No. 22A136

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,

Respondent.

REPLY IN SUPPORT OF 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 IMMEDIATE ADMINISTRATIVE STAY

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INTRODUCTION

The Secretary's response is remarkable for what it lacks. There is no attempt to dispute his deliberate and unambiguous *Purcell* waiver in the district court. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006). There is no effort to defend the panel majority's misreading of *Purcell* or its flawed extension of that principle to this case. And there is no assertion that the Secretary has sent even a single ballot proof to a single county in Georgia—meaning that the minimal administrative burden to the Secretary of canceling the November Public Service Commission elections is the exact same now as it was when the court of appeals issued its split decision on August 12. These omissions confirm that the majority's decision to grant a stay solely on *Purcell* grounds is demonstrably wrong.

Unable to justify what the panel majority actually did and acting as if the majority had instead granted a stay based on the *Nken* factors—which the majority did not even cite—the Secretary asks this Court to deny the Voters' application on the ground that he made the "strong showing of likelihood of success on the merits" *Nken* requires. BIO 18; *see Nken v. Holder*, 556 U.S. 418 (2009). But the arguments he advances in support of that showing gained no traction in the court of appeals and fare no better here. That is because those arguments are either waived, foreclosed by binding precedent, or amount to mere disagreements with factual findings by the district court that were not clearly erroneous. Judge Rosenbaum, the only member of the panel who addressed these arguments, explained persuasively why each was

meritless and why the Voters, not the Secretary, were "likely to win on appeal." App. 28a-34a, 43a.

The Secretary also argues that the Voters have not shown irreparably injury because they would be in the "same position" regardless of what this Court does with their application. BIO 13. They would not. Absent relief here, the Voters will have to endure yet another round of Public Service Commission elections using an at-large method that a federal court—after a full trial on the merits—has found unlawfully dilutes their franchise. Granting relief here, by contrast, would prevent that injurious result and ensure that no future Public Service Commission elections are held using an unlawful method. That is all the Voters must show to establish that their rights "*may be* seriously and irreparably injured by the stay." *Id.* at 16 (quoting *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)) (emphasis added). This Court should grant the Voters' application.

ARGUMENT

I. The Secretary's Response Confirms That the Court of Appeals' Decision Is Demonstrably Wrong

A. The Court of Appeals Granted a Stay Based Solely on an Argument the Secretary Admits He Waived

The facts surrounding the Secretary's waiver of any *Purcell* argument are not in dispute. The Secretary promised the district court back in February, "we won't make an appeal based on *Purcell*." Supp. App. 167a. The district court relied on that express disclaimer to adopt a trial schedule the Secretary had proposed. Application 14. And the Secretary never raised in the district court the argument that a decision

by mid-August—a soft deadline he had proposed and the district court met—was too late for him to obtain effective appellate review of the merits. *Id.* at 13-14. The Secretary's *Purcell* waiver is beyond doubt. It also compels this Court to find that the panel majority's decision to grant a stay, based only on a *Purcell* argument the Secretary waived, is demonstrably wrong.

Powerless to deny his waiver, the Secretary spends only two paragraphs of his response on it. He admits that he expressly waived any "argument that cancelling elections for PSC Districts 2 and 3 would cause disruption or voter confusion." BIO 18. To avoid his disclaimer, the Secretary attempts to disguise his too-late-for-appellate-review assertion as a "merits" argument, not a *Purcell* one. *Id.* This is wrong for at least three reasons. First, the Secretary's argument to the court of appeals, citing only *Purcell*, was that the district court had "erred by ruling *too close to an election* to obtain effective appellate review." Sec'y Emergency Mot. to Stay 16 (11th Cir. Aug. 8, 2022) (emphasis added). Anyone reading that would take it as a *Purcell* argument. Second, the panel majority did just that. The majority found that the Secretary's complaint was a "*Purcell*-type" argument, App. 8a, not a merits one, and analyzed it only as such, *see id.* 7a (majority declining to "express[] any views on the merits"). Third, this is a case of waiver upon waiver. The first time the Secretary ever argued that a mid-August ruling would be too late to obtain effective appellate review was in his emergency stay motion to the court of appeals. Application 13. He never raised this argument in the district court, nor does he claim otherwise in his response. So even if his blanket *Purcell* disclaimer did not apply (and it did), the argument is still

waived. The majority's reliance on a doubly waived argument as its sole basis for granting a stay is clearly and demonstrably wrong.

