

No. _____

IN THE

Supreme Court of the United States

RICHARD ROSE *ET AL.*,

Applicants,

v.

BRAD RAFFENSPERGER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF
STATE OF THE STATE OF GEORGIA, *ET AL.*,

Respondent.

**APPENDIX TO EMERGENCY APPLICATION TO VACATE ELEVENTH
CIRCUIT'S STAY OF PERMANENT INJUNCTION ISSUED BY THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
AND FOR AN IMMEDIATE ADMINISTRATIVE STAY**

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

Nicolas L. Martinez
Wesley A. Morrissette
Bartlit Beck LLP
Courthouse Place
54 W. Hubbard Street, Suite 300
Chicago, IL 60654
(312) 494-4401
nicolas.martinez@bartlitbeck.com
wesley.morrissette@bartlitbeck.com

Counsel for Applicants

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Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12593-J

RICHARD ROSE,
an individual,
BRIONTE MCCORKLE,
an individual,
WANDA MOSLEY,
an individual,
JAMES MAJOR WOODALL,

Plaintiffs-Appellees,

versus

SECRETARY, STATE OF GEORGIA,

Defendant-Appellant.

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

Before: JORDAN, ROSENBAUM, and LUCK, Circuit Judges.

BY THE COURT:

Appellees' "Emergency Motion for an Administrative Stay" is DENIED.

The Clerk is directed to treat any motion for reconsideration of this order as a non-emergency matter.

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ROSENBAUM, J., dissenting

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ROSENBAUM, Circuit Judge, dissenting:

We stayed the district court’s injunction because “the cancellation of the November elections for Districts 2 and 3 ha[d] to be done by August 12, 2022[.]” *See* Order Staying Injunction at 6. I dissented, arguing that the *Purcell*¹ principle wasn’t applicable. *Id.* at 7. In response, the Majority suggested that “if we are mistaken on this point, the Supreme Court can tell us.” *Id.* at 6.

The Appellees have now asked for an administrative stay of our order to allow the Supreme Court to tell us whether the *Purcell* principle applies. To be sure, while the parties agreed—and the district court assumed—that Secretary Raffensperger would suffer administrative burden without a final ruling by August 12, the record shows that there is some wiggle room on the exact date.

Director Michael Barnes—the person in charge of finalizing the ballots—testified that his “preference” was that the final order be entered by August 12, 2022. But he conceded this was a soft deadline, not a hard one. He said that it would be “better” if the election were canceled during the ballot-building phase, which he said would happen in the “[m]iddle of August to early September.” If the district court entered an order in early September, he said, “the work could still be done, but then we’re into a phase where we’re not going to have much time to double-check and proof[.]”

¹ *Purcell v. Gonzalez*, 549 U.S. 1, 4–6 (2006).

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As this testimony makes clear, August 12 is a reasonable deadline—but it is not an absolute one. Because this case involves a finding of liability on the Voting Rights Act—that is, Georgia’s system of electing Public Service Commission members dilutes the votes of Black Georgians—it is crucial that we get it right and that we give the Supreme Court the opportunity (if it wants) to weigh in.

I would grant a short administrative stay through midnight August 16, 2022, to allow the Supreme Court to consider whether it wishes to weigh in while the ballots still have not gone to print. A modest postponement would not create administrative burden on Secretary Raffensperger and would give the Supreme Court the opportunity to tell us if we are mistaken.

I respectfully dissent.

Appendix B

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-12593

RICHARD ROSE,
an individual,
BRIONTE MCCORKLE,
an individual,
WANDA MOSLEY,
an individual,
JAMES MAJOR WOODALL,

Plaintiffs-Appellees,

versus

SECRETARY, STATE OF GEORGIA,

Defendant-Appellant.

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Order of the Court

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Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:20-cv-02921-SDG

Before JORDAN, ROSENBAUM, and LUCK, Circuit Judges.

PER CURIAM:

Brad Raffensperger, the Secretary of State of Georgia, moves for a stay pending appeal of the district court’s August 5, 2022, order permanently enjoining him from conducting state-wide elections on November 8, 2022, for Districts 2 and 3 of the Georgia Public Service Commission. The district court’s order, rendered following a bench trial and pursuant to § 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301(a)–(b), also decreed that the Commissioners currently representing Districts 2 and 3 (Commissioners Timothy Echols and Terrell Johnson) would continue in those positions as “holdover” officials until such time as an election is held with single-member voting districts. For the reasons which follow, we grant Secretary Raffensperger’s motion and stay the district court’s permanent injunction pending appeal.

I

The Supreme Court has recently explained that “lower federal courts should ordinarily not alter the election rules on the eve of an election.” *Republican Nat’l Committee v. Democratic Nat’l*

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Committee, 140 S. Ct. 1205, 1207 (2020) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Frank v. Walker*, 574 U.S. 929 (2014); and *Veasey v. Perry*, 574 U.S. 951 (2014)). *See also id.* (“[W]hen a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error.”). The cases cited in *Republican Nat’l Committee*—*Purcell*, *Frank*, and *Veasey*—were less than clear on this point. The stay in *Purcell* was based on more than just a timing issue, while *Frank* and *Veasey* contained no explanation whatsoever for the Court’s rulings. Nevertheless, the Court’s opinion in *Republican Nat’l Committee* has now laid out a relatively clear principle. *See League of Women Voters of Fla. v. Fla. Sec’y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022) (“federal district courts ordinarily should not enjoin state election laws in the period close to an election”) (quoting *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2020) (Kavanaugh, J., concurring)).

Here the district court’s permanent injunction, issued about three months before the scheduled election, appears to run counter to the Supreme Court’s teaching in *Republican Nat’l Committee*. First, the election is sufficiently close at hand under our recent precedent. *See League of Women Voters*, 32 F.4th at 1371 (holding that the “*Purcell* principle,” as articulated in *Republican Nat’l Committee*, applies when an election is less than four months away). Second, although the mechanics of implementing the injunctive relief may be relatively straightforward, it seems to us that postponing the elections for Districts 2 and 3—and keeping Commissioners

Echols and Johnson in their positions as “holdovers” until elections are held with single-member voting districts—“fundamentally alters the nature” of the upcoming elections. *Cf. Republican Nat’l Committee*, 140 S. Ct. at 1207 (“Extending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election.”). Third, cancellation of the November elections for Districts 2 and 3 has to be done by August 12, 2022, and the permanent injunction was issued too close to that date to allow for meaningful appellate review of the district court’s findings of fact and conclusions of law.

The plaintiffs could overcome the *Purcell* principle by demonstrating that their position on the merits is “entirely clearcut.” *League of Women Voters*, 32 F.4th at 1372 (quoting *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring)). As we have interpreted this burden, Secretary Raffensperger “need only show” that the plaintiffs’ position is not entirely clearcut. *See id.* Without expressing any views on the merits of the district court’s findings of fact, conclusions of law, and permanent injunctive relief, we note that the legal question presented is one of first impression. As the district court noted in its summary judgment order, “the novel question is whether there can be voter dilution in violation of [§] 2 of the Voting Rights Act . . . when the challenged election is held on a statewide basis.” D.E. 97 at 1. When, as here, the question resolved by the district court has not been decided elsewhere, we

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cannot say that the plaintiffs' position on the merits is entirely clear-cut.

II

In her thoughtful dissent, Judge Rosenbaum asserts that Secretary Raffensperger waived any reliance on *Purcell* and its progeny. That is not the way we read the record. As we understand what transpired in the district court, Secretary Raffensperger may have disclaimed any argument that an injunction postponing the elections for Districts 2 and 3 would cause disruption or voter confusion. But he still maintained that there were *Purcell*-type problems because an injunction issued in August would leave no time for plenary appellate review before state officials had to act with respect to the elections.

Secretary Raffensperger raised *Purcell* at trial, *see* D.E. 144 at 65, and the district court expressly addressed *Purcell* in crafting a remedy, concluding that the “concerns raised by [*Purcell*] . . . are not present here.” D.E. 151 at 62. And here, in his motion for a stay, Secretary Raffensperger has argued that the “timing of the ruling effectively prevents” him “from obtaining appellate review until after the date for statewide elections has already passed. The current Commissioners will remain in place until such time as there is an election, but [he] is prevented from obtaining appellate review prior to the cancellation of the November elections due to the timeline.” Motion to Stay at 16. He has also asserted that “[w]hile the district court correctly analyzed the impact of [*Purcell*] on the disruption to the *mechanics* of the election-administration

process, . . . it did not consider the impact of ruling so close to the election on voter confidence.” *Id. Cf. New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020) (“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”) (quoting *Purcell*, 549 U.S. at 4).

Judge Rosenbaum also argues that *Purcell* and its progeny likely do not apply in circumstances like these, which involve only a postponement of an election, and she points out that we cite no cases applying the *Purcell* principle in similar scenarios. The latter point is correct, but Judge Rosenbaum also does not cite any cases refusing to apply the *Purcell* principle in analogous circumstances. So we could make the same criticism about her position.

We believe that the principle articulated in *Republican Nat’l Committee* is broad and covers the case before us. But if we are mistaken on this point, the Supreme Court can tell us.

III

Secretary Raffensperger’s motion for a stay is GRANTED.

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ROSENBAUM, J. dissenting

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ROSENBAUM, Circuit Judge, dissenting:

I. INTRODUCTION

If everyone in the United States got to vote on who Georgia’s U.S. Senators would be, I don’t think anyone would think that the system was fair to Georgians.

But Georgia has that type of system for choosing who regulates public utilities. The Georgia Public Service Commission (“PSC”) has five Commissioners, and each one must live in a separate district, meaning a separate part of Georgia. Yet the entire state votes on each district’s Commissioner. So though the majority of District 3’s residents are Black, that majority almost never is able to elect its preferred candidate to the Commission. In fact, while several Black candidates have run to represent District 3, the District has had only one Black Commissioner ever. And that Commissioner was the only Black Commissioner ever elected for any PSC district.

In 2020, the Appellees—a group of Black Georgians—sued Georgia Secretary of State Brad Raffensperger, seeking to enjoin this system and to stop the dilution of the votes of Black Georgians. After more than two years of litigation and a bench trial, the district court made detailed findings of fact and comprehensive conclusions of law and determined that the PSC’s electoral system violated the Voting Rights Act (“VRA”) because it discriminated against Black Georgians and diluted their votes. The district court temporarily postponed the November 2022 election for Districts 2

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and 3 until the Georgia General Assembly meets in January 2023 to approve a new system.

Today, the Majority stays the district court's injunction based on the *Purcell*¹ principle, which states that changes in election procedures shouldn't be made too close to elections. But Secretary Raffensperger expressly disclaimed any *Purcell* argument that was based on the notion that Georgia would have administrative problems or that voters would suffer confusion as a result of the district court's injunction. By relying on the *Purcell* principle, the Majority obviates the need to engage with the district court's fact-bound analysis and its holding that Georgia's status quo impairs Black Georgians' right to vote. It also extends the *Purcell* principle to an entirely new category of litigation without, in my view, a sufficient explanation. I respectfully dissent.

II. PROCEDURAL HISTORY

In this Section, I proceed in three steps. First, I introduce the history of Georgia's Public Service Commission. Second, I provide some factual background about racial economic disparities in Georgia. And third, I review the district-court litigation and the district court's factual findings and conclusions of law.

¹ *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (explaining that federal courts ordinarily should not enjoin state election laws "close" to an election).

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A. The Public Service Commission

The Georgia Constitution creates a “Public Service Commission,” which regulates utilities. GA. CONST., art IV, § I(a). The Commission has five members who are “elected by the people” and serve in staggered six-year terms. *Id.* The Georgia Constitution further provides that “[t]he filling of vacancies and the manner and time of election of members of the commission shall be as provided by law.” *Id.*(c).

The form and powers of the Commission, as well as its method of selecting members, has changed over time. The PSC began as the “Railroad Commission” and regulated railroad freights and passenger tariffs. GA. CONST. art. IV, § 2, ¶ 1 (1877). Georgia law provided that three Commissioners would be appointed by the governor and confirmed by the Senate. *See* 1878 Ga. Laws 125 (Law No. 269, *Reg. of Freight & Passenger Tariffs*).

In 1906, Georgia changed the law, adding two Commissioners—bringing the body to its present-day total of five—and provided that the commissioners were to be “elected by the qualified voters of the whole state, who are entitled to vote for members of the General Assembly.” 1906 Ga. Laws 100, § 1 (Law No. 453, *Election of R.R. Comm’rs*).

In 1928, the General Assembly expanded the Commission’s powers to govern utilities and changed its name to the Public Service Commission. *See* 1922 Ga. Laws 143 (Law No. 539, *R.R. Comm’n Changed to Pub. Serv. Comm’n*). Not quite twenty years later, in 1945, the Georgia Constitution was amended to grant the

General Assembly the power to regulate public utilities. GA. CONST. art., IV, § IV, ¶ III (1945).

Today, the PSC has an expanded set of powers. The PSC sets residential, commercial, and industrial utility rates and regulates Georgia Power. And it has jurisdiction over rural broadband internet connectivity.

The PSC is an “administrative body” with both “quasi-legislative” and “quasi-judicial” functions. *Tamiami Trial Tours, Inc. v. Ga. Pub. Serv. Comm’n*, 213 Ga. 418, 428 (1957). As to its legislative powers, the PSC sets utility rates, administers federal funds for pipeline safety, and holds hearings. The PSC can also act judicially: it holds evidentiary hearings, makes evidentiary rulings, and administers fines.

Until 1998, the method to elect PSC Commissioners remained unchanged: the entire electorate could vote for the Commissioners “under the same rules and regulations as apply to the election of the Governor.” 1998 Ga. Laws 1530 (Law No. 978, *Pub. Util & Pub. Transp. – Pub. Serv. Comm’n; Election of Members; Dist.*) (amending O.C.G.A. § 46-2-1).

In 1998, Georgia changed the system for electing PSC Commissioners to the one at issue in this case. Under the present system, Commissioners are elected by a statewide vote but each district is represented by only one Commissioner. *Id.* at 1531. That is, the entire state of Georgia decides who will be each district’s Commissioner. *Id.* There is also a majority-vote requirement,

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with a runoff held if no candidate wins more than 50% of the statewide vote. The 1998 changes did not affect the six-year term or the staggered nature of the terms. *Id.*

B. Present Day Georgia

With this historical background, we now come to present day Georgia. As of the 2020 Census, Georgia had approximately 10.7 million people—50.1% non-Hispanic white, 33.0% Black,² and 16.9% other racial groups. In terms of voting age population, Georgia is a little more predominantly white (but not much): 52.8% non-Hispanic white, 31.7% Black,³ and 15.4% other racial groups. As the parties agree, unfortunately, “[t]he State of Georgia has a well-documented history of discrimination against its Black citizens.”⁴

Despite comprising over 30% of the voting-age population, Black candidates almost never win statewide offices. As of 2021, only *four* Black candidates had *ever* been elected to statewide office (Senator Raphael Warnock; Mike Thurmond, the three-times-elected Commissioner of Labor; Thurbert Baker, the three-time-elected Attorney General; and David Burgess, elected to the Public Service Commission). In fact, between 1972 and 2020, Black candidates won only 8 of 164 general elections—or 4.9%—despite comprising almost a third of the electorate. As to the PSC, only

² Including 2% of Black Georgians who are multi-racial.

³ Including 1.4% of Black Georgians who are multi-racial.

⁴ Joint Pre-trial Stipulation. *See* Doc. 121-3 ¶ 8

one Black Commissioner has ever served, David Burgess—and he was originally appointed. That happened in 1999. After that, Burgess narrowly won his first election in 2000 and, despite winning the plurality in the 2006 election, ultimately lost to a white candidate in the runoff election that same year.

While the five districts have equal populations, they are not racially homogenous. As of the 2015–19 American Community Survey, District 3’s Citizen Voting Age Population was 53.4% Black while District 4’s share was just 12.94%.

Finally, the district court found that Black Georgians are poorer than white Georgians. Black Georgians have about half the per-capita income (\$24,000 versus \$40,000) and twice the poverty rate (18.8% to 9%).

C. Procedural History

In July 2020, four Black Georgians—all registered voters and residents of District 3—sued Secretary Raffensperger in his official capacity under Section 2 of the Voting Rights Act. They alleged that the PSC’s selection procedure—five members elected at large in staggered six-year terms—violated the Voting Rights Act because it diluted their votes. To address this problem, they contended that Black Georgians were numerous enough, geographically compact enough, and politically cohesive enough to constitute a single-member district in a five-district plan.

