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.

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

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PARTIES TO THE PROCEEDING

The applicants in this Court are Richard Rose, Brionté McCorkle, Wanda Mosley, and James "Major" Woodall.

The respondent in this Court is Brad Raffensperger, in his official capacity as Secretary of State of the State of Georgia.

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To The Honorable Clarence Thomas, Circuit Justice for the Eleventh Circuit:

Pursuant to Rules 22 and 23 of this Court and the All Writs Act, 28 U.S.C. § 1651, Applicants Richard Rose, Brionté McCorkle, Wanda Mosley, and James "Major" Woodall respectfully apply for an emergency order vacating the order granting a stay pending appeal issued on August 12, 2022, by the United States Court of Appeals for the Eleventh Circuit. App. 4a.[1] They also seek an immediate administrative stay pending the Court's consideration of this application. The court of appeals' order stayed a permanent injunction issued on August 5, 2022, by the United States District Court for the Northern District of Georgia. *Id.* 47a.

INTRODUCTION

Less than ten days ago, the district court issued a sixty-four-page opinion—after more than two years of litigation and a full trial on the merits—holding that Georgia's at-large method of electing Public Service Commissioners dilutes Black voting strength in violation of Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301. Based on repeated assurances from Georgia's Secretary of State that it could do so with minimal disruption to the State at this point, the district court permanently enjoined the Secretary from administering future Commission elections using that unlawful method, and it gave the Georgia General Assembly an opportunity to devise a remedy at its next session, which begins in January 2023.

[1] En banc review of a stay order is unavailable in the Eleventh Circuit. 11th Cir. R. 35-4(a).

Last Friday, a deeply divided Eleventh Circuit motions panel stayed the district court's permanent injunction based solely on the principle established in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), that federal courts ordinarily should not enjoin state election laws close to elections. But the Secretary expressly disclaimed any *Purcell* argument below, telling the district court unambiguously, "we won't make an appeal based on *Purcell*." Dkt. 108 at 125:4-8.[2] The majority's decision to invoke *Purcell* anyway departs from this Court's *Purcell* precedents in novel ways and is inconsistent with traditional stay principles.

To correct the panel majority's demonstrable errors and to prevent Public Service Commission elections from proceeding in November under a system that unlawfully dilutes the votes of millions of Black citizens in Georgia, this Court should vacate the Eleventh Circuit's stay **as soon as practicable and ideally before Friday, August 19, 2022, at 5:00 p.m. EDT**. Based on testimony the Secretary sponsored at trial, a decision by then would still give the Secretary several weeks to implement any order before election ballots are finalized in "early September." Dkt. 141 at 442:5-21, 443:17-25.

In the meantime, this Court should grant a narrow administrative stay as soon as practicable to preserve the status quo while it considers this emergency application. The Secretary says he has now begun the process of finalizing "ballot proofs," or draft ballots, for review by county officials, but—as of last Friday—the Secretary had

[2] "Dkt." refers to docket entries in the district court.

not yet distributed any of those to the counties. Sec'y Response to Admin. Mot. to Stay at 2 (11th Cir. Aug. 12, 2022). The testimony at trial was that, even though canceling the Public Service Commission elections would be feasible through "early September" and possible right up until the day of the elections, it would be better to resolve the status of this November's elections ***before*** ballot proofs are sent to the counties than at some point thereafter. Dkt. 141 at 442:5-21, 443:17-25, 445:6-19. An administrative stay prohibiting the Secretary from sending ballot proofs to the counties for a few days while the Court considers this application would therefore facilitate this Court's review without imposing any undue hardship on the Secretary.

JURISDICTION

This Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a).

STATEMENT

Georgia's Public Service Commission consists of five members elected at large by all Georgia voters in partisan elections to serve staggered six-year terms. Ga. Const. art. IV, § 1, ¶ I; O.C.G.A. § 46-2-1. Among many other duties, the Commission regulates the rates that electric, natural gas, and telephone companies can charge Georgia consumers. O.C.G.A. § 46-2-1 *et seq*.

Applicants are four Black voters (the "Voters") who reside in Georgia, and they brought this suit against the Secretary in July 2020, alleging that the at-large method of election for the Public Service Commission violates Section 2. Respondent is the Georgia Secretary of State, who administers elections for members of the Commission

and is responsible for certifying the results. *See* O.C.G.A. §§ 21-2-50(a)(4), 21-2-154(a), 21-2-132(d)(2), 21-2-499(a), 21-2-502(c).

On January 24, 2022, the district court granted partial summary judgment for the Voters, holding that they had satisfied the three preconditions of (1) geographic compactness, (2) political cohesiveness, and (3) racial bloc voting set forth in *Thornburg v. Gingles*, 478 U.S. 30, 48-51 (1986). Dkt. 97 at 36. The court determined, however, that final resolution of the Voters' Section 2 claim under the totality-of-circumstances test required factual findings to be made after trial. *Id.* at 24, 32.

One week later, the parties submitted a "joint scheduling proposal," which the court adopted, that included a trial on the merits from June 27 to July 1. Dkt. 98 at 1; *see* Dkt. 99. Although the Voters were "available for trial sooner if the Court's schedule permits an earlier date," they agreed to those dates "to accommodate the current trial schedule of Defendant's counsel." Dkt. 98 at 2. Importantly, the parties' joint proposal was "designed to create the opportunity for the next general Public Service Commission election, currently scheduled for November 8, 2022, to be modified from a statewide election to a district-based election if Plaintiffs prevail at trial." *Id.* at 1. "To allow that option," the parties requested "a ruling from the Court on the issues tried no later than August 15, 2022." *Id.*

Seeking to nip in the bud any potential *Purcell* issue, the Voters then moved for a preliminary injunction prohibiting the Secretary from proceeding with the November elections for Public Service Commission Districts 2 and 3 pending a trial on the merits. Dkt. 101, 106. At the February 25 preliminary injunction hearing, counsel

for the Secretary urged the court to deny the Voters' motion because, among other things, there would be enough time after the June trial "to stop that election process and then craft a remedy moving forward" without raising *Purcell* concerns. Dkt. 108 at 118:5-15. That procedure, counsel represented, would be the "best approach here" if the district found in the Voters' favor on the merits. *Id.* The district court responded, "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." *Id.* at 118:20-23. The Secretary's counsel replied, "Certainly." *Id.* at 118:24.

When the discussion returned to *Purcell* later in the hearing, the Secretary's attorney expressly disclaimed any appeal based on that principle:

> I just would want to note for the record . . . that we may appeal based on the merits, **but we won't make an appeal based on *Purcell*** so we can at least get that put down. . . . I wanted to make that clear.

Id. at 125:4-8 (emphasis added). Relying on those assurances, the district court denied the Voters' preliminary injunction motion, noting that it had "scheduled trial sufficiently in advance of the election" so that the Voters would "still have an opportunity to obtain injunctive relief related to the 2022 election cycle." Dkt. 112 at 9.

The case then went to trial from June 27 to July 1. In his opening statement, counsel for the Voters reminded the district court of the Secretary's waiver:

> The parties agreed at the preliminary injunction hearing in February that the U.S. Supreme Court's decision in *Purcell vs. Gonzalez* would pose no barrier to Your Honor's authority to cancel the November Public Service Commission