B. The Secretary Barely Defends the Court of Appeals' Misapplication of *Purcell*

The Secretary offers only a tepid, one-paragraph defense of the panel majority's application of *Purcell.* BIO 26. He endorses the majority's application of Justice Kavanaugh's gloss on *Purcell* in *Milligan,* but he doesn't say a word about the majority's invention of an entirely new basis for invoking the *Purcell* principle or its substitution of bright-line rules for the hard work of balancing traditional stay principles. Nor does the Secretary dispute that the majority's application of Justice Kavanaugh's proposed standard would bar relief any time a defendant can articulate a non-frivolous basis for an appeal, even if the plaintiff had obtained permanent relief several months or more before an election.

That is not the result Justice Kavanaugh intended. His concurrence attempts to harmonize *Purcell* with traditional stay principles, while the panel majority's opinion does the opposite. Whereas Justice Kavanaugh's "starting point" was the district court's opinion on the merits, *Merrill v. Milligan*, 142 S. Ct. 879, 882 (2022) (Kavanaugh, J., concurring), the majority barely considered it. The Secretary does not even try to explain why the panel majority's interpretation of Justice Kavanaugh's concurrence is correct, or why five or more members of this Court should agree.

And that is because the panel majority's *Purcell* standard is *not* correct. Rather than embrace traditional stay principles, it repudiates them. The majority's standard turns *Purcell* into an absolute bar. This Court should therefore vacate the stay below

and use this case as a vehicle to clarify the contours of the *Purcell* principle by correcting the majority's demonstrable errors.

This case is a good vehicle to do so because the Secretary conceded below the absence of an administrative burden or voter confusion as long as the election is removed before draft ballots are finalized, and his response in this Court confirms that nothing has changed. BIO 10-11. There is no assertion that he has distributed even a single *draft* ballot to the counties, and weeks still remain before ballots will be finalized in "early September." *Id.* at 10.

C. The Court of Appeals Did Not Find That the Secretary Made a Strong Showing of Likelihood of Success on the Merits

Choosing not to mount any serious defense of the panel majority's *Purcell* analysis, the Secretary instead argues that this Court should deny the Voters' application because he made the required "strong showing" of likely success on the merits in the court of appeals. BIO 18. Not so. Setting aside for a moment the fact that the majority didn't even consider his likelihood of success, the two arguments for reversal that he raises in this Court are highly unlikely to succeed.

1. The District Court's Finding of Racially Polarized Voting Is Not Clearly Erroneous

The Secretary first argues that he is likely to succeed on the merits because the district court did not give enough weight to his expert's testimony that partisanship—not race—best explains why Black-preferred candidates lost every election for the Public Service Commission over the last decade. BIO 19-22. He claims, in other words, that the district court's finding of racially polarized voting in Public Service

Commission elections is clearly erroneous. *See Thornburg v. Gingles,* 478 U.S. 30, 78-79 (1986) (reaffirming that the clearly erroneous standard of review applies to findings of racially polarized voting).

It is not. The district court found the Voters' expert, Dr. Stephen Popick—an experienced statistician who has performed hundreds of similar analyses on thousands of elections—to be "highly persuasive." App. 61a. Dr. Popick analyzed all Public Service Commission elections since 2012 and found that Black and white voters had voted in blocs ranging from roughly 75 percent to 98 percent in each one, with the Black-preferred candidate losing all of them regardless of the race or party of the candidate. He described the results as "one of the clearest examples of racially polarized voting" he had ever seen. *Id.* The district court found Dr. Popick's testimony to be both "credibl[e]" and "compelling[]." *Id.* 83a.

On the other hand, the district court "generally credit[ed]" the testimony of the Secretary's expert, Dr. Michael Barber, but found it "of limited utility in this case" for several reasons. *Id.* 66a. First, the district court found that Dr. Barber "did not examine PSC elections at all and could not speak to the effect of race or partisanship in those contests." *Id.* 65a. Second, the court found that Dr. Barber "did not consider the impact of race on party affiliation"—a "crucial omission"—even though his own prior scholarship had concluded that "race is the strongest predictor" of a person's actual partisan affiliation. *Id.* 66a. Third, the court found that racial polarization in Public Service Commission races is even starker than Dr. Barber's analysis of partisan identification would predict. *Id.* 84a. Fourth, the court found that racial polarization

"increased after 2016 but partisan identification did not." *Id.* And fifth, the court found that voting was racially polarized even in contests that did not feature a Republican-Democrat matchup. *Id.*

The district court ultimately concluded that "Plaintiffs have proven . . . racial polarization in PSC elections" and that the Secretary had failed to show "an alternative explanation for why minority-preferred candidates are less successful." *Id.* 85a. While the Secretary obviously disagrees with the district court's weighing of the evidence, he has made no showing that the court clearly erred in crediting Dr. Popick over Dr. Barber.