In January 2021, after the district court denied a motion to dismiss, the case proceeded to discovery. The parties jointly

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submitted a proposed scheduling report, and noting the November 8, 2022, election, they contemplated filing summary-judgment motions in the summer of 2021. At no point during these proceedings did Secretary Raffensperger invoke the *Purcell* principle to argue that the schedule would create problems for the November 2022 election.

In late July 2021, the parties cross-moved for summary judgment. Secretary Raffensperger again didn't invoke the *Purcell* principle.

In January 2022, the district court denied the Secretary's motion and granted the Appellees' motion in part. It concluded that there were genuine issues of fact as to Appellees' standing and Georgia's interests in maintaining the at-large method of electing the PSC. The district court concluded as a matter of law that the *Gingles*⁵ prerequisites to maintain a VRA Section 2 claim were satisfied. Given these circumstances, the district court set the case over for a bench trial.

The parties jointly proposed a schedule where the district court would rule on the issues "no later than August 15, 2022,"

⁵ The Supreme Court identified these factors in *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986). There, it explained that a multimember district can impair a minority group's voting rights only when (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the white majority votes as a bloc to usually defeat the minority group's preferred candidate. *Id.*

while Secretary Raffensperger expressly retained “his right to raise the timeliness of imposing a remedy for 2022 as an issue at trial.” The Appellees said that they were “available for trial sooner if the Court’s schedule permits an earlier date.” The district court, without objection, scheduled the bench trial for June 27 through July 1, 2022.

1. Preliminary Injunction Hearing

The day after the district court entered the scheduling order, on February 3, 2022—more than ten months before the election—the Appellees moved for a preliminary injunction against qualifying candidates for the 2022 PSC elections. At the hearing on the preliminary injunction, Secretary Raffensperger’s counsel spoke about *Purcell*:

On public interest and equities, I thought I’d just kind of play out the scenarios in my mind. There’s like four possible paths I see. You don’t enter the injunction and you find for the State, the election processes continue, there’s no interruption for voters, we hold the normal elections in 2022 for Public Service Commission. That’s kind of Option 1. Easy, no issues there.

Option 2: You don’t enter the injunction the plaintiffs request, but you ultimately side with the plaintiffs after the trial. In that scenario, I think, as you talked about with Mr. Barnes [Director of the Secretary of State’s Center for Election Systems], the November

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election could be canceled and a remedial plan figured out at that point. Obviously, that would be somewhat disruptive for the candidates, but it's a method for resolving what we need to do going forward. Is it going to be a special election, a special primary? We can figure out a solution after the finding of liability.

The other option that we have, if you were to enter the injunction, stop, hit pause, as the plaintiffs have said, and then you find for the State after the trial we now have to figure out some sort of remedial structure to conduct statewide special elections which obviously have a cost where every county has to run a special election that could have otherwise been held in the normal course in 2022.

The only other place that really makes sense is if the plaintiffs ultimately do prevail and you enter the injunction we craft a remedial plan then. But we can also do that if you don't enter the injunction at the conclusion of the trial and I think there's going to be time for that.

The *Purcell* issues the State is concerned about are more trying to address the time period between the conclusion of the trial and the November election. We don't believe there's going to be time, if you find for the plaintiffs after the trial, to then affect and get the general election on the November ballot, there's

not time to do that. **There is time to stop that election process and then craft a remedy moving forward and so we would suggest that's the more logical and best approach here, to not enter the [preliminary] injunction, let this case proceed and then if you ultimately side with the plaintiffs then craft a remedial plan at that point.** Meanwhile, the people of Georgia get to have input on the election process.

The district court responded,

Well, let me ask you this because when we set the trial for the end of June it was certainly my intent to reach a resolution on the merits in advance of the November election so that, like you said, if I found in favor of the Secretary, the election proceeded. **If I found in favor of the plaintiffs, my intent was to enjoin that election from happening. It's certainly never been my intention, nor is it now, to find a violation of the Voting Rights Act and yet allow the election to proceed anyway.**

“Certainly,” Secretary Raffensperger’s counsel replied. In fact, Secretary Raffensperger’s counsel recognized that “there’s some precedent for that that I think wouldn’t necessarily get into *Purcell*land if it’s going to be straight don’t hold the election in November, so I wanted to mention that.” Finally, counsel conceded that “I would want to note for the record for [Appellees’ counsel] that we may appeal based on the merits, but **we won’t make an appeal based on**

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Purcell so we can at least get that put down. If we get to that point. I wanted to make that clear.” The district court denied the preliminary injunction, noting that the bench trial was scheduled for “well before the general election” and the Appellees didn’t face irreparable harm because “they [would] still have an opportunity to obtain injunctive relief related to the 2022 election cycle.”

2. Bench Trial

In June 2022, the district court held a five-day bench trial. The district court entered its findings of fact and conclusions of law just a month later, on August 5—well before the August 12 deadline in the scheduling order.

Beginning with its findings of fact, the district court evaluated the testimony of the three expert witnesses. First, the Appellees presented Dr. Stephen Popick, a former member of the Civil Rights Division of the Department of Justice. Dr. Popick analyzed the voting patterns in PSC elections between 2012 and 2020 and concluded that strong racial polarization existed: Black voters voted as a bloc between 79.18 and 97.84% of the time. White voters, he said, voted together between 75.72 and 87.51% of the time. Dr. Popick testified “that, in all of his years of experience, his analysis of the PSC elections in Georgia since 2012 ‘is one of the clearest examples of racially polarized voting’ he has ever seen.” The district court found “Dr. Popick’s opinions and conclusions to be highly persuasive and compelling evidence of racial polarization in PSC elections.”

Next, the Appellees offered Dr. Bernard Fraga, a political data analyst. Dr. Fraga testified that the combination of a statewide election with numbered seats and residency districts was unusual and allowed Georgia's majority-white population to dilute the votes of any majority-Black district. And because the elections were staggered, Dr. Fraga said, the minority group members had "less of an opportunity to concentrate [their] voting strength behind a candidate of choice." In other words, the staggered structure amplified the problem. The district court found "Dr. Fraga's analysis, opinions, and conclusions to be highly persuasive and entitled to great weight."

Finally, Secretary Raffensperger offered Dr. Michael Barber, a political science expert. Dr. Barber testified that Black voters preferred Democratic candidates (86 to 93% of the time) while white voters did not (voting for Democratic candidates less than 40% of the time). Dr. Barber didn't analyze the results of any PSC elections. The district court "generally credit[ed]" Dr. Barber's analysis but found it "of limited utility" because Dr. Barber "did not consider the impact of race on party affiliation," even though his own research concluded that "race is the strongest predictor" of partisan affiliation.

The district court applied these factual findings to the law and concluded that the PSC at-large districts violated Section 2 of the Voting Rights Act. The district court correctly explained that a Section 2 claim proceeds in two steps: first, plaintiffs must prove that the three *Gingles* preconditions are satisfied. Second, the

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district court explained, it must evaluate the totality of the circumstances using the nine factors that the Senate outlined in the 1982 Voting Rights Act amendment—the “Senate Factors.”

As to the first step, the district court concluded, based on the summary-judgment record, that the Appellees had established the three *Gingles* preconditions were satisfied: Black Georgians were numerous enough to constitute a majority of a single-member district, Black Georgians were politically cohesive, and the white majority voted as a bloc to usually defeat the Black-preferred candidate. Next, the court turned to the Senate Factors and found that six of the nine weighed in the Appellees’ favor.

The district court concluded that Senate Factor 1—the History of Official Discrimination—weighed in favor of the Appellees because Secretary Raffensperger had stipulated that Georgia had a well-documented history of racial discrimination against Black citizens.

As to Senate Factor 2 (Racial Polarization), the district court, relying on Dr. Fraga’s testimony, determined that a high degree of racial polarization existed in elections. Although the district court considered Secretary Raffensperger’s alternate position that the PSC election results reflect only partisan polarization, the court rejected that view. As the district court explained, under *Gingles*, the Appellees had to show that voting was politically cohesive. So of course, that necessarily would also show polarization along partisan lines to some degree because a showing of political cohesion,

by definition, would require a showing that the voters are voting for the same candidate.

In any event, the district court added that racially polarized voting increased in Georgia after 2016, but partisan identification did not. The district court concluded that white voters voted as a bloc even in races when no Democratic candidate appeared on the ballot. So for example, in a race between a Republican and a (Black-preferred) Libertarian candidate, white voters defeated the Black-preferred candidate.

The district court reasoned, if the white majority vote fractured along partisan lines—some whites voted with the Blacks and some did not—then the Appellees wouldn't be able to state a Section 2 claim because they wouldn't be able to show racial-bloc voting. But here, the district court said, the Appellees had shown *both* political cohesion *and* racial polarization in PSC elections, and Secretary Raffensperger hadn't shown—let alone offered—an alternate explanation for why Black-preferred candidates had been less successful, like “organizational disarray, lack of funds, want of campaign experience, the unattractiveness of particular candidates, or the universal popularity of an opponent.” Senate Factor 2, the district court said, weighed heavily in the Appellees' favor.

As to Senate Factor 3—Voting Practices that Enhanced Opportunities for Discrimination—the district court found Dr. Fraga's analysis persuasive, so it concluded that the factor weighed in the Appellees' favor. Dr. Fraga testified that the unique PSC structure enhanced the opportunity for discrimination because the statewide

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district increased the cost of campaigning—especially problematic given the wealth disparities between white and Black Georgians. The district court also highlighted that several aspects of the PSC election system are identical to those listed as causes for concern in the Senate Report: “anti-single shot” rules,⁶ staggered terms with numbered seats, and run-off requirements. For instance, the district court said, a majority-vote requirement would allow the majority two chances to elect a preferred candidate—if the Black-preferred candidate won the plurality over two white-preferred candidates, the white-preferred candidate could win in the runoff.⁷

As to Senate Factor 4—Slating Processes—the district court concluded that there was no evidence that Black-preferred candidates suffered from any informal “slating process” conferring an incumbency advantage.

The district court concluded that Senate Factor 5—Effects of Discrimination—weighed in the Appellees’ favor because Black Georgians had worse educational and employment opportunities

⁶ An anti-single shot rule requires that a voter cast votes for as many candidates as there are positions, invalidating all ballots that do not show votes for as many candidates as there are positions. *Nevett v. Sides*, 571 F.2d 209, 217 n.10 (5th Cir. 1978) *superseded by statute as recognized in Jones v. City of Lubbock*, 727 F.2d 364, 369 (5th Cir. 1984). “Minority voters can be disadvantaged by such a rule because it may force them to vote for nonminority candidates, thus depreciating the relative position of minority candidates.” *Id.*

⁷ Burgess, the only Black Georgian ever elected to the PSC, won the plurality vote but lost to a white-preferred candidate in a runoff in 2006.

and lower income levels and living conditions as a result of past discrimination in Georgia.

As to Senate Factor 6—Racial Appeals in Campaigning—the district court concluded that there wasn’t any evidence of such appeals in PSC campaigns and so the factor weighed in favor of Secretary Raffensperger.

The district court determined that Senate Factor 7—Election of Minorities to Public Office—favored the Appellees because very few Black candidates had won statewide office in Georgia either recently or historically. Indeed, Black candidates had won under 5% of races, despite the 30% share of the population.

Next, the district court found that Senate Factor 8—responsiveness of elected officials—weighed in favor of Secretary Raffensperger because there was no evidence that the Commissioners weren’t responsive to the concerns of Black citizens.

Finally, the district court concluded that the record contained little evidence as to Senate Factor 9—Policy Justifications for the Voting Practice. Secretary Raffensperger argued that the district-based system was important because it created a “linkage” between the commissioners’ jurisdiction and the electoral base. The district court found this argument unconvincing because the “linkage” argument had precedential support for only *judicial* elections and hadn’t been extended to quasi-judicial/quasi-legislative bodies like the PSC. Indeed, the district court found important differences between judicial elections and elections for bodies like the PSC.

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For example, the district court said, while “[i]t makes sense that the state would not want judges—who are supposed to be impartial neutrals—to favor their own constituents . . . the PSC . . . is by and large and administrative body with policy-making responsibilities that make it qualitatively different than courts.”

Overall, then, the district court found that six of the nine Senate Factors favored the Appellees, and as *Gingles* requires, it weighted Senate Factors 2 and 7 most heavily. *See Gingles*, 478 U.S. at 49 n.15 (“[T]he most important Senate Report factors bearing on § 2 challenges to multimember districts are the ‘extent to which minority group members have been elected to public office in the jurisdiction’ and the ‘extent to which voting in the elections of the state or political subdivision is racially polarized.’”). Viewing the totality of the circumstances, the district court concluded that the PSC election system violated Section 2 of the VRA.

The district court next turned to the Secretary’s alternate argument. Secretary Raffensperger argued that the Appellees’ proposed remedy—moving to single-member districts—would violate the federal Constitution because it would require alteration of Georgia’s form of government. The district court disagreed. It explained that the Georgia Constitution didn’t require at-large districts; it required only that PSC members be elected “by the people” and that the manner and time of election of members” be “as provided by law.” GA. CONST. art. IV, § 1, ¶ 1(c). Here, the district court said, it was requiring the Georgia General Assembly to

choose only a new method. It wasn't imposing the Appellees' requested method—single-member districts.

The district court also considered whether enjoining the 2022 PSC election would violate the *Purcell* principle.⁸ And based on the evidence at trial, the district court concluded it would not. As the district court noted, Michael Barnes, the director of Georgia's Center for Election Systems testified that there would be little disruption to Georgia's preparation for or ability to conduct the November 2022 general election, if the court ruled by August 12, 2022, while the ballots were still being drafted. As to voter confusion, Director Barnes worried only that if the district court ruled *after* August 12—counties may take “proofed ballots” and try to use them “to educate the public about what is on the ballot.” That, according to Director Barnes, would be a problem since, under those circumstances, the contents of the ballots could change given the ongoing litigation. But, the district court concluded, because it was ruling before August 12, 2022, disruption to Georgia's preparation was not a substantial consideration.

III. STANDARD OF REVIEW

We review factual findings in a Section 2 case under the “clearly erroneous” standard set forth in Federal Rule of Civil

⁸ In his proposed findings of fact and conclusions of law, Secretary Raffensperger said only that the evidence showed that there was potential for cost, confusion, and hardship if there were “any changes in election ballot design past August 12, 2022.”

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Procedure 52. *Solomon v. Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1226–27 (11th Cir. 2000) (“All of the district court’s findings regarding the probative value assigned to each piece of evidence are reviewed for clear error.”). While “Rule 52(a) does not inhibit an appellate court’s power to correct errors of law,” *see Gingles*, 478 U.S. at 79, “[w]here the district court’s understanding of the law is correct, . . . and the record indicates that the court ‘engaged in a searching and meaningful evaluation of all the relevant evidence,’ and there is ‘ample evidence in the record to support the court’s conclusion[s],’ our review is at an end.” *Solomon*, 221 F.3d at 1228 (citing *Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1293 (11th Cir. 1995) (en banc)).

IV. DISCUSSION

Secretary Raffensperger seeks a stay of the injunction pending appeal. So I analyze the four *Nken* factors to decide whether a stay is appropriate: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 425–26 (2009). In my view, he falls short on three of the four. In the course of addressing the Secretary’s arguments, I also explain why *Purcell* does not provide a valid reason for us to ignore Georgia’s shortcomings on the merits of its motion for a stay.

A. Likelihood of Success on the Merits

Secretary Raffensperger makes four primary arguments about why he is likely to succeed on the merits of his appeal. First, he contends that the district court erred by not certifying this case to the Georgia Supreme Court. In support of this position, the Secretary asserts that, by failing to certify the case, the district court interfered with Georgia's system of government and wrongly interpreted the Georgia Constitution. Second, Secretary Raffensperger claims that the district court exceeded its authority under the VRA by interfering with Georgia's chosen form of government. Third, the Secretary argues that the district court erred in conflating polarization along *partisan* lines with polarization among *racial* ones. And fourth, he says that the district court erred in ruling too close to the election to allow Georgia to obtain effective appellate review.

Even though Secretary Raffensperger expressly disclaims reliance on the *Purcell* principle, the Majority relies on it, so I discuss that, too.

1. The district court did not err in declining to certify a question to the Georgia Supreme Court

Secretary Raffensperger argues that the district court should have certified whether the Georgia Constitution or Georgia statute required the statewide election of districted PSC members. In other words, he suggests that the language in the Georgia Constitution that the PSC be elected "by the people" requires statewide election.

