtful—it's obvious that House Bill 1312 isn't narrowly tailored to serve that interest because its term-altering provisions affect PSC elections beyond just the "upcoming" one. Nor was there any need to change state election procedures once this Court lifted the district court's injunction. *See* Part II.B, *supra*.

The Secretary's strict-scrutiny argument fails for the same reasons. Even if the State has a compelling interest in "continuity" on the PSC—which also seems doubtful, given that no court has ever so held—House Bill 1312 isn't narrowly tailored to serve that interest. It wasn't necessary to shorten or lengthen any commissioner's term to keep PSC elections staggered. Nor was it necessary to cancel the 2024 elections in order to maintain continuity on the PSC. *See id.*

IV. Reassignment on remand is required.

Finally, the Secretary opposes the appellants' request to direct the clerk to reassign this case to a different judge on remand. (Appellee's Br. 61 n.3.) He argues that the plaintiffs' request is based on little more than disagreement with the substance of the court's ruling. (*Id.*)

Not so. The request is based on the district court's written comment describing one plaintiff's litigation pending before another judge as "misguided." (App. 20 at 10 n.2.) That has nothing to do with the substance of the district court's ruling. But the comment does prejudge the plaintiff's case because that case isn't over. The Secretary claims that "this Court *held* that Plaintiffs' case was misguided" (Appellee's Br. at 61 n.4), but it did no such thing. It held only that "the district court had committed an error of law by failing to properly apply our precedent." *Rose v. Sec'y, State of Ga.*, 107 F.4th 1272, 1273 (11th Cir. 2024) (Branch, J., respecting the denial of rehearing en banc). And the Court explicitly rejected any suggestion that the plaintiffs could never prevail on their claim. *See id.* at 1275. The district court's unsolicited and unnecessary written

commentary on the plaintiff's other litigation is as straightforward an instance of prejudice as one is ever likely to see.

Federal judges have an ethical obligation to refrain from public comment on pending litigation. *See* Code of Conduct for U.S. Judges, Canon 3(A)(6). That obligation is part of a judge's larger responsibility to perform the duties of that office fairly and impartially and to avoid even the appearance of impropriety. Here, the district court's negative commentary on pending litigation is written in black and white. As the ethical canons suggest, those comments could lead a reasonable litigant to question his fairness and impartiality, and reassignment is therefore required. 28 U.S.C. § 455.

Conclusion

Duncan, Gonzalez, and *Polelle* make this an easy case. The plaintiffs' complaint alleges a well-established federal claim, and McCorkle has standing to bring it. The Court should therefore reverse the district court's judgment and remand the case for further proceedings.

Dated: May 16, 2025

Respectfully submitted,

/s/ Bryan L. Sells
Bryan L. Sells
Georgia Bar No. 635562
The Law Office of
Bryan L. Sells, LLC.
Post Office Box 5493
Atlanta, Georgia 31107-0493
(404) 480-4212
bryan@bryansellslaw.com

/s/ Lester Tate
Samuel Lester Tate, III
Georgia Bar No. 698835
Akin & Tate, PC
Post Office Box 878
11 South Public Square
Cartersville, Georgia 30120
(770) 382-0780
lester@akin-tate.com

Attorneys for the Appellants

Certificate of Compliance

This document complies with the type-volume limitation of Rule 32(a)(7) of the Federal Rules of Appellate Procedure because, excluding parts of the document exempted by Rule 32(f), it contains 5,911 words. This document 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.

/s/ Bryan L. Sells
Attorney for the Appellants
May 16, 2025