Nor has the Secretary shown that the district court applied the wrong legal standards. To determine whether the at-large method of election dilutes Black voting strength "on account of race," the district court faithfully applied this Court's decision in *Gingles*. *Id.* 80a. In doing so, the court followed binding precedent and correctly gave greatest weight in its totality-of-circumstances analysis to the Senate Factors that are most probative of vote dilution in this context. *Id.* 82a (citing *Gingles*, 478 U.S. at 48 n.15; *City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1555 (11th Cir. 1987)). The court noted further that it had already found racially polarized voting at summary judgment and that the parties did not dispute that fact. App. 82a. Indeed, the Secretary had stipulated to it. Dkt. 121-3 ¶ 9. The district court then gave the Secretary every opportunity to rebut the Voters' showing of racial polarization with evidence of non-racial explanations of electoral outcomes. It simply found that the Secretary's evidence was lacking. App. 85a.

The district court's approach is consistent with every circuit that has considered the issue. *See Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213, 230-32 (2d Cir. 2021) (Section 2 claims do not require a separate showing of racial bias but a district court may consider causation evidence in its totality-of-circumstances analysis); *Lewis v. Alamance Cnty.*, 99 F.3d 600, 615 n.12 (4th Cir. 1996) (Luttig, J.) (same); *Milwaukee Branch of the NAACP. v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997) (same); *Uno v. City of Holyoke*, 72 F.3d 973, 980 (1st Cir. 1995); *LULAC v. Clements*, 999 F.2d 831, 850-51 (5th Cir. 1993) (en banc) (same); *cf. Solomon v. Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1226 (11th Cir. 2000) (en banc) (suggesting that a state's evidence of non-racial causes is to be considered, alongside all other relevant factors bearing on the existence or not of vote dilution, at the totality-of-circumstances stage).

The district court did not "fail[] to grapple with the impact of partisanship," as the Secretary contends. BIO 22. The court just made credibility determinations and well-supported factual findings about partisanship that the Secretary doesn't like. That is no basis to grant a stay.

2. The Secretary Is Unlikely to Succeed on His Certification Argument

The Secretary's only other argument on the merits fares no better. He claims that the district court "erred by not certifying an issue of unsettled state law" to the Georgia Supreme Court. BIO 22. The question that he says is unsettled is whether the Georgia Constitution or a Georgia statute prescribes the statewide method of election for the Public Service Commission. His argument that the district court should have certified this question fails for two reasons.

The first is quite simple: he abandoned this argument in the district court. The Secretary first raised the certification argument at summary judgment, but the district court deferred ruling on it until after trial. Supp. App. 21a-24a. He brought it up once more at the preliminary injunction hearing in February. Supp. App. 161a-165a. But the Secretary never brought it up again in any meaningful way. He did not mention certification in the proposed pretrial order. Dkt 121. He made no substantive argument in support of it at trial. And he said not a word about it in his 68-page post-trial proposed findings of fact and conclusions of law. Dkt. 144. The district court did not err in ruling against the Secretary on an argument he abandoned, and appellate courts consider such arguments waived. *See Helton v. AT&T Inc.*, 709 F.3d 343, 360 (4th Cir. 2013) (finding appellant waived argument it did not raise "at trial or in its proposed Findings of Fact and Conclusions of Law").

Second, it also wasn't error because certification lies within the district court's "sound discretion." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 n.7 (2018). The district court here correctly determined that the answer to the proposed question is straightforward because the Georgia Constitution provides that the General Assembly shall determine the "manner" in which members of the Public Service Commission are to be "elected by the people." Ga. Const. art. IV, § 1, ¶ I(c). The General Assembly, in turn, has prescribed by statute that "each member of the commission shall be elected state wide." O.C.G.A. § 46-2-1(a). This is not a close question.

Even if it were, the district court did not abuse its discretion in determining that certification would not have affected the outcome of this case. App. 104a-106a.