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Federal courts may certify “novel, unsettled questions of state law” to a state’s highest court for resolution. *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 79 (1997). Federal district courts in Georgia may certify questions of state law if questions of Georgia law “are determinative of the case and there are no clear controlling precedents in the decisions of the [Georgia] Supreme Court.” O.C.G.A. § 15-2-9(a). The decision whether to certify a question “rests in the sound discretion of the federal court.” *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). For three reasons, the district court did not abuse its discretion in declining to certify a question here.

First, Secretary Raffensperger did not preserve this argument. To be sure, Secretary Raffensperger orally asked the district court to certify the question at the summary-judgment hearing. But the district court declined to decide the issue until after trial. Secretary Raffensperger never brought up the issue again, didn’t renew his oral motion, and didn’t include a request in his proposed findings of fact or conclusions of law. As a result, the district court never considered whether to do so. We shouldn’t consider an argument that Secretary Raffensperger didn’t preserve. *CSX Transp. Inc. v. General Mills, Inc.*, 846 F.3d 1333, 1336–37 (11th Cir. 2017) (“[I]f a party hopes to preserve an argument, it must first clearly present it to the district court in such a way as to afford the district court an opportunity to recognize and rule on it.”) (alterations adopted).

Second, even if he had, the Secretary doesn't sufficiently develop the argument on appeal. He doesn't explain why, under the Voting Rights Act, the court could enjoin the PSC elections if the system of elections was provided by state statute but not if it were prescribed by the state constitution. Indeed, he has abandoned the issue. "We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014).

Third, I'm not sure why Georgia could dilute the votes of Black Georgians if it prescribed the system in its Constitution rather than by statute. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 217 (2009) (Thomas, J., concurring in part) ("To be sure, state authority over local elections is not absolute under the Constitution. The Fifteenth Amendment guarantees that the 'right of citizens of the United States to vote shall not be denied or abridged by the United States *or by any State* on account of race, color, or previous condition of servitude,' § 1, and it grants *Congress the authority to 'enforce' these rights 'by appropriate legislation,'* § 2.") (emphasis added). If Georgia passed a constitutional amendment that had the effect of stripping Black Georgians of the franchise, would the VRA really be irrelevant? In any event, the district court did not abuse its discretion because this question isn't outcome determinative, as Georgia statute, not the Georgia constitution, sets forth the election mechanism here.

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2. The district court did not “interfere” with Georgia’s chosen form of government

Secretary Raffensperger next argues that the district court erred by violating Georgia’s sovereignty and altering its form of government.

I agree that federalism is an extremely important constitutional value. *Younger v. Harris*, 401 U.S. 37, 44–45 (1971) (“What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments It should never be forgotten that this slogan, ‘Our Federalism,’ born in the early struggling days of our Union of States, occupies a highly important place in our Nation’s history and its future.”). But federalism doesn’t mean “blind deference to ‘States’ Rights.” *Id.* And here, the Constitution, through the Fifteenth Amendment, has “render[ed] unconstitutional any federal or state law that would limit a citizen’s access to the ballot” on the basis of race. *Nw. Austin Mun. Util. Dist.*, 557 U.S. at 217 (Thomas, J., concurring). Section 2 of the Voting Rights Act “seek[s] to implement the Fifteenth Amendment’s substantive command.” *Id.* at 217–28.

Even assuming that Secretary Raffensperger is right, that the Voting Rights Act doesn’t provide federal district courts the power to “alter the form of government,” that’s not the remedy the district court imposed. The district court didn’t, for instance, add a branch of government, or move a power from one branch to another. Nor did it create a new office or impose new requirements on officeholders. And it didn’t change how any of the three

branches must conduct themselves. Instead, the district court enjoined a state statute and instructed the state legislature to choose a new manner of selecting PSC Commissioners. In so doing, the district court abided by the Georgia Constitution's directive that "[t]he filling of vacancies and the manner and time of election of members of the commission shall be as provided by law." GA. CONST., art IV, § I(c).

3. The district court did not err in how it weighed evidence of partisan voter behavior

Secretary Raffensperger next argues that the district court erred in finding that voting in PSC elections is racially polarized. Instead, he says, the failure of Black-preferred candidates to win office is tied to partisanship, not racial-bloc voting.

The district court did not clearly err in concluding that voting in PSC elections is racially polarized. The district court found Dr. Popick—a former DOJ Civil Rights Division analyst who had performed hundreds of analyses on thousands of elections—to be highly persuasive. And Dr. Popick determined that Black voters and white voters voted in blocs over 75% of the time in PSC elections between 2012 and 2020. Not only that, but he described PSC elections as “one of the clearest examples of racially polarized voting’ he has ever seen.” While the district court “generally” credited Secretary Raffensperger’s expert, Dr. Barber, the district court noted that Dr. Barber didn’t analyze PSC elections at all and didn’t analyze the effect of race on party affiliation. In other words, Dr. Barber’s analysis had shortcomings in methodology. And there’s

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nothing showing the district court clearly erred in crediting Dr. Popick over Dr. Barber.

But that's not all. The district court also found that white voters voted in blocs even when the election featured no Democratic candidate. And the district court relied on Dr. Fraga's testimony that, after 2016, racially polarized voting in Georgia increased, but partisan polarization did not. These findings are fatal to Secretary Raffensperger's argument because, if he were right that any apparent racially polarized voting is just a proxy for partisan polarization, we'd expect to see the two metrics vary together.

But even if Secretary Raffensperger were right, that wouldn't change the answer here. As the district court explained, *Gingles requires* political cohesion. If the fact that Black voters voted together meant that their polarization was only partisan, not racial, then the second *Gingles* factor—that the minority group has political cohesion—would simultaneously be both a necessary and disqualifying condition because any group that had political cohesion wouldn't be able to show racial polarization (and vice versa). In other words, relief under the VRA would become illusory.

4. The *Purcell* principle isn't about time for appellate review.

Secretary Raffensperger's claim that he cannot obtain adequate appellate review this close to the election fails. He asserts that we should stay the district court's injunction because, in his view, he can't obtain adequate appellate review this close to the

election. The Majority embraces this position and characterizes it as a *Purcell* argument.

It is not. Nowhere do *Purcell* and its progeny mention this argument as part of the *Purcell* principle. See *Purcell*, 549 U.S. at 4–5. Nor does the Secretary or the Majority cite any authority for the proposition. *Purcell* deals with only the administrative burdens on elections and voter confusion that changes too close to an election can create. *Id.*

And on its own merits, the Secretary’s contention—now endorsed by the Majority—proves too much. Appellate courts are accustomed to reviewing cases like these on an emergency basis. Plus, appellate review could add years to the process, ensuring that no VRA violation could ever be enjoined, and giving defendants another reason to draw out the proceedings as long as possible.

5. The *Purcell* Principle doesn’t change the result

Finally, the Majority—not Secretary Raffensperger—involes the *Purcell* principle as to the relief the district court imposed here. Secretary Raffensperger, in fact, explicitly *declines* to invoke the *Purcell* principle on that basis. He concedes that “he can implement the relief ordered by that date which was provided to the district court months ago.” In his words, “[t]his Motion and this appeal are not based on timing and the administration of elections.” Rather, the Secretary asserts that “the only relevance of *Purcell* . . . to this appeal relates to the Secretary’s ability to obtain appellate review of the merits issues.”

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As a reminder, the *Purcell* principle holds that “federal courts ordinarily should not alter state election laws in the period close to an election.” *Dem. Nat’l Committee v. Wis. State Leg.*, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J. concurring).

For six reasons, I disagree that this case raises a disqualifying *Purcell* problem.

First, Secretary Raffensperger expressly and purposely waived this argument. He couldn’t have waived this argument more if he tried. He didn’t raise *Purcell* timing in his motion to dismiss. He didn’t raise it in the first joint scheduling order in January 2021. He didn’t raise it in his July 2021 motion for summary judgment. In late January 2022, the parties submitted a joint scheduling order requesting a ruling from the Court “no later than August 15,” and even there, the Secretary “did not waive his right” to raise the *Purcell* issue only *at trial*.

And after that, in February 2021, the district court held a preliminary-injunction hearing, and the Secretary told the district court “for the record” that Secretary Raffensperger “won’t make an appeal based on *Purcell*” and that he “wanted to make that clear.” Indeed, based on the Secretary’s representations, the district court denied the preliminary injunction in part because it thought that the Appellees would “still have an opportunity to obtain injunctive relief related to the 2022 election cycle.” And at trial, Secretary Raffensperger didn’t raise *Purcell* either.

This issue is waived. Secretary Raffensperger told the district court that he wouldn't "make an appeal based on *Purcell*." On appeal, he agrees that he "typically raises *Purcell* issues related to the administration of elections and the attendant difficulties [of] making last-minute changes . . . [but] [t]hat is not the case here." "[I]f a party affirmatively and intentionally relinquishes an issue, then courts must respect that decision." *United States v. Campbell*, 26 F.4th 860, 872 (11th Cir. 2022) (en banc) (cleaned up). We should—indeed must—respect that decision.

Here's a concrete reason why: had the district court known that Secretary Raffensperger was concerned about timing, it might have granted the preliminary injunction in February 2021—well before any *Purcell* concerns would arise. And if the district court knew that Secretary Raffensperger was concerned about voter confusion, it might have analyzed that as a concern (but it didn't know, so it didn't analyze that alleged concern).

The *state* is well-positioned—perhaps the best-positioned—to evaluate and weigh those considerations. Here, Georgia knew about *Purcell* and told the district court that *Purcell* wasn't implicated because it could easily take the PSC District 2 and 3 elections off the ballot and run a special election. *See Campbell*, 26 F.4th at 872 ("[I]t is an abuse of discretion for a court to override a party's deliberate waiver.") (cleaned up & alterations adopted).

Second, I'm not sure this even is a *Purcell* case. Unlike in most *Purcell* cases, the injunction isn't changing the rules mid-stream but rather postponing the election. All the typical

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concerns—that voting has already started, election administrators will be confused, unanticipated consequences will follow—aren’t present here.

Secretary Raffensperger even *agrees* with me: he admitted that “there’s some precedent for that that I think wouldn’t necessarily get into *Purcell*land if it’s going to be straight don’t hold the election in November.” Nor does the Majority Opinion cite a case where the court stayed, on *Purcell* grounds, an order that postponed an election.

This case just isn’t like the other *Purcell* cases the Supreme Court has handed down recently. For instance, in *Merrill v. Milligan*, the Supreme Court vacated an injunction requiring Alabama to draw new district lines for the upcoming elections. *Merrill v. Milligan*, 142 S. Ct. 879 (2022). Justice Kavanaugh concurred, explaining that, with primary elections happening the next month, the injunction was a recipe for chaos because (1) candidates didn’t know against whom they’d be running (2) which district they’d run in, (3) and state and local officials would need “substantial time to plan for elections.” *Id.* at 880 (Kavanaugh, J., concurring).

None of that is present here. Georgia told us so. It conceded that the district court “correctly analyzed the impact of *Purcell* □ on the disruption to the *mechanics* of the election-administration process.” The Majority’s other cases all involve the *mechanics* of administering an election. *See Republican Nat’l Committee*, 140 S. Ct. at 1206 (when ballots must be received by); *League of Women Voters*, 32 F.4th at 1371 (regulations for ballot drop boxes); *Frank*

v. Walker, 574 U.S. 929 (2014) (photo ID rules); *Veasey v. Perry*, 574 U.S. 951 (2014) (same). None involves postponing an election altogether.

The Majority says that “the Supreme Court can tell us” if the Majority is wrong that *Purcell* applies here. Maj. Op. at 3. But that’s no answer. *Purcell* cuts off remedies in voting cases when violations have been proven. It is strong medicine. And we should not, on our own, expand its application to preclude remedying a proven voting violation. *Purcell* is a narrow limiting principle, cautioning federal courts against acting in specific circumstances due to specific, articulated concerns—namely, voter confusion and electoral administration. *Purcell*, 549 U.S. at 4–5. The burden is on the Court, if it applies *Purcell* to an entirely new fact pattern, to justify why it is doing so.

Third, even if this were a *Purcell* case, the principles implicated weigh lightly here. The *Purcell* principle aims to avoid “voter confusion” and an “incentive [for voters] to remain away from the polls.” *Purcell*, 549 U.S. at 4–5.

As to administrative burden, there won’t be any burden on Georgia. The district court held—and Secretary Raffensperger hasn’t challenged on appeal—that Georgia can hold elections for all other offices without trouble in November 2022, as long as we rule by August 12, 2022. Michael Barnes, the Director of the Secretary of State’s Center for Election Systems, testified that he could take the elections for PSC District 2 and 3 seats off the statewide

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ballot and that his “preference” would be that the order be given by August 12, 2022.

As to voter confusion, there won’t be any because there won’t be an election for PSC Districts 2 and 3 until the Georgia General Assembly picks a new system. In fact, the only evidence in the record cuts against a finding of voter confusion: Director Barnes was worried that, if the district court ruled *after* August 12—when the ballots were finished proofing—“once counties have proofed ballots they may take those proofed ballots and try to use them as sample ballots to provide the public—to educate the public about what is on the ballot.” Because the injunction was issued before the ballot was finalized, there are no proofed ballots to be used as samples to confuse voters.

As to the concern that voters will lose confidence in the system if the PSC elections are pulled from the ballot, in my view, just the opposite is true. The district court duly found that the election system for the PSC seats violates the VRA and dilutes Black voters’ votes, effectively rendering them meaningless. Ironically, ignoring that problem and failing to require it be remedied is what will cause voters—especially Black Georgians—to lose confidence in the system. In contrast, postponing those elections until a fairer system can be devised will strengthen the public’s confidence in the system.

Fourth, even if *Purcell* did apply, we are far enough out from an election. We can’t just count days and see how far we are from election day. The facts on the ground matter. Here, the injunction

at issue *postponed* the election. Unlike in, for instance, the *League of Women Voters*, the district court’s injunction didn’t change how votes were counted or collected. In the *Purcell* cases the Majority Opinion cites, the challenged injunction “fundamentally alter[ed] the nature of the election.” *Republican Nat’l Comm.*, 140 S. Ct. at 1206 (staying injunction entered five days before election day). But canceling an election until there is a new system doesn’t “fundamentally alter” *that election*—it just postpones it. Take *Republican National Committee*. There, the district court—five days before the election—required that absentee ballots mailed and post-marked after election day be counted (so long as they were received by the municipal clerk by a specific day). *Id.* at 1207. Five days! Here, we are more than three months out from the election.

In *League of Women Voters*, on the other hand, the district court—*while voter registration and local elections were ongoing*—enjoined provisions about drop boxes, third-party voter-registration organizations, and provisions prohibiting solicitation near a drop box. *League of Women Voters*, 32 F.4th at 1369–70. So even though the primary was months away, we said that changing how voters registered and cast their votes was too drastic a remedy. *Id.* at 1371. For example, the remedy required “re-training poll workers.” *Id.* Of course, that’s not the case here. None of that comes into play since the district court ordered the postponement of the election.

The Majority Opinion cites two unexplained Supreme Court orders, but I’m not sure what lessons we should draw from

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those. In *Veasey*, the Supreme Court denied an application to vacate a stay imposed by the Fifth Circuit on an injunction of Texas’s voter ID law. 574 U.S. at 951. But that concerned the mechanics of qualifying voters in a scheduled, upcoming election—unlike our case.

The Majority also (confusingly) cites to *Frank*, but there, the Supreme Court *vacated* the Seventh Circuit’s stay and allowed the district court’s injunction—issued just 26 days before the election—to remain. 574 U.S. at 929. That, if anything, seems to support my view that *Purcell* is inapplicable here.

The Majority says we need to “weigh” an injunction’s impact. But then it does not do that. *League of Women Voters of Fla., Inc.*, 32 F.4th at 1370 n.4. Instead, it engages in bean-counting—how many days are we away from the election? But we must *weigh* the factors, not recite them by rote. *Cf. Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1235 (11th Cir. 2016) (“[P]redominance [in a Rule 23 certification] requires a qualitative assessment too; it is not bean counting[.]”). The district court conducted extensive factfinding and analysis and ultimately chose a measured remedy: letting the state legislature decide. And there is no record evidence that the decision will cause voter confusion or undue administrative burden. That weighs in favor of letting that decision stand rather than vacating years of the district court’s work.

Fifth, even if we applied Justice Kavanaugh’s heightened standard, *Purcell* would not be a roadblock. As Justice Kavanaugh has explained, *Purcell* does not set forth an absolute principle.

Merrill, 142 S. Ct. at 881 (Kavanaugh, J. concurring). Rather, under his heightened view of the principle, it can be overcome when “(i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship.” *Id.*

As this dissent explains, the situation here satisfies all these conditions: (i) the Appellees won after a full bench trial (and are likely to win on appeal); (2) their right to vote in the 2022 PSC elections will be irreparably harmed; (3) the Appellees sued *years* before the election; and (4) everyone agrees that the changes are feasible without significant cost. So at least under Justice Kavanaugh’s expressed standard, *Purcell* should not change the result here.

Finally, consider this. If plaintiffs can file a case *two years* before the election, win a trial months out from an election, show a violation of their rights before the ballot has even been finalized, obtain an order postponing the election⁹ with no administrative

⁹ In the meantime, there is no change to the status quo, so it is not as though the PSC will be unable to function. Everyone agrees that, under Georgia law, if no election occurs in November, the Commissioners will remain in their office until their successors are elected. The statute provides that Commissioners serve “for terms of office of six years and until the election and qualification of their respective successors.” O.C.G.A. § 46-2-1. See also *Kanitra v. City of Greensboro*, 296 Ga. 674, 769 S.E.2d 911, 913 (2015) (“While there is some authority to the contrary, as a general rule, apart from any constitutional

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burden on the state, and still be told that *Purcell* prevents them from receiving the remedy to which they are entitled, then when will *Purcell* ever be inapplicable?

In short, Secretary Raffensperger does not have a likelihood of success on the merits, and the *Purcell* principle doesn't apply.

B. Irreparable Harm

The second *Nken* factor requires us to consider whether the applicant will be “irreparably injured absent a stay.” *Nken*, 556 U.S. at 425–26. Secretary Raffensperger says he will suffer an “irreparable injury” absent a stay because he will be enjoined from conducting this year’s elections pursuant to a statute enacted by the legislature.

Our precedent binds me to agree with the Secretary on this point. We have said that when the district court bars “the State from conducting this year’s elections pursuant to a statute enacted by the Legislature,” unless the statute is unconstitutional, an injunction would “seriously and irreparably harm the State.” *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020). But this factor isn’t the end of the story for two reasons. For one, this is only *one* factor of four. *Nken*, 556 U.S. at 425–46. Given that, in my view, Secretary Raffensperger has an extremely slim, if any, likelihood of success on the merits, I’m skeptical as to this

or statutory regulation on the subject, an incumbent of an office may hold over after the conclusion of his or her term until the election and qualification of a successor.” (citation omitted)).

harm. And two, giving this factor a heavy weight would mean, essentially, that states are entitled as a matter of right to stays of illegal but not unconstitutional voting laws on appeal. That cannot be right.

C. Injury

The third *Nken* factor asks “whether issuance of the stay will substantially injure the other parties interested in the proceeding.” *Nken*, 556 U.S. at 425–26. Secretary Raffensperger says that the Appellees won’t be harmed by a stay because they will—like all other Georgians—be able to vote for Commissioners of Districts 2 and 3. But he gives away the game when he admits that “vote dilution is an injury.” In fact, he concedes, “the right to vote is sacred.” Indeed.

This case involves “one of the most fundamental rights of our citizens: the right to vote.” *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009). As the district court concluded—after more than two years of litigation and a full bench trial—Georgia’s PSC system infringed on Black Georgians’ fundamental right to vote. Vote dilution, as Secretary Raffensperger concedes, *is* an injury, and Black Georgians have been injured by the status quo. A stay of the injunction will just perpetuate their injury.

D. Public Interest

The final *Nken* factor is “where the public interest lies.” *Nken*, 556 U.S. at 425–26. This one is easy. On the one hand, we could simply postpone an election for a few months while we determine whether the district court erred in finding that the current

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system violates the Voting Rights Act. But if we allow the election to go forward, we run a risk. If we (as I think likely) determine that the current system violates the Voting Rights Act, then Black Georgians in Districts 2 and 3 are stuck—for the next *six years*, until 2029—with Commissioners whom they didn't have their full role in selecting.

V.

This is not a close case. Secretary Raffensperger waived *Purcell*, it doesn't apply to this situation, and it doesn't weigh against staying this injunction. And Secretary Raffensperger hasn't made a sufficient showing on the *Nken* factors.

I respectfully dissent.

Appendix C

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

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

Plaintiffs,

v.

BRAD RAFFENSPERGER, *in his official capacity*
as Secretary of State of the State of Georgia,

Defendant.

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

OPINION AND ORDER

Since 1906, commissioners on the Public Service Commission for the State of Georgia have been elected on a statewide, at-large basis. Today, the Court finds that this method of election unlawfully dilutes the votes of Black citizens under Section 2 of the Voting Rights Act of 1965 and must change.

The Secretary of State is hereby **ENJOINED** from preparing ballots for the November 8, 2022 election that include contests for Districts 2 and 3 of the Public Service Commission (PSC); from administering any future elections for vacancies on the PSC using the statewide, at-large method; and from certifying the election of any PSC commissioner who is elected using such method.

I. Procedural Posture

Plaintiffs filed this lawsuit against the Georgia Secretary of State in July 2020, alleging a violation of Section 2 under the Voting Rights Act (VRA), 52 U.S.C. § 10301. In January 2022, the Court ruled on the parties' competing motions for summary judgment. In its order, the Court concluded that the totality-of-the-circumstances analysis necessary to resolve Plaintiffs' Section 2 claim, including the feasibility of their proposed remedy, required factual findings to be made after a trial.¹

The Court therefore conducted a five-day bench trial, from June 27 to July 1, 2022. Following the trial, and at the Court's direction, each side filed Proposed Findings of Fact and Conclusions of Law.² In a bench trial, this court "must find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(a)(1). In vote dilution cases, the Eleventh Circuit has further required that district courts "explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning." *Johnson v. Hamrick*, 196 F.3d 1216, 1223 (11th Cir. 1999) (quoting *Cross v. Baxter*, 604 F.2d 875, 879 (5th Cir. 1979)). Having presided over the bench trial, evaluated the credibility of the witnesses,

¹ See generally ECF 97 (Summary Judgment Motions (SJM) Order).

² ECF 144 (Def.'s proposed findings); ECF 145 (Pls.' proposed findings).

and carefully considered the evidence and the record in its entirety, the Court makes the following factual findings and legal conclusions.

II. Factual Findings

A. The Structure and Function of the PSC

The Court finds it necessary, as a preliminary matter, to explain how the PSC developed over the last 140 years. That history not only underscores the importance of Plaintiffs' claim, but it also provides context for the Court's conclusion that their proposed remedy is feasible.

The 1877 Georgia Constitution conferred “[t]he power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs” on the Georgia General Assembly. GA. CONST. art. IV, § 2, ¶ I (1877). In 1879, the General Assembly adopted an act concerning the regulation of railroad freight and passenger tariffs, which created the Railroad Commission and provided that three commissioners – appointed by the governor and confirmed by the state senate – would carry out the act's provisions. 1878 Ga. Laws 125 (Law No. 269, *Reg. of Freight & Passenger Tariffs*). Commissioners served a six-year term, and appointments were staggered to ensure that a new commissioner would be appointed every two years. *Id.* § I.

In 1906, the General Assembly changed the method of selecting commissioners to require that they be “elected by the electors of the whole State, who are entitled to vote for members of the General Assembly.” 1906 Ga. Laws 100, § 1 (Law No. 453, *Election of R.R. Comm’rs*) (the 1906 Act). The following year, the General Assembly added two commissioners, bringing the total to five. 1907 Ga. Laws 72, § 1 (Law No. 223, *R.R. Comm’n, Membership, Powers, etc.*) (the 1907 Act). The commissioners were to be “elected by the qualified voters of Georgia as prescribed” in the 1906 Act. *Id.*

The General Assembly changed the name of the Railroad Commission to the Public Service Commission in 1922 and expanded its powers and duties. 1922 Ga. Laws 143 (Law No. 539, *R.R. Comm’n Changed to Pub. Serv. Comm’n*). In 1945, the Georgia Constitution was amended to confer on the General Assembly, among other things, the “power and authority of regulating . . . public utilities.” GA. CONST. art. IV, § I, ¶ I (1945). The amendment enshrined members of the PSC as constitutional officers who “shall be elected by the people.” GA. CONST. art. IV, § IV, ¶ III (1945). The terms of the commissioners remained six years and staggered, as they always had been. *Id.* It was left to the General Assembly to determine the “manner and time of election” of commissioners. *Id.*

Prior to 1998, the Georgia Code provided that any voter in Georgia entitled to vote for members of the General Assembly could vote for members of the PSC, and that election procedures were to be held “under the same rules and regulations as apply to the election of the Governor.” 1998 Ga. Laws 1530 (Law No. 978, *Pub. Util. & Pub. Transp. – Pub. Serv. Comm’n; Election of Members; Dist.*) (amending O.C.G.A. § 46-2-1). This formulation of who was entitled to vote for members of the PSC was consistent with the structure employed in the 1906 and 1907 Acts: “elected by the electors of the whole State” and “elected by the qualified voters of Georgia.”

In 1998, the General Assembly amended the Georgia Code to require members of the PSC to reside in one of five districts, but the members would continue to be elected by statewide vote. *Id.* at 1531 (adding O.C.G.A. § 46-2-1(a)). Commissioners’ terms remained six years and were staggered as prescribed by the State Constitution, although the code amendment altered the method applied to create the stagger. *Id.* (adding O.C.G.A. § 46-2-1(d)). There is no indication from the revision to the statute that the General Assembly intended any change to who would be permitted to vote for PSC members.

Thus, while the Georgia Constitution guarantees that PSC commissioners must be elected by popular vote, what constitutes an election “by the people” is

left to the discretion of the General Assembly. By statute, the General Assembly has decided that PSC elections are to be held using the same rules and regulations applied to gubernatorial elections; that general elections must take place every two years; and that one commissioner must live in each of the five residency districts for which they are seeking office for at least 12 months prior to the election and throughout the six-year term. O.C.G.A. § 46-2-1.

The seats from PSC Districts 2 and 3 are on the ballot for the November 8, 2022 general election and are at the heart of this dispute.³ Between 2012 and 2022, District 3 included Clayton, DeKalb, Fulton, and Rockdale Counties.⁴ According to 2010 Census data of which the Court took judicial notice, the population of District 3 was 52.02% Black (including those who identified as another race in addition to Black).⁵ The residency districts were redrawn in 2022, after the 2020 Decennial Census, pursuant to Georgia Senate Bill 472. 156th Gen. Assemb., Reg. Sess. (Ga. 2022). District 3 is now comprised of Clayton, DeKalb, and Fulton

³ Trial Tr. 438:3-11 (Barnes); PX-66 (Barnes Decl.), at 10.

⁴ PX-2, at 1 (2012 PSC map).

⁵ *Id.* at 2 (population data for 2012 PSC map); PX-8 (Popick Rpt.), at 16 (tbl.3).

Counties.⁶ The population was 48.79% Black and 9.88% Hispanic (including Black Hispanics).⁷

PSC Chairperson Tricia Pridemore testified that the PSC has three primary roles—ensuring the “safety, reliability and affordability of utilities.”⁸ PSC decisions affect the lives of every Georgian because they determine how much consumers pay for utilities and whether utility providers may pass certain costs on to their consumers.⁹ For example, the PSC sets residential, commercial, and industrial utility rates.¹⁰ It regulates aspects of Georgia Power, including what the company charges customers, and electric energy generation and transmission.¹¹ On the telecommunications side, the PSC regulates pole attachments and landlines. It also has some jurisdiction over connectivity and rural broadband internet connectivity.¹²

⁶ PX-3, at 1 (2022 PSC map).

⁷ *Id.* at 2 (population data for 2022 PSC map).

⁸ Trial Tr. 388:19–21 (Pridemore).

⁹ PX-36 (PSC website printout), at 2; PX-98, at 13 (Eaton Tr. 83:11–18); PX-103, at 8 (Shaw Tr. 37:20–21).

¹⁰ Trial Tr. 390:2–6 (Pridemore).

¹¹ *Id.* 388:24–389:2 (Pridemore).

¹² *Id.* 389:18–21 (Pridemore).

The PSC hears rate cases, holds hearings, listens to witnesses, makes evidentiary rulings, and weighs testimony from stakeholders to come to a decision. It decides utility rates that affect all ratepayers throughout Georgia. The PSC can also assess fines and administer federal funds for pipeline safety across Georgia.¹³ The PSC is therefore “an administrative body” that performs both “quasi-legislative” and “quasi-judicial” functions “by virtue of the express powers conferred upon it by the General Assembly.” *Tamiami Trail Tours, Inc. v. Ga. Pub. Serv. Comm’n*, 213 Ga. 418, 428 (1957) (citations omitted).¹⁴

B. Census Data and Georgia’s Demographics

Based on the 2020 Census, there are 10,711,908 Georgians. Of those, 50.1% identify as non-Hispanic White; 33.0% identify as “any part” Black (meaning Black alone or in combination with another race); and 16.9% identify as members of other racial groups.¹⁵ According to data from the Secretary of State, Georgia had 7,004,034 active voters as of December 2021. Of those, 53.1% identified as White;

¹³ ECF 121-3 (Joint Stip.), ¶¶ 1, 14-17, 19.

¹⁴ Trial Tr. 412:3-4 (Pridemore); ECF 121-3 (Joint Stip.), ¶¶ 14-15; PX-98, at 14-15 (Eaton Tr. 85:18-25).

¹⁵ ECF 121-3 (Joint Stip.), ¶ 4.

29.4% identified as Black; 12.1% identified as members of another racial group; and, for 8.8%, their race was unknown.¹⁶

Further, American Community Survey (ACS) and 2020 Census data show significant continuing disparities between the socioeconomic circumstances of Black and White Georgians. Per capita income for Black Georgians is \$24,215, while per capita income for White Georgians is almost double that, at \$40,348.¹⁷ The poverty rate for Black Georgians is more than twice that of White Georgians—18.8% compared to 9%.¹⁸

Georgia has an unemployment rate of 4.8% for those in the labor force who are at least 16 years old. The rate is 3.8% for non-Hispanic Whites and 6.9% for Blacks.¹⁹ The median household income in Georgia is \$61,980. For households headed by non-Hispanic Whites, the median income is \$71,790. It is just \$47,096 for Black-headed households.²⁰ Sixty-four percent of all households in Georgia own their own homes. Among households headed by non-Hispanic Whites, 75.1%

¹⁶ *Id.* ¶ 6.

¹⁷ ECF 57 (Mot. for Judicial Notice), ¶ 8. The Court granted Plaintiffs' motion for judicial notice of various census data. ECF 97 (SJM Order), at 1.

¹⁸ ECF 57 (Mot. for Judicial Notice), ¶ 6.

¹⁹ *Id.* ¶ 5.

²⁰ *Id.* ¶ 7.

are homeowners and 24.9% are renters. For Black-headed households, only 47.5% own their own homes and 52.5% rent.²¹ For all households in Georgia, 11.2% receive Supplemental Nutrition Assistance Program (SNAP) benefits (also known as food stamps). Of non-Hispanic White-headed households, 6.5% receive SNAP benefits. That percentage is over three times higher—20.3%—for Black-headed households.²² Black Georgians are also less likely than White Georgians to have graduated high school or obtained a college degree.²³

C. The Plaintiffs

The Plaintiffs are Black voters who reside in PSC District 3 and who voted in recent PSC elections.²⁴ Although each testified that, in their experience, race plays a role in Georgia elections,²⁵ none have been prevented from casting a vote in Georgia because of their race.²⁶

²¹ *Id.* ¶ 9.

²² *Id.* ¶ 10.

²³ *Id.* ¶¶ 3-4.

²⁴ *Id.* ¶ 2.

²⁵ Trial Tr. 60:2-61:10 (Woodall), 321:12-21 (McCorkle), 479:10-480:4 (Rose), 545:16-25 (Mosley).

²⁶ ECF 121-3 (Joint Stip.), ¶ 3. *See also* Trial Tr. 97:2-4 (Woodall), 502:12-4 (Rose).

Plaintiff Richard Rose is the president of the NAACP's Atlanta chapter.²⁷ In that role, he regularly attends community meetings with Black Georgians. Rose also fields calls from Black Georgians and maintains contact with political leaders in the Black community.²⁸ He is aware of issues particular to the Black community that he believes fall within the PSC's purview.²⁹

Plaintiff Wanda Mosley is the national field director at Black Voters Matter Fund, which is based in Atlanta. Prior to that, she served as the organization's senior state coordinator in Georgia.³⁰ In that role, Mosley was responsible for organizing and registering Black voters and conducting outreach in Black communities, which has provided her an understanding of issues that are important to Black Georgians.³¹

Plaintiff James Woodall is a minister and former president of the Georgia NAACP.³² Woodall testified that, during his tenure with the NAACP, his top priority was understanding the concerns of Black Georgians, so he regularly

²⁷ Trial Tr. 469:12-13, 470:1-3.