After carefully weighing each of the nine Senate Factors, the district court concluded that most of them—including the two most important factors—weighed in the Voters' favor. *Id.* 100a. A different ruling on the Secretary's esoteric legal question would not have changed that result, and he does not explain how it could. "It is common ground that state election-law requirements," including those enshrined in a state constitution, "may be superseded by federal law." *Bartlett v. Strickland*, 556 U.S. 1, 7 (2009) (plurality opinion); *see, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966) (holding that New York's constitutional literacy test violated the Voting Rights Act); *see generally* U.S. Const. art. VI ¶ 2 (Supremacy Clause). The Secretary, thus, is unlikely to succeed on his certification argument.

II. The Secretary Ignores the Risk of Irreparable Harm to the Voters in the Absence of Relief Here

The Secretary dedicates far more of his response to this factor than he does defending the reasons the panel majority gave for its decision. He concedes that the standard is whether the Voters' rights "*may be* seriously and irreparably injured by the stay." BIO 16 (quoting *Coleman*, 424 U.S. at 1304) (emphasis added). But he argues no such injury is even possible because the Voters would be in the "same position" regardless of whether this Court grants or denies their application. *Id.* at 13. If the Voters prevail on appeal, according to the Secretary, there will be district-based elections for Public Service Commission whether or not the stay is lifted. *Id.* at 14-15. The "only difference," he says, "is the status of incumbents after the appeal is heard," *id.* at 14—i.e., whether they are "newly elected Commissioners" or "holdover Commissioners," *id.* at 2.

The fundamental problem with the Secretary's argument is it focuses only on the ends while ignoring the means. It may be true that district-based elections would be the end result if the Voters were to prevail on appeal, regardless of how this Court rules on their application. But that framing ignores what would happen in between. If the Court denies the application, the November Public Service Commission elections will go forward using an at-large method that the district court found unlawfully dilutes the voting strength of Black citizens in Georgia, including the Voters. The injury to the Voters would be lasting because, unless shortened by a federal court, one of those Commissioners would be elected to a new *six-year* term using that unlawful method. *See* O.C.G.A. § 46-2-1(a). If the Court grants the application, however, the district court's permanent injunction will be reinstated, and no more unlawful elections will take place in the meantime. That matters. As this Court's precedents demonstrate, one more election using a practice that violates the Voting Rights Act is one too many. *See, e.g.*, *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (finding "irreparable harm likely would flow" if an election were allowed to "go forward" despite its violating the Voting Rights Act); *see also Clark v. Roemer*, 500 U.S. 646, 655 (1991) (district court erred by not enjoining elections that violated the Voting Rights Act). The Secretary has no answer to these precedents.

He instead faults the Voters because the practical effect of the district court's permanent injunction is "to extend the terms of individuals elected under what [the Voters] claim is an illegal system." BIO 15. But what choice do they have? The Voters cannot control the Secretary's decision to appeal the district court's ruling or how long

that appeal will take. Nor can they control whether it will be the Georgia General Assembly or the district court that will craft a district-based remedy that complies with Section 2 and, if so, how long that will take including any appeals. What the Voters can control, however, is whether to exhaust all possible legal options to prevent *another* unlawful election from taking place while the appeals and remedies are sorted out. They have done just that by seeking emergency relief that only this Court has the power to grant.

The Secretary's remaining arguments, as he admits, are "bound up with the merits of the district court's ruling." BIO 15. Even if the merits were close—and they are not for the reasons explained above—a federal court has ruled after a full trial that Georgia's at-large method of electing Public Service Commissioners injures the Voters, and the only federal appellate judge to consider the merits thus far has found it "likely" that the district court's well-reasoned decision will be affirmed on appeal. App. 43a. Those facts alone mean the Voters' rights "may be seriously and irreparably injured" by the court of appeals' decision to stay the district court's permanent injunction and allow this year's Public Service Commission elections to proceed using the at-large method. *Coleman*, 424 U.S. at 1304. The Voters have met their burden.

III. The Secretary Will Likely Seek Review in This Court on the Merits

The Secretary hardly disputes this factor, arguing instead that the Court should give "very little weight" to it. BIO 17. The Secretary takes that approach because he admits that if the court of appeals were to affirm the district court's decision on the merits, he would "petition for review in this Court." *Id.* That admission is

sufficient to establish that this case "could and very likely would be reviewed here upon final disposition in the court of appeals." *Coleman*, 424 U.S. at 1304.

CONCLUSION

For the foregoing reasons, this Court should vacate the stay entered by the Eleventh Circuit. This Court should also grant an immediate administrative stay while it considers this emergency application.

August 18, 2022

Respectfully Submitted,

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