²⁸ *Id.* 471:24-472:20.

²⁹ *Id.* 472:21-23.

³⁰ *Id.* 517:1-2, 520:13-14, 520:24-521:3.

³¹ *Id.* 522:10-13.

³² *Id.* 45:11-18.

attended meetings where Black Georgians voiced their issues.³³ Woodall's engagement with Black Georgians makes him aware of issues that fall within the PSC's purview and that have a disproportionate effect on Black Georgians.³⁴

Plaintiff Brionté McCorkle is executive director of Georgia Conservation Voters, a nonprofit organization that advocates for environmental justice and organizes and mobilizes communities around environmental justice issues.³⁵ She has had significant involvement with the PSC and has attended PSC hearings.³⁶ Her work has provided her with an understanding of the particularized needs of Black Georgians when it comes to issues that fall within the PSC's purview.³⁷

The Court found each Plaintiff to be credible when it comes to identifying and understanding how matters within the PSC's jurisdiction affect the Black community.³⁸

³³ *Id.* 47:9-48:11.

³⁴ *Id.* 48:12-14, 54:12-22.

³⁵ *Id.* 261:3-262:2, 262:11-18.

³⁶ *Id.* 274:25-276:21, 279:15-20, 277:11-15.

³⁷ *Id.* 279:25-281:9.

³⁸ At a bench trial, "it is the exclusive province of the judge . . . to assess the credibility of witnesses and to assign weight to their testimony." *Childrey v. Bennett*, 997 F.2d 830, 834 (11th Cir. 1993).

D. The Defendant

Defendant Brad Raffensperger (the Secretary) was sued in his official capacity as the Secretary of State for the State of Georgia.³⁹ He is Georgia's chief election official and is a nonvoting member of the State Election Board. O.C.G.A. §§ 21-2-50(b), 21-2-30(d). The Election Board must "formulate, adopt, and promulgate such rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct of primaries and elections." *Id.* § 21-2-31(2). Among his other duties, the Secretary is responsible for certifying the results of PSC elections.⁴⁰

E. The Experts

The parties presented three experts – two testifying for Plaintiffs and one for the Secretary – who evaluated mass voting behavior in Georgia and opined on voting disparities and the reasons for those disparities.

1. Stephen J. Popick, Ph.D.

Plaintiffs offered Dr. Stephen Popick to discuss the statistical analysis of election data.⁴¹ From 2006 to 2012, Dr. Popick worked in the Voting Rights Section

³⁹ ECF 1 (Compl.), ¶ 10.

⁴⁰ Trial Tr. 446:3–5, 446:21–24 (Barnes).

⁴¹ *Id.* 165:3–6, 166:9–12.

of the Civil Rights Division at the U.S. Department of Justice.⁴² Here, Dr. Popick conducted a racial-bloc voting analysis of PSC election contests from 2012 to 2020 to ascertain whether voting in Georgia was racially polarized.⁴³ He has conducted hundreds of such analyses on thousands of individual elections.⁴⁴ Dr. Popick referred to this as the “separate electorates test,” which predicts whether Black voters would have elected a different candidate if the election were held only amongst Black voters as opposed to Black and White voters together.⁴⁵

Dr. Popick found strong evidence of racial polarization in PSC elections and concluded that “Black voters were cohesive in their support of the same candidate in each election,” and “White voters were cohesive around a different candidate in each election, and that the candidate preferred by White voters won 11 out of 11 times.”⁴⁶ Since 2012, Black voters have voted as a bloc at rates ranging from 79.18 to 97.84%.⁴⁷ During that same time frame, White voters also voted as a bloc

⁴² *Id.* 160:8–12.

⁴³ *Id.* 166:17–20.

In *Gingles*, the Supreme Court used the terms “racial bloc” and “racial polarization” interchangeably. *Thornburg v. Gingles*, 478 U.S. 30, 53 n.21 (1986).

⁴⁴ Trial Tr. 183:17–23.

⁴⁵ *Id.* 182:17–21.

⁴⁶ *Id.* 168:16–22, 197:12–19.

⁴⁷ PX-8 (Popick Rpt.), at 11.

at rates ranging from 75.72 to 87.51%.⁴⁸ In each of the six most recent general and runoff elections for PSC commissioners, Black voters supported the same candidate at a rate greater than 94%.⁴⁹ Despite this strong cohesion, the Black-preferred candidate lost in all elections despite the Black-preferred candidate going to a runoff in two of those elections.⁵⁰ Dr. Popick testified that, in all of his years of experience, his analysis of the PSC elections in Georgia since 2012 “is one of the clearest examples of racially polarized voting” he has ever seen.⁵¹

The Court finds Dr. Popick’s opinions and conclusions to be highly persuasive and compelling evidence of racial polarization in PSC elections.

2. Bernard Fraga, Ph.D.

Plaintiffs also offered the testimony of Dr. Bernard Fraga, an expert in political data analysis.⁵² Dr. Fraga testified that Georgia’s method of conducting PSC elections involves several practices that enhance the opportunity for the dilution of Black votes, including a statewide method of election despite the existence of residency districts, a majority-vote and runoff requirement, and

⁴⁸ *Id.* at 12.

⁴⁹ Trial Tr. 198:1-11; PX-8 (Popick Rpt.), at 11.

⁵⁰ Trial Tr. 197:18-20.

⁵¹ *Id.* 183:20-23, 198:12-17.

⁵² *Id.* 571:23-572:3.

staggered terms and numbered seats, which Dr. Fraga believes are an “anti-single shot” mechanism.⁵³

Dr. Fraga testified that Georgia’s combination of a statewide election with numbered seats and residency districts is quite unusual.⁵⁴ He opined that this practice institutionalizes a form of vote dilution by allowing the State’s majority-White population to dilute the votes of any majority-Black residency district in voting for the commissioner from that district.⁵⁵ And, because elections are staggered, a minority group has less of an opportunity to concentrate its voting strength behind a candidate of choice.⁵⁶

Dr. Fraga also testified as to whether members of the minority group have been denied access to a candidate slating process. He views the system of gubernatorial appointments employed in Georgia for PSC vacancies as an informal slating process, which confers an incumbency advantage on the person

⁵³ *Id.* 574:3-9; ECF 121-3 (Joint Stip.), ¶ 13.

“Single-shot voting” occurs when a minority is able to win some at-large seats, but only “if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates.” *Gingles*, 478 U.S. at 38 n.5.

⁵⁴ Trial Tr. 574:18-575:1, 575:16-25.

⁵⁵ *Id.* 576:1-11.

⁵⁶ *Id.* 577:15-24.

appointed for the open position, although the incumbency advantage has decreased over time.⁵⁷ Dr. Fraga looked at gubernatorial appointments to the PSC from 1996 through 2020.⁵⁸ Of those, only one (David Burgess) was Black.⁵⁹ Black appointees therefore comprised only 20% of the total appointments during that time. This is an underrepresentation in comparison to Black Georgians' 32.1% share of the citizen voting age population (CVAP).⁶⁰ Based on this analysis, Dr. Fraga concluded that Black Georgians are excluded from the informal slating process and, therefore, are less likely to enjoy the benefits of incumbency.⁶¹

Dr. Fraga also testified on "the[] lingering effects of discrimination manifesting in lower rates of participation in the electoral process."⁶² For example, there was an approximately 5% to 11% voter turnout gap between White voters and Black voters in each general and runoff election from 2016 through 2021.⁶³ Dr. Fraga attributes that gap, and the lower rate of political participation by Black

⁵⁷ *Id.* 589:22–590:8, 590:16–20, 611:20–612:7.

⁵⁸ *Id.* 590:9–15; PX-5 (Fraga Rpt.), at 14.

⁵⁹ Trial Tr. 591:16–20; PX-5 (Fraga Rpt.), at 14.

⁶⁰ Trial Tr. 591:24–592:2; PX-5 (Fraga Rpt.), at 5, 15.

⁶¹ Trial Tr. 592:3–10; PX-5 (Fraga Rpt.), at 15.

⁶² Trial Tr. 585:14–18.

⁶³ *Id.* 579:22–583:23; PX-5 (Fraga Rpt.), at 6.

voters, to the lingering effects of discrimination.⁶⁴ He also found that Black Georgians donate to candidates at a lower rate than White Georgians.⁶⁵ Eighty percent of individual donors were White, but less than 10% were Black.⁶⁶

Dr. Fraga found that Black candidates are substantially less likely to win office in non-judicial statewide elections for the PSC and other offices than White candidates.⁶⁷ He examined the 164 statewide Georgia elections that occurred between 1972 and 2021, and only four Black candidates won during that time.⁶⁸ The four successful Black candidates won a total of eight separate elections – 4.9% of the total. Raphael Warnock was elected U.S. Senator in 2020; Mike Thurmond was elected Commissioner of Labor in 1998, 2002, and 2006; Thurbert Baker was elected Georgia Attorney General in 1998, 2002, and 2006; and David Burgess was elected to the PSC in 2000.⁶⁹ Thus, despite comprising 32.1% of the CVAP in Georgia, Black candidates were only successful 4.9% of the time. Of the twelve major-party Black candidates to enter the primary process for U.S. Senate and

⁶⁴ Trial Tr. 583:24–584:4.

⁶⁵ *Id.* 584:5–12.

⁶⁶ *Id.* 585:3–9; PX-5 (Fraga Rpt.), at 10.

⁶⁷ Trial Tr. 585:19–586:3; PX-5 (Fraga Rpt.), at 4, 11–13.

⁶⁸ Trial Tr. 586:4–13; PX-5 (Fraga Rpt.), at 11–12.

⁶⁹ Trial Tr. 587:8–19; PX-5 (Fraga Rpt.), at 11–12.

Governor since 2006, only two made it to the general election ballot.⁷⁰ Dr. Fraga concluded that Black Georgians are underrepresented in statewide offices and statewide elections.⁷¹

The Court found Dr. Fraga's analysis, opinions, and conclusions to be highly persuasive and entitled to great weight.

3. Michael Barber, Ph.D.

The Secretary presented Dr. Michael Barber as an expert in political science, the interplay between racial and political polarization, and statistical analysis.⁷² Dr. Barber testified that Black voters consistently prefer Democratic candidates regardless of the race of the candidate.⁷³ He generally found that Black voters supported Democratic candidates between 86% and 93% of the time, compared with less than 40% for White voters.⁷⁴ Dr. Barber did not examine PSC elections at all and could not speak to the effect of race or partisanship in those contests.⁷⁵

⁷⁰ Trial Tr. 588:10-589:2; PX-5 (Fraga Rpt.), at 12.

⁷¹ Trial Tr. 588:6-9; PX-5 (Fraga Rpt.), at 11-12.

⁷² Trial Tr. 625:7-13, 627:22-628:1.

⁷³ *Id.* 639:2-14; DX-28 (Barber Rpt.), at 6-10.

⁷⁴ DX-28 (Barber Rpt.), at 9.

⁷⁵ Trial Tr. 705:8-10, 17-19.

The Court generally credits Dr. Barber's analysis but finds it of limited utility in this case. Dr. Barber did not consider the impact of race on party affiliation, which was a crucial omission. Indeed, Dr. Barber conceded that his model did not account for factors that may determine partisanship, including race or racial identity.⁷⁶ This omission is surprising in light of his own prior scholarship, which concluded that "race is the strongest predictor" of a person's actual partisan affiliation.⁷⁷

Plaintiffs called Dr. Fraga back to the stand to rebut Dr. Barber's testimony. Dr. Fraga opined that it is impossible to separate racial identity from partisan affiliation because "everything related to party, in part, is due to race, not the other way around."⁷⁸ Dr. Fraga criticized Dr. Barber's failure to account for the large volume of political science research showing that race or racial identity is a key determinant of an individual's party affiliation.⁷⁹ By failing to consider what

⁷⁶ *Id.* 697:23–698:7.

⁷⁷ PX-111 (Michael Barber & Jeremy Pope, *Groups, Behaviors, and Issues as Cues of Partisan Attachments in the Public*, Am. Pol. Res. (2022), at 4–5). *See also* Trial Tr. 701:6–702:8, 702:23–704:17.

⁷⁸ Trial Tr. 760:20–761:16.

⁷⁹ *Id.* 759:5–761:3.

causes party identification, Dr. Fraga opined, Dr. Barber's attempt to disentangle race and party is inherently flawed.⁸⁰

The Court finds that the interplay between race and partisanship is difficult if not impossible to disentangle. But, as discussed further in its Conclusions of Law, the Court is unconvinced that such disentangling is necessary or even relevant to the vote dilution analysis.

F. The Commissioners

Each of the current PSC commissioners testified live or by deposition during the trial. The Court highlights only the portions of their testimony that are relevant to the Court's analysis.

Tricia Pridemore, commissioner for District 5, is the PSC chairperson.⁸¹ She testified that it takes a majority vote of the commissioners to raise utility rates and decide Integrated Resource Plan cases.⁸² She also testified that the PSC has a consumer affairs group that works for all five commissioners to field issues raised by consumers, which prevents preferential treatment of certain commissioners

⁸⁰ *Id.* 761:17-763:7.

⁸¹ *Id.* 352:13-20.

⁸² *Id.* 400:21-23, 412:5-10.

and districts.⁸³ Pridemore does not believe that Black ratepayers have different needs than White ratepayers.⁸⁴

In her opinion, statewide, at-large elections “provide centralization of thought for energy and utility policy,” as commissioners avoid fighting over decisions such as more or less favorable rates, where to locate new plants and energy facilities, or which districts receive broadband or lower pole attachment rates.⁸⁵ She believes the current structure allows commissioners to “work in the best interest of the whole state” and to use the existing transmission, pipeline, and telecommunication systems to “maximize the needs for the state.”⁸⁶ Pridemore believes that the statewide nature of its elections allows the PSC to keep utility rates below the national average and helps drive the State’s economic development, although she provided no evidence of any correlation.⁸⁷

Pridemore opposes single-member districts, which she believes would introduce favoritism and politics into utility regulation.⁸⁸ She believes it would be

⁸³ *Id.* 391:5-6, 11-12, 393:18-24.

⁸⁴ *Id.* 418:21-419:1, 422:20-21.

⁸⁵ *Id.* 386:23-387:12.

⁸⁶ *Id.* 387:13-17.

⁸⁷ *Id.* 387:17-22.

⁸⁸ *Id.* 397:19-21.

“detrimental to how the state operates and oversees utility regulation” for commissioners to be elected by district instead of statewide.⁸⁹

The Court finds Pridemore’s testimony credible concerning the inner workings and functions of the PSC – matters that relate to her core responsibilities as chairperson. However, her lay opinions regarding the effect of changing from statewide to district-based elections were speculative and are not afforded much weight.

Charles Eaton is a former commissioner of District 3, where Plaintiffs reside.⁹⁰ In 2006, he defeated the only Black commissioner up to that point in the District 3 PSC runoff election. Although the Black incumbent – David Burgess – received more votes in the general election, he lost to Eaton in the runoff.⁹¹ Even in the runoff, though, Burgess won a majority of the votes in each of the counties that comprised District 3.⁹² In other words, Eaton would not have won the District

⁸⁹ *Id.* 396:13–14.

⁹⁰ ECF 121-3 (Joint Stip.), ¶ 3; PX-98, at 2 (Eaton Tr. 18:4–7).

Eaton testified by deposition. PX-104 (Eaton video deposition clips).

⁹¹ PX-98, at 11 (Eaton Tr. 71:3–72:1).

The Court overrules the Secretary’s Fed. R. Evid. 602 and 701 objections. Eaton is competent to testify and has personal knowledge of election results related to his own candidacy.

⁹² PX-98, at 11, 12 (Eaton Tr. 73:15–17, 77:5–8).

3 election if it had been a single-member district.⁹³ Nor would he have won reelection in 2012 or 2018 if the elections had been by single-member district.⁹⁴ Indeed, in every PSC election, Eaton was not the candidate of choice for the voters of District 3.⁹⁵

Timothy Echols is the commissioner from District 2.⁹⁶ He believes the purpose of the residency districts for PSC commissioners is “[t]o make sure that the state is fully represented geographically.”⁹⁷ Echols believes that the General Assembly “wanted to make sure that rural parts of the state had representation and that metro Atlanta didn’t dominate politics in Georgia.”⁹⁸ In his view, energy regulation is “the least partisan of all politics, probably, in any state.”⁹⁹

⁹³ *Id.* at 11 (Eaton Tr. 72:2–73:20).

⁹⁴ *Id.* at 4–5, 10–11 (Eaton Tr. 34:23–36:1, 38:3–16, 69:18–70:24).

Although it is unclear whether the Secretary’s objections are limited to specific portions of this testimony, the Court similarly overrules the Secretary’s Rule 602 and 701 objections. Indeed, counsel for the Secretary conceded during trial that there was no dispute that the counties in District 3 voted for Eaton’s opponent in the 2018 election. Trial Tr. 152:10–20.

⁹⁵ PX-98, at 13 (Eaton Tr. 79:18–25).

⁹⁶ PX-99, at 2, 13 (Echols Tr. 20:18–21:1, 52:22–24).

Echols testified by deposition. PX-105 (Echols video deposition clips).

⁹⁷ PX-99, at 14, 16 (Echols Tr. 54:19–22, 56:9–15).

⁹⁸ *Id.* at 16 (Echols Tr. 56:25–57:7).

⁹⁹ *Id.* at 56 (Echols Tr. 160:5–8). *See also generally id.* (Echols Tr. 159:8–160:8).

Jason Shaw, the commissioner from District 1, testified that he was appointed to the PSC in 2018.¹⁰⁰ There was no application process for the position; he was simply contacted by the governor about the possible appointment.¹⁰¹ Likewise, Lauren McDonald, the commissioner from District 4, was first appointed to the PSC in 1998.¹⁰² As with Shaw, McDonald did not apply for the position but was contacted by the governor and asked to accept the appointment.¹⁰³ He believes the residency districts were created to ensure that the PSC represents all parts of Georgia.¹⁰⁴ Nothing about his day-to-day work would change if he were elected only by the voters of District 4, except that his workload would be reduced due to fewer phone calls from constituents in other districts.¹⁰⁵

The Secretary's Rule 403 and 701 objections are overruled. Echols may express his lay opinion on these issues.

¹⁰⁰ PX-103, at 6 (Shaw Tr. 32:20-33:2).

¹⁰¹ *Id.* at 9 (Shaw Tr. 40:13-22).

¹⁰² PX-101, at 3-4, 6 (McDonald Tr. 25:13-21, 27:17-28:2, 28:17-18, 44:11-14); PX-107 (McDonald video deposition clips).

¹⁰³ PX-101, at 3-4 (McDonald Tr. 25:13-28:2).

¹⁰⁴ *Id.* at 18 (McDonald Tr. 92:5-13).

Plaintiffs' foundation objection is overruled. McDonald may testify as to his personal opinion.

¹⁰⁵ *Id.* at 13 (McDonald Tr. 62:1-7).

Terrell Johnson is the current commissioner from District 3, where Plaintiffs reside.¹⁰⁶ Governor Kemp appointed Johnson to fill the vacancy in 2021 when Eaton was appointed to the bench.¹⁰⁷ Johnson is only the second Black person to serve on the PSC.¹⁰⁸ Like Shaw and McDonald, he did not apply for appointment but was contacted by a member of the governor's staff.¹⁰⁹ He had never considered running for the PSC, though he does not believe that the job requires any specialized knowledge in power or energy.¹¹⁰ None of his duties would change if he were elected only by the residents of District 3.¹¹¹

Like the testimony of Pridemore, the Court finds the testimony of each of the remaining commissioners to be credible on matters within their personal knowledge.

¹⁰⁶ PX-100, at 7 (Johnson Tr. 32:20–33:10).

Johnson testified by deposition. PX-106 (Johnson video deposition clips).

¹⁰⁷ PX-100, at 7 (Johnson Tr. 32:20–33:10); PX-35 (July 21, 2021 Press Release by the Office of the Governor); Aug. 26, 2021 Executive Order 1 *available at* <https://gov.georgia.gov/executive-action/executive-orders/2021-executive-orders>.

¹⁰⁸ ECF 121-3 (Joint Stip.), ¶ 1; PX-100, at 10 (Johnson Tr. 40:11–17).

¹⁰⁹ PX-100, at 9 (Johnson Tr. 37:24–39:10).

¹¹⁰ *Id.* at 14 (Johnson Tr. 61:1–4).

¹¹¹ *Id.* at 11 (Johnson Tr. 49:20–50:5).

G. The District 3 Candidates

Plaintiffs presented the testimony of two former candidates for PSC District 3, both of whom were unsuccessful. Lindy Miller challenged Eaton in 2018.¹¹² She won every county in District 3 but lost the election statewide.¹¹³ Miller testified that, based on the economic data, there are “many more low-income Black rate payers than high-income Black rate payers and [a] disproportionate number of low-income Black rate payers [relative to] low-income White rate payers in Georgia.”¹¹⁴ She does not believe the PSC has been responsive to the needs of low-income Black voters.¹¹⁵ She does not believe that the commissioners had “openly advocat[ed] or highlight[ed] issues that were important to Black communities, like energy burden, for example,” or reducing the fees customers were being charged in connection with Georgia Power’s construction of nuclear power facilities.¹¹⁶

¹¹² ECF 130-3, at 5, 31 (Miller Tr. 5:9–12, 31:2–10).

Miller testified by video deposition. PX-110.

¹¹³ ECF 130-3, at 33 (Miller Tr. 33:21–25).

¹¹⁴ *Id.* at 52 (Miller Tr. 52:13–17). *See generally id.* at 51–53 (Miller Tr. 51:21–53:6).

¹¹⁵ *Id.* at 24, 28–30 (Miller Tr. 24:8–16, 28:14–30:19).

¹¹⁶ *Id.* at 27 (Miller Tr. 27:4–19). Ms. Miller described an “energy burden” as “what percent of your gross household income [] you spend on energy costs.” *Id.* at 18 (Miller Tr. 18:6–8).

Miller testified to her experience in running a statewide election campaign and the difficulties that entails.¹¹⁷ In her view, the statewide election of commissioners creates an “accountability” question.¹¹⁸ Although a candidate must live in a particular district to run for the PSC and presumably has relationships and networks in that district, that person must win votes from those outside the district who may not relate to or experience the issues facing lower-income or Black populations.¹¹⁹

Chandra Farley lives in Atlanta and lost in the 2022 Democratic primary for PSC District 3.¹²⁰ Farley also discussed the disproportionate effect that “energy burden” has on Black households because they are more likely to be low-income.¹²¹ According to Farley, the PSC is regularly provided with information relating to energy equity and has the ability to lessen the energy burden on Black Georgians, but it has failed to do so.¹²² For example, she and others unsuccessfully

¹¹⁷ *Id.* at 34–36 (Miller Tr. 34:13–36:19).

¹¹⁸ *Id.* at 12, 24–25 (Miller Tr. 12:6–8, 24:8–25:19).

¹¹⁹ *Id.* at 36–38 (Miller Tr. 36:20–38:3).

¹²⁰ Trial Tr. 99:14–19, 124:5–7, 131:16–132:3.

¹²¹ *Id.* 109:4–16.

¹²² *Id.* 110:17–111:18, 113:24–116:4.

lobbied the PSC to extend the Covid-related moratorium on utility disconnections.¹²³

Although the Court generally found Miller's and Farley's testimony credible, it affords little weight to their lay opinions on matters relevant to the Court's determination.

III. Conclusions of Law

This Court must conduct an "intensely local appraisal" of the facts to determine what result is compelled by the VRA under the totality of the circumstances. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (cleaned up). This involves a "searching practical evaluation of the 'past and present reality.'" *Id.* (quoting Senate Rpt. at 30, 1982 USCCAN 177, 208). The Court is confident that it has done exactly that.

A. Vote Dilution Claims Under the Voting Rights Act

Section 2 of the VRA prohibits any "standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . ." 52 U.S.C. § 10301(a). Vote dilution occurs if, based on the totality of circumstances, members of that protected class "have less opportunity than other members of the electorate to participate in the

¹²³ *Id.* 117:7-121:20.

political process and to elect representatives of their choice.” *Id.* § 10301(b). Members of the class are not entitled to proportional representation, only equal access to participate in the political process. *Id.*

The Supreme Court has outlined three preconditions that Plaintiffs must show to establish a vote-dilution claim: (1) the minority group must be large and geographically compact enough to form a majority in a single-member district; (2) the minority group must be politically cohesive; and (3) the minority group must show that the majority votes sufficiently as a bloc to generally defeat the minority group’s preferred candidate. *Gingles*, 478 U.S. at 50–51.

Once a court is satisfied that these preconditions are met, it must evaluate several factors that were identified in the Senate Report accompanying the 1982 VRA amendment (the Senate Report). *Id.* at 44–45. The so-called “Senate Factors” are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single

shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;
9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Solomon v. Liberty Cnty., 899 F.2d 1012, 1015–16 (11th Cir. 1990) (Kravitch, J., specially concurring) (citing Senate Rpt. at 28–29, 1982 USCCAN 206–07); *see also Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1289 (11th Cir. 2020) (same). Vote dilution is highly likely where these factors are present.

Solomon, 899 F.2d at 1015; *see also Gingles*, 478 U.S. at 45 (concluding that these nine factors “will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims”) (footnote omitted).

The Supreme Court has instructed lower courts to weigh Senate Factors 2 and 7 more heavily: “If present, the other factors . . . are supportive of, but *not essential to*, a minority voter’s claim.” *Gingles*, 478 U.S. at 48 n.15 (emphasis in original); *see also City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1555 (11th Cir. 1987) (*Carrollton NAACP*) (reversing the district court’s judgment for the defendants because it failed to sufficiently consider racial bloc voting and racial polarization).

The Secretary argues that Plaintiffs’ votes are not being diluted “on account of race or color” because, as Dr. Barber testified, the polarization that exists in Georgia elections is the result of partisanship rather than race.¹²⁴ The Court’s rejection of this argument is more fully developed in its analysis of Senate Factor 2 below, but it warrants a preface here.

Plaintiffs do not need to show that their votes have been diluted because of purposeful discrimination. It is the *result* of the challenged practice – not the intent

¹²⁴ *See, e.g.*, Trial Tr. 833:3–834:6 (Def.’s closing); ECF 121-2 (Def.’s Stmt. of the Case), at 3.

behind it—that matters. *Gingles*, 478 U.S. at 35–36; *see also Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (emphasizing that “Congress made clear that a violation of § 2 could be established by proof of discriminatory results alone”). Thus, even if race and partisanship are highly correlated and hard to disentangle, the fact remains that there is a disproportionate—and dilutive—effect on Black voters.

But more importantly, nothing in the VRA requires a plaintiff to control for every possible covariant to ensure that the discriminatory effect is caused solely or even predominantly by race as opposed to some other factor. Race and partisanship are correlated because Black voters may perceive that the issues that matter to them are more likely to be addressed by a particular party or candidate. In other words, they are not selecting Democratic candidates because they are Democrats; they are selecting Democratic candidates because they perceive, rightly or wrongly, that those candidates will be more responsive to issues that concern Black voters. This is supported by Dr. Fraga’s expert testimony that race is a key factor in determining party affiliation.¹²⁵

The Secretary’s argument is flawed because it asks the Court to introduce a factor into the vote dilution analysis that is simply not supported by the law. A

¹²⁵ Trial Tr. 759:5–761:3.

high correlation between race and partisanship does not *undermine* a Section 2 claim, it is *necessary* to it. The minority voting group must be politically cohesive, which is a *Gingles* prerequisite, and the best (albeit imperfect) proxy for political cohesion is partisan alignment. We expect politically cohesive groups to vote in corresponding patterns.

To determine whether a practice dilutes the right to vote “on account of race,” then, this Court chooses to stay within the confines of the *Gingles* preconditions and the Senate Factors. *See Gingles*, 478 U.S. at 48–51; *Solomon*, 899 F.2d at 1013–16 (Kravitch, J., concurring). The Secretary cannot point to a single case establishing that, even if those factors are satisfied, a plaintiff must still prove that race independent of partisanship explains the discriminatory effect.¹²⁶ That is not the law, and this Court will not impose such a requirement.

B. The *Gingles* Preconditions Are Met.

The Court finds that Plaintiffs carried their burden of showing that the *Gingles* preconditions are satisfied. This Court found at summary judgment that

¹²⁶ *See, e.g.*, Trial Tr. 841:11–17, 860:22–862:15 (Def.’s closing) (citing the opinion by Judge Tjoflat, joined by one other judge, in *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994), and *Alabama State Conf. of the NAACP v. Alabama*, No. 2:16-CV-731-WKW, 2020 WL 583803 (N.D. Ala. Feb. 5, 2020), involving elections of judges).

Plaintiffs largely satisfied the three *Gingles* preconditions.¹²⁷ The evidence at trial only reinforced that finding, so the Court need only summarize its original *Gingles* analysis here.

As to geography and compactness, it was undisputed that Black voters are a sufficiently large and geographically compact group in current-day Georgia to constitute at least one single-member district in which they would have the potential to elect their representative of choice in district-based PSC elections. *Gingles*, 478 U.S. at 50; *Wright*, 979 F.3d at 1303.¹²⁸ Plaintiffs further showed that Black voters are politically cohesive.¹²⁹ *Gingles*, 478 U.S. at 51. The Secretary agreed that Black voters have been politically cohesive in general elections for PSC commissioners since 2012.¹³⁰ Plaintiffs also established racial-bloc voting by the White majority that enables that majority to defeat Black-preferred candidates, further supported by the trial testimony of Dr. Stephen Popick.¹³¹ *Id.*

¹²⁷ See generally ECF 97 (SJM Order).

¹²⁸ *Id.* at 24–27.

¹²⁹ *Id.* at 27–29.

¹³⁰ ECF 85-1 (Def.'s Resp. to Pls.' SUMF), No. 6; ECF 121-3 (Joint Stip.), ¶¶ 9–10.

¹³¹ ECF 97 (SJM Order), at 29–32; ECF 121-3 (Joint Stip.), ¶ 12.

C. The Senate Factors Compel a Finding of Vote Dilution.

Of the nine Senate Factors, courts are to weigh Senate Factors 2 and 7 more heavily in the vote dilution analysis. *Gingles*, 478 U.S. at 48 n.15; *see also Carrollton NAACP*, 829 F.2d at 1555. The Court will therefore address those two factors first.

1. Racial Polarization in Elections (Senate Factor 2)

Senate Factor 2 concerns the extent to which voting in the jurisdiction is racially polarized, which is “[t]he surest indication of race-conscious politics,” and the “the keystone of a dilution case.” *United States v. Marengo Cnty. Comm’n*, 731 F.2d 1546, 1566, 1567 (11th Cir. 1984); *accord Wright*, 979 F.3d at 1305. The Court has already found—and the parties do not dispute—that voting in Georgia is polarized.¹³²

As previewed above, the Secretary argues that partisanship better explains this polarization, and therefore any dilution occurs on account of party rather than race. But the Court is heavily persuaded by Dr. Fraga’s testimony that it is impossible to separate race from politics in current-day Georgia, even if that were required under the VRA. As Dr. Fraga made clear, race likely drives political party

¹³² ECF 97 (SJM Order), at 29–32; ECF 121-3 (Joint Stip.), ¶ 9; Trial Tr. 841:7–9 (Pls.’ closing).

affiliation, not the other way around.¹³³ Even the Secretary's expert, Dr. Barber, conceded that race is a significant factor in determining vote choice.¹³⁴ His own scholarship tells us that race is the "strongest predictor" of partisan identification—even more so than one's political views.¹³⁵

The Secretary's position is facially inconsistent with *Gingles*, which requires Plaintiffs to show that voting is both racially polarized *and* politically cohesive. This necessarily means that the correlation between race and partisan voting must be high, or else there would be no discernable evidence of cohesive bloc voting. And Plaintiffs here easily proved both racial polarization and political cohesion. Indeed, they showed that the racial polarization found to exist in the *Gingles* case itself is exceeded by the racial polarization in recent PSC general elections.¹³⁶

Dr. Popick, who has analyzed racial bloc voting in thousands of individual elections in his professional career, credibly and compellingly testified that his analysis of the PSC general elections since 2012 shows "one of the clearest

¹³³ Trial Tr. 760:20–761:16.

¹³⁴ *Id.* 705:20–24, 706:6–12.

¹³⁵ *Id.* 701:6–702:8. See also PX-111 (*Groups, Behaviors, and Issues as Cues of Partisan Attachments in the Public*).

¹³⁶ Trial Tr. 806:16–807:9 (Pls.' closing); ECF 144 (Pls.' proposed findings), ¶ 550 & tbl.

examples of racially polarized voting” he has ever seen.¹³⁷ And that racial polarization is far more stark than partisan identification alone would predict.¹³⁸ Racially polarized voting in Georgia increased after 2016 but partisan identification did not.¹³⁹ Racial polarization exists even in elections that do not feature a Republican-Democrat matchup.¹⁴⁰ In fact, political cohesion by White voters was the strongest in the 2014 District 1 election where there was no Democratic candidate and the Black-preferred candidate was a Black Libertarian.¹⁴¹ This contest showed even higher political cohesion among Black voters (82.44%) than the contest featuring a Black Democratic candidate for District 4 (81.29%).¹⁴²

This does not mean that partisan division is never relevant to a vote dilution analysis. For example, courts must consider whether the White majority votes as a bloc or whether that vote is fractured along political lines. *See Gingles*, 478 U.S. at

¹³⁷ Trial Tr. 183:20–23, 198:12–17.

¹³⁸ *Id.* 765:15–767:4 (Fraga).

¹³⁹ Trial Tr. 767:25–769:19 (Fraga). *Compare* PX-8 (Popick Rpt.), at 11–12 *with* DX-28 (Barber Rpt.), at 7.

¹⁴⁰ Trial Tr. 695:9–16 (Barber), 769:20–770:16 (Fraga).

¹⁴¹ *Id.* 767:5–24 (Fraga); PX-6 (Fraga Rebuttal Rpt.), at 7.

¹⁴² PX-8 (Popick Rpt.), at 11.

48 n.15 (“[I]f difficulty in electing and White bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates.”). Where the White majority vote is fractured, some White votes would align with Black votes and allow the Black-preferred candidate to prevail. So, while a plaintiff claiming vote dilution could meet the political cohesion requirement, that scenario would not be sufficient to demonstrate racial-bloc voting.

But here, Plaintiffs have proven both political cohesion and racial polarization in PSC elections. The Secretary has not offered any evidence of an alternate explanation for why minority-preferred candidates are less successful, such as “organizational disarray, lack of funds, want of campaign experience, the unattractiveness of particular candidates, or the universal popularity of an opponent.” *Uno v. City of Holyoke*, 72 F.3d 973, 983, 983 n.4 (1st Cir. 1995) (citing *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994) (Tjoflat, J.)). Senate Factor 2 weighs heavily in Plaintiffs’ favor.

2. Election of Minorities to Public Office (Senate Factor 7)

Senate Factor 7 looks at the extent to which members of the minority group have been elected to public office in the jurisdiction. While the other Senate Factors

focus on the effects on minority voters and their ability to participate in the political process, this one focuses on the race of the candidates for office.¹⁴³

There is no dispute that, outside of the unique context of judicial elections, Georgia has elected few Black officials statewide. Nor is there dispute that the lack of diversity among the members of the PSC has been and continues to be substantial. There have been five Black candidates for the PSC in the seven most recent elections, including two Black candidates in 2014. Every time, the Black candidate lost to a White candidate.¹⁴⁴ The Secretary rightly points out that, for the upcoming November 2022 election, both major-party candidates for PSC District 3 are Black.¹⁴⁵ But that race—and even Georgia’s U.S. Senate race, which also features two Black candidates¹⁴⁶—will not significantly alter the overall paucity of Black candidates who have been elected to statewide public office in Georgia. Analyzing 164 statewide elections over a 50-year timeframe, Dr. Fraga found that

¹⁴³ The Secretary claims, without any supporting authority, that this factor is of limited utility. *See, e.g.*, ECF 144 (Def.’s proposed findings), ¶ 181. The Secretary’s position is directly contrary to precedent, which prioritizes Senate Factors 2 and 7 in the totality-of-the-circumstances analysis. *Gingles*, 478 U.S. at 48 n.15; *Carrollton NAACP*, 829 F.2d at 1555.

¹⁴⁴ Trial Tr. 589:10–17 (Fraga); PX-5 (Fraga Rpt.), at 12–13.

¹⁴⁵ Trial Tr. 132:1–21 (Farley).

¹⁴⁶ *Id.* 754:18–755:10 (Rose).

Black candidates won only eight races — less than 5% of the total.¹⁴⁷ Even assuming a Black candidate wins both the District 3 and U.S. Senate races in November 2022, the total would increase to only 6%. This is substantially lower than the CVAP, the Black voting population, and the total Black population in Georgia.¹⁴⁸

It is true, as the Secretary highlights, that Black-preferred candidates have won some recent statewide elections in Georgia. For example, in the 2020 general elections, Black-preferred candidates were successful in the presidential race and two U.S. Senate races.¹⁴⁹ But Senate Factor 7 asks courts to consider the election of minority candidates, not minority-preferred candidates, as a barometer for the racial environment. This factor weighs in Plaintiffs' favor.

3. History of Official Discrimination (Senate Factor 1)

This factor looks at “the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote or otherwise to participate in the democratic process.” *Solomon*, 899 F.2d at 1015 (Kravitch, J., specially concurring). Past discrimination has lingering effects on voter behavior because it “may cause [B]lacks to register

¹⁴⁷ *Id.* 585:19–586:13 (Fraga); PX-5 (Fraga Rpt.), at 4, 11–13.

¹⁴⁸ ECF 121-3 (Joint Stip.), ¶¶ 4–6.

¹⁴⁹ *Id.* ¶ 11.

or vote in lower numbers than [W]hites” and “may also lead to present socioeconomic disadvantages, which in turn can reduce participation and influence in political affairs.” *Marengo Cnty. Comm’n*, 731 F.2d at 1567.

The Court finds no need to belabor its discussion of Senate Factor 1 because it is undisputed that Georgia has a “well-documented history of discrimination against its Black citizens.”¹⁵⁰ Some may argue that Georgia’s history should not be held against it forever and that this factor should therefore not carry much weight. But the Supreme Court instructs this Court to consider Georgia’s history of discrimination in evaluating the totality of the circumstances for a VRA claim, and the Court finds that Senate Factor 1 is satisfied.

4. Voting Practices that May Enhance Opportunities for Discrimination (Senate Factor 3)

This factor examines “the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.” *Solomon*, 899 F.2d at 1015 (Kravitch, J., specially concurring).

¹⁵⁰ Trial Tr. 842:15–17 (Def.’s closing); ECF 121-3 (Joint Stip.), ¶ 8.

Dr. Fraga persuasively testified that Georgia's unique PSC election procedures enhance the opportunity for discrimination against Black Georgians, including a statewide election with residency districts; the majority-vote/runoff requirement; and "anti-single shot" staggered terms with numbered seats.¹⁵¹ He testified that PSC elections are "textbook examples" of Senate Factor 3 because they mirror the specific policies called out in the Senate Report.¹⁵²

Large election districts can enhance the opportunity for discrimination by increasing the cost of campaigning. *See, e.g., Marengo Cnty. Comm'n*, 731 F.2d at 1570 (recognizing that large, rural area made countywide campaigns expensive). The financial barriers to entry are particularly problematic in light of the economic disparities proven at trial.¹⁵³ Majority-vote/runoff requirements can also create opportunities for vote dilution in contrast to a plurality-win system. Under the latter, members of the minority group may be able to consolidate their votes behind one candidate while the majority group splits its votes among several different candidates. If votes are split in this manner under a majority-vote requirement, a runoff takes place, and the majority has a second opportunity to

¹⁵¹ Trial Tr. 574:3-9.

¹⁵² *Id.* 573:21-574:2.

¹⁵³ *See supra* Section II.B.

defeat the minority's preferred candidate. *City of Rome v. United States*, 446 U.S. 156, 183–84 (1980), *superseded by statute on other grounds as stated in Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 209–11 (2009); *United States v. Dallas Cnty. Comm'n*, 739 F.2d 1529, 1536–37 (11th Cir. 1984). *See also LULAC v. Clements*, 986 F.2d 728, 749 (5th Cir. 1993) (“Majority vote requirements can obstruct the election of minority candidates by giving [W]hite voting majorities a ‘second shot’ at minority candidates who have only mustered a plurality of the votes in the first election.”) (citations omitted). Finally, Georgia’s staggered terms for PSC commissioners also work as an anti-single shot mechanism and thereby enhance the opportunity for discrimination. *City of Rome*, 446 U.S. at 184-85, 185 n.21.

The Court finds Dr. Fraga’s testimony on this point compelling and concludes that, by employing this unique aggregation of statewide, at-large elections for PSC commissioners, with requirements for a majority vote, residency districts, and staggered terms with numbered seats, Georgia uses electoral practices that enhance the opportunity for vote dilution. Senate Factor 3 weighs in Plaintiffs’ favor.

5. Slating Processes (Senate Factor 4)

The fourth Senate Factor examines whether members of the minority group have been denied access to any candidate slating process. Slating is “a process in

which some influential non-governmental organization selects and endorses a group or ‘slate’ of candidates, rendering the election little more than a stamp of approval for the candidates selected.” *Westwego Citizens for Better Gov’t v. City of Westwego*, 946 F.2d 1109, 1116 n.5 (5th Cir. 1991) (citing *Overton v. City of Austin*, 871 F.2d 529, 534 (5th Cir. 1989) (per curiam)).

There is no formal candidate slating process in Georgia. But Dr. Fraga characterized the use of gubernatorial appointments to fill vacancies on the PSC (which is required by statute, O.C.G.A. § 46-2-4) as an “informal slating process” that confers an incumbency advantage on candidates who are appointed.¹⁵⁴ Echols and Shaw both testified that their incumbency made it easier to raise funds and run statewide.¹⁵⁵

The Court is not persuaded in the PSC election context that gubernatorial appointments act as an informal slating process, even if the appointments confer some incumbency advantage. Of the five appointments Dr. Fraga examined, three of those commissioners were defeated in their post-appointment elections.¹⁵⁶

¹⁵⁴ Trial Tr. 590:4–22. *See generally supra* Section II.E.2.

¹⁵⁵ PX-99, at 24 (Echols Tr. 71:15–22); PX-103, at 11, 13 (Shaw Tr. 44:18–45:21, 54:20–24).

The Secretary’s Rule 701 objection to Shaw’s testimony is overruled.

¹⁵⁶ Trial Tr. 611:13–16.

Even if the Court were to accept that appointments constitute an informal slating process for PSC members, the Court does not find that Black candidates have necessarily been excluded from it – at least not in recent years. Of the six PSC appointments between 1996 and 2022, two have been Black. While Plaintiffs are skeptical of Johnson’s appointment because it occurred during the pendency of this litigation, the Court declines to discount it. Senate Factor 4 does not weigh in Plaintiffs’ favor.

6. Effects of Discrimination (Senate Factor 5)

Senate Factor 5 looks at the extent to which members of the minority group bear the effects of discrimination that hinder their ability to participate effectively. But “the burden is not on the plaintiffs to prove that this disadvantage is causing reduced political participation.” *Marengo Cnty. Comm’n*, 731 F.2d at 1569. Instead, the burden is on “those who deny the causal nexus to show that the cause is something else.” *Id.*

The Senate Report explains the rationale and the nature of the inquiry for this factor:

[D]isproportionate educational, employment, income level and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown, and where the level of Black participation in politics is depressed, plaintiffs need not prove any further causal

nexus between their disparate socio-economic status and the depressed level of political participation.

Senate Rpt. at 29 n.114, 1982 USCCAN 206 (citations omitted); *see also Gingles*, 478 U.S. at 69 (“[P]olitical participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes.”).

The evidence at trial demonstrated that Black Georgians still suffer from the effects of segregation and discrimination. Dr. Fraga testified that Black voters turnout at lower rates and donate to campaigns at lower rates because of the lingering economic disparities caused by historical discrimination.¹⁵⁷ Income per capita for Blacks is only 60% of that for Whites; the median household income for Black-headed homes is 66% of that for Whites; the poverty rate is twice as high; the unemployment rate is close to twice that of Whites; the rate of homeownership is lower; and the rate of receiving benefits under the SNAP is more than three times higher.¹⁵⁸

¹⁵⁷ Trial Tr. 583:24–585:9 (Fraga); PX-5 (Fraga Rpt.), at 6, 9–11.

¹⁵⁸ Trial Tr. 736:6–14 (Barber); DX-49 (Barber Rebut. Rpt.), at 8 (indicating an income gap of approximately \$23,000 between Black and white Georgia households); ECF 57 (Mot. Jdl. Notice) ¶¶ 3, 5, 6, 7, 8, 10. *See also supra* Section II.B.

Even the Secretary's expert, Dr. Barber, reached similar conclusions in his scholarly work, finding "large and persistent gaps in voter turnout by race" and concluding that "[B]lack citizens are much less likely to vote and much more likely to live in local communities where fewer individuals vote than [W]hites."¹⁵⁹ Dr. Barber concluded that Black citizens are more than three times as likely to live in an area where voter turnout is consistently low, which can perpetuate political inequality along racial lines.¹⁶⁰ Senate Factor 5 weighs in Plaintiffs' favor.

7. Racial Appeals in Political Campaigns (Senate Factor 6)

Senate Factor 6 examines whether political campaigns have been characterized by overt or subtle racial appeals. The parties agree that racial appeals in statewide political campaigns are relevant to this factor.¹⁶¹ The Court interprets this factor to encompass political campaign advertisements in Georgia generally; the type of campaign to which they relate is relevant to the weight this evidence carries.¹⁶²

¹⁵⁹ Trial Tr. 668:19–25 (Barber).

¹⁶⁰ *Id.* 668:7–669:25 (Barber); PX-37 (Michael Barber & John B. Holbein, *410 Million Voting Records Show That Minority Citizens, Young People, and Democrats Are at a Profound Disadvantage at the Ballot Box*).

¹⁶¹ *Id.* 464:14–465:20 (colloquy).

¹⁶² *Id.* 465:21–24 (colloquy).

Witnesses testified to seeing political ads or statements made during a political campaign that they characterized as racial appeals. Some of the political ads shown were overtly racial in nature and disturbing, even if not sponsored by the candidates themselves. But several of the ads were more subtle, and reasonable people could disagree over whether they were racial appeals at all. The Court does not question Plaintiffs' sincere beliefs about what constitutes a racial appeal, but these ads and statements do not carry the weight Plaintiffs seek to place on them. On balance, while there was some evidence of racial appeals made during political campaigns in statewide Georgia races generally, there was no evidence of such appeals in PSC campaigns. Senate Factor 6 does not weigh in Plaintiffs' favor.

8. Responsiveness of Elected Officials (Senate Factor 8)

Senate Factor 8 concerns the responsiveness (or lack thereof) of elected officials to the particularized needs of the members of the minority group. Unresponsiveness is "evidence that minorities have insufficient political influence to ensure that their desires are considered by those in power." *Marengo Cnty. Comm'n*, 731 F.2d at 1572. This factor is "of limited importance" both because of its subjectivity and Section 2's focus on the ability to participate in the political process itself. *Id.* Even if officials are responsive, that does not necessarily equate to equal electoral opportunity. *Id.*

As evidence of the PSC's purported lack of responsiveness to Black voters, Plaintiffs point to testimony from the current commissioners expressing their views that the Black community does not have specialized needs when it comes to matters within the PSC's jurisdiction.¹⁶³ McDonald, for instance, believes that income status is the issue.¹⁶⁴

Plaintiffs testified that some PSC issues disproportionately affect Black Georgians.¹⁶⁵ These issues include high utility rates and energy burden; the location of power plants; the utility disconnection moratorium; and cost overruns related to the construction of Georgia Power's nuclear power plant.¹⁶⁶ Plaintiff McCorkle testified that the City of Atlanta – which is in PSC District 3 – is home to communities that endure the highest energy burden in Georgia.¹⁶⁷ But Pridemore testified credibly that the decision to lift the moratorium involved a number of

¹⁶³ Trial Tr. 418:21–419:1, 421:19–422:1 (Pridemore); PX-99, at 28, 30 (Echols Tr. 85:10–20, 91:3–8); PX-100, at 12 (Johnson Tr. 55:12–18); PX-101, at 18 (McDonald 94:7–18); PX-103, at 18 (Shaw Tr. 70:21–71:3).

¹⁶⁴ PX-101, at 18 (McDonald 94:7–95:23).

¹⁶⁵ Trial Tr. 55:8–23, 62:6–21 (Woodall); *id.* 281:10–13, 314:7–13, 334:13–335:23 (McCorkle); *id.* 475:6–25, 480:5–20 (Rose); *id.* 536:21–537:6, 559:10–560:6 (Mosley).

¹⁶⁶ *Id.* 49:7–50:13, 52:15–53:16 (Woodall); *id.* 284:19–285:13 (McCorkle); *id.* 472:21–473:9 (Rose); *id.* 522:14–18 (Mosley).

¹⁶⁷ *Id.* 300:7–15 (McCorkle).

competing policy interests.¹⁶⁸ Echols similarly testified that continuing the moratorium would have “put people in a greater [financial] difficulty down the road.”¹⁶⁹

The issues identified by Plaintiffs are important ones and they are inherently tied to income and poverty levels, which disproportionately affect Black Georgians given the continuing effects of discrimination on socio-economic factors.¹⁷⁰ But Senate Factor 8 focuses on a lack of responsiveness, not disproportionate effect, and the Court concludes that it requires something more than an outsized effect correlated with race. Plaintiffs have not presented sufficient evidence here. Senate Factor 8 does not weigh in Plaintiffs’ favor.

9. Policy Justifications for the Voting Practice (Senate Factor 9)

This final Senate Factor considers whether the policy underlying Georgia’s use of the voting standard, practice, or procedure at issue is “tenuous.” Senate Report at 29, 1982 USCCAN 207; *see also Houston Laws.’ Ass’n v. Att’y Gen. of Tex.*, 501 U.S. 419, 426–27 (1991) (“[W]e believe that the State’s interest in maintaining

¹⁶⁸ *Id.* 416:17–418:23 (Pridemore).

¹⁶⁹ PX-99, at 42 (Echols Tr. 115:23–116:6). *See also* PX-101, at 19–20 (McDonald Tr. 98:13–99:8); PX-103, at 17 (Shaw Tr. 66:14–67:4).

¹⁷⁰ *See, e.g.*, Trial Tr. 422:17–21 (Pridemore); PX-101, at 18 (McDonald 94:7–95:23); *see also supra* Section II.B.

an electoral system . . . is a legitimate factor to be considered by courts among the ‘totality of circumstances.’”).

The Court expected the Secretary at trial to offer robust evidence explaining why Georgia’s method of selecting PSC members was thoughtfully contemplated by the General Assembly, or that it otherwise furthered some concrete interest that was documented and provable. Perhaps a policy statement, or arguments buried in legislative history, might have articulated an explanation for why this particular electoral mechanism makes sense for Georgia. But the only evidence the Court heard to this point came from the lay opinions of the commissioners, most notably Pridemore.¹⁷¹

Although not herself an expert on electoral structure and function, Pridemore nonetheless opined that statewide elections serve to (1) avoid conflict over the location of energy and infrastructure; (2) avoid having different utility rates for different districts; (3) avoid potential favoritism by the consumer affairs staff; and (4) maintain the federal and state pipeline safety programs.¹⁷² But the Court finds Pridemore’s testimony on these points unpersuasive, not because the

¹⁷¹ Trial Tr. 390:13–19 (ruling making clear Pridemore was providing lay opinion testimony).

¹⁷² Trial *Id.* 386:23–388:14, 390:22–392:16, 402:2–9 (Pridemore).

Court questions her sincere beliefs, but because they were not tethered to any objective data and they lacked foundation entirely. In fact, it appeared to the Court based on its close observation of Pridemore's testimony at trial that the justifications she gave for the PSC's electoral structure were developed in preparation for her testimony and were not preconceived.

The Secretary's counsel argued in closing that Georgia had an interest in maintaining its electoral structure to guarantee a "linkage" between the commissioners' jurisdiction and electoral base.¹⁷³ Counsel's argument is not evidence, of course, but the Court will address it nonetheless.

It is no doubt important to maintain the linkage between officials' jurisdiction and their electoral base, which preserves accountability and reduces the incentive to favor certain constituents. *See S. Christian Leadership Conf. of Ala. v. Sessions*, 56 F.3d 1281, 1296–97 (11th Cir. 1995) (en banc). But that decision, on which the Secretary relies, was focused on judicial elections, and the Eleventh Circuit has not extended its application beyond that unique context. *Wright*, 979 F.3d at 1297; *Davis v. Chiles*, 139 F.3d 1414, 1423–24 (11th Cir. 1998). It makes sense that the state would not want judges—who are supposed to be impartial

¹⁷³ *Id.* 836:4–837:2, 857:24–858:3 (Def.'s closing).

neutrals—to favor their own constituents. Although the PSC’s functions are considered both “quasi-legislative” and “quasi-judicial,” it is by and large an administrative body with policy-making responsibilities that make it qualitatively different than courts.

Even crediting the Secretary’s linkage concern, which the Court does find deserves some weight, it does not outweigh the interests of Black Georgians in not having their votes for PSC commissioners diluted. *Houston Laws.’ Ass’n*, 501 U.S. at 427 (“Because the State’s interest . . . is merely one factor to be considered in evaluating the ‘totality of circumstances,’ that interest does not automatically, and in every case, outweigh proof of racial vote dilution.”). Senate Factor 9 weighs in Plaintiffs’ favor.

In sum, six of the nine Senate Factors weigh in Plaintiffs’ favor, including the most important Factors, 2 and 7. This Court concludes that Georgia’s statewide, at-large system for electing PSC members dilutes the votes of Black Georgians in violation of the VRA.

D. The Secretary’s Statutory Interpretation Argument Fails.

The Secretary argues that the statewide, at-large election of PSC members is not a “standard, practice, or procedure” within the meaning of Section 2 because

the State itself cannot be viewed as a “district.”¹⁷⁴ Statewide election is not a districting plan, the Secretary argues, but rather a choice made by the sovereign state “about how it will regulate utilities” in Georgia.¹⁷⁵

This Court has already ruled that nothing in the VRA suggests that a party lacks standing when the challenge is to a statewide versus political subdivision election, nor has the Secretary presented a persuasive argument for why the VRA exempts statewide at-large elections from its scope.¹⁷⁶ But more importantly, the Secretary’s argument is foreclosed by the plain language of Section 2, which applies any time “it is shown that the political processes leading to nomination or election *in the State or political subdivision* are not equally open to participation by members” of a protected class. 52 U.S.C. § 10301(b) (emphasis added). The statute clearly addresses elections held at the state-level and the district-level, and the Secretary has provided no authority to suggest that this language means

¹⁷⁴ ECF 121-2 (Def.’s Stmt. of the Case), at 2. The Secretary raised this issue for the first time in the parties’ proposed pretrial order. *See also* Trial Tr. 27:23–28:11 (Def.’s opening). Plaintiffs asserted that this argument was waived because the Secretary did not raise it in his Answer or motion to dismiss. *Id.* 825:10–14 (Pls.’ closing). The Court finds it unnecessary to wade into the issue of waiver because the Secretary’s position is substantively foreclosed by the plain language of the statute.

¹⁷⁵ Trial Tr. 832:4–8 (Def.’s closing).

¹⁷⁶ ECF 36 (MTD Order), at 20–21.

anything other than what it explicitly says. Nor does the Secretary's status as an agent of a "sovereign" shift this analysis. So long as PSC members are elected by popular vote, those elections must comply with the VRA regardless of whether they are conducted at the state or political subdivision level.

E. Plaintiffs' Proposed Remedy

Under Eleventh Circuit precedent, Plaintiffs must offer a viable remedy to establish the first *Gingles* prerequisite. *Nipper*, 39 F.3d at 1530–31; *see also* *Burton v. City of Belle Glade*, 178 F.3d 1175, 1199 (11th Cir. 1999); *Davis*, 139 F.3d at 1419–20 ("In assessing a plaintiff's proposed remedy, a court must look to the totality of the circumstances, weighing both the state's interest in maintaining its election system and the plaintiff's interest in the adoption of his suggested remedial plan.") (citing *Houston Laws.' Ass'n*, 501 U.S. at 426); *Brooks v. Miller*, 158 F.3d 1230, 1239 (11th Cir. 1998) (same).

Plaintiffs seek to convert PSC elections from statewide, at-large residency districts to single-member districts.¹⁷⁷ Under the map presented by Plaintiffs, proposed District 1 (covering Clayton, DeKalb, Fayette, part of Fulton, Henry, Newton, and Rockdale Counties) would be a majority-Black district, with slightly

¹⁷⁷ *See, e.g.*, ECF 1 (Compl.), ¶ 18; PX-8 (Popick Rpt.), at 19–20; PX-50, at 1 (Pls.' Illustrative Plan).

over 54% of the voting-age population being Black.¹⁷⁸ This proposed District 1 overlaps in large part with existing PSC District 3.¹⁷⁹

Single-member districting is a standard remedy for a Section 2 violation caused by at-large elections. *See, e.g., Gingles*, 478 U.S. at 50; *see also id.* at 50 n.17 (“The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected.”); *Ga. State Conf. of the NAACP v. Fayette Cnty. Bd. of Comm’rs*, 952 F. Supp. 2d 1360, 1366 (N.D. Ga. 2013) (where “the challenged system is at-large voting, just as in *Gingles*[,] the adequate alternative electoral system is simply single-member districting, which is a workable regime and an available remedy”). Courts must impose single-member districts unless they “can articulate such a singular combination of unique factors” that a different result is justified. *Chapman v. Meier*, 420 U.S. 1, 21 (1975) (cleaned up); *accord Wise v. Lipscomb*, 437 U.S. 535, 540–41 (1978); *Connor v. Johnson*, 402 U.S. 690, 692 (1971) (per curiam).

The Secretary has conceded that there is nothing “facially problematic” with the proposed map submitted by Plaintiffs and that “it’s exactly the kind of

¹⁷⁸ PX-50, at 2 (population data for Pls’ Illustrative Plan).

¹⁷⁹ PX-2, at 1 (2012 PSC Map); PX-8 (Popick Rpt.), at 15–18.

evidence that you could put forward to show the feasibility of a remedy” if this case did not involve a “sovereign.”¹⁸⁰ The Secretary also acknowledged at summary judgment that the Section 2 injury alleged by Plaintiffs is “one that has been accepted by courts since the inception” of the VRA; however, he argued that Plaintiffs failed to *prove* the existence of that injury.¹⁸¹ At the summary judgment stage, the Court agreed.¹⁸² But Plaintiffs have now proven their case.

The Court previously declined to enter judgment in favor of Plaintiffs on the Secretary’s Third and Fourth Affirmative Defenses, which respectively assert that Plaintiffs lack constitutional and statutory standing. The Court declined ruling at that time only because of the open question concerning the viability of Plaintiffs’ proposed remedy.¹⁸³ Having now concluded that it is, Defendants’ Third and Fourth Affirmative Defenses are rejected.

The Secretary’s Eighth Affirmative Defense asserts that Plaintiffs’ proposed remedy “will result in a violation of the U.S. Constitution because Plaintiffs’

¹⁸⁰ ECF 35 (MTD H’g Tr.), 40:12–24.

¹⁸¹ ECF 88 (Def.’s SJM Reply), at 2.

¹⁸² ECF 97 (SJM Order), at 9–12.

¹⁸³ *Id.* at 12.

proposed remedies require the alteration of the form of government of the State of Georgia.”¹⁸⁴ The Court disagrees.

The Georgia Constitution currently provides, “[t]he filling of vacancies and manner and time of election of members of the [PSC] shall be as provided by law.” GA. CONST. art. IV, § 1, ¶ I(c). The statewide, at-large method of election is prescribed by statute, not the Georgia Constitution. O.C.G.A. § 46-2-1(a); *Cox v. Barber*, 275 Ga. 415, 415 (2002). Further, and as discussed above, the history of the Georgia constitutional provision concerning the PSC makes clear that the requirement that commissioners be “elected by the people” was intended only to require that they be elected rather than appointed by the governor as originally had been done.¹⁸⁵

This interpretation is also consistent with adjacent provisions of the Georgia Constitution relating to other constitutional boards and commissions. Members of the State Board of Pardons and Paroles shall be “appointed by the Governor.” GA. CONST. art. IV, § II, ¶ I. Members of the State Personnel Board shall also be “appointed by the Governor.” GA. CONST. art. IV, § III, ¶ I(a). Members of the State Transportation Board shall be “elected by a majority vote of the members of the

¹⁸⁴ ECF 37 (Ans.), Eighth Aff. Defense.

¹⁸⁵ *See supra* Section II.A.

House of Representatives and Senate.” GA. CONST. art. IV, § IV, ¶ I(a). By contrast, the Georgia Constitution leaves the “manner” of PSC elections to the General Assembly, which opted for statewide, at-large elections.

Nothing in the Court’s order requires a change to Georgia’s constitution; it does, however, require a change to the manner in which PSC commissioners are elected. The constitutional requirements that the PSC have five members, that they be elected, and that they serve six-year staggered terms will be unaffected by using single-member voting districts as the *manner* for those elections. The Court rejects the Secretary’s Eighth Affirmative Defense.

F. Timing

Georgia has significant interests “in conducting an efficient election [and] maintaining order,” because “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam)).

It is now August, and the PSC elections for Districts 2 and 3 are on the November 8, 2022 ballot.¹⁸⁶ The Court specifically conducted the trial in this action

¹⁸⁶ O.C.G.A. § 46-2-1(d), § 46-2-4; ECF 110-1, at 9 (2022 State Elections & Voter Registration Calendar).

sufficiently in advance of the November election so that Plaintiffs could be afforded relief in the event they prevailed in the Court's ruling on a complete record.¹⁸⁷ Michael Barnes, who runs the State's Center for Election Systems, testified at trial that there would be little disruption to the State's preparation for or conduct of the November 2022 general election if the Court directed that the PSC races be removed from the ballots for that election before August 12, 2022, while the draft ballots were still being prepared by his office.¹⁸⁸ This Order is entered sufficiently in advance of that deadline to minimize the disruption to the electoral process and the Secretary's operations.

During the preliminary injunction hearing, counsel for the Secretary made clear the State's position on what would happen under Georgia law in the event the Court enjoined the PSC races on the November 2022 ballots: The commissioners currently holding the positions for Districts 2 and 3 (Echols and

¹⁸⁷ ECF 112 (PI Order), at 9.

¹⁸⁸ Trial Tr. 441:18-444:9 (Barnes); ECF 108, at 24-25 (PI H'g Tr. 23:11-23, 24:14-25:25).

Johnson) would “holdover” in those positions “until such time as there was an election.”¹⁸⁹ The Court agrees with the Secretary’s analysis under Georgia law.

The concerns raised by *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006), – that courts generally “should not enjoin state election laws in the period close to an election” – are not present here. *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022). In *Purcell*, the preliminary injunction was issued one month before the election and without adequate time to develop a factual record. 549 U.S. at 5–6. The Court’s ruling here is not preliminary. It is a permanent injunction, entered after a full trial, on a complete record, with factual findings and conclusions of law. As a result, the Court finds no impediment to enjoining the Secretary from conducting elections for PSC Districts 2 and 3 in November. This Order issues in sufficient time to present little disruption to the State.

While delaying elections for Districts 2 and 3 until a later date will regrettably cause disruption to the candidates currently running for those offices, the Court does not find that such disruption outweighs the important VRA interests that are implicated, for the reasons discussed in this Order. And there is

¹⁸⁹ ECF 108, at 6 (PI H’g Tr. 5:19–7:5) (relying on *Clark v. Deal*, 298 Ga. 893 (2016); *Kanitra v. City of Greensboro*, 296 Ga. 674 (2015); and *Garcia v. Miller*, 261 Ga. 531 (1991)).

no evidence in the record suggesting that the Court's injunction will cause disruption to voters themselves.

IV. Conclusion

This Order should not be interpreted to find that statewide, at-large elections violate Section 2 of the Voting Rights Act in all circumstances and at any point in time. Rather, the Court has followed its mandate under *Gingles* of conducting an "intensely local appraisal" of the facts to determine what result is compelled under the totality of the circumstances for Georgia today. And that appraisal, in this Court's view, compels only one result.

The Secretary is **ENJOINED** from preparing ballots for the November 8, 2022 election that include contests for PSC Districts 2 and 3; from administering any future elections for vacancies on the PSC using the statewide, at-large method currently prescribed by O.C.G.A. § 46-2-1, *et seq.*; and from certifying the election of any PSC commissioner elected using this method.

The Court is cognizant of the fact that the General Assembly next meets in regular session in January 2023. Consequently, this Order shall remain in effect until a method for conducting such elections that complies with Section 2 is enacted by the General Assembly and approved by the Court, or is otherwise adopted by the Court should the General Assembly fail to enact such a method.

The Clerk is **DIRECTED** to enter **JUDGMENT** in favor of Plaintiffs.

Within 30 days after entry of this Order, Plaintiffs are **DIRECTED** to file a motion in support of their claim under 42 U.S.C. § 1988 and 52 U.S.C. § 10310(e) for attorneys' fees and expenses.

SO ORDERED this 5th day of August, 2022.



Steven D. Grimberg
United States District Court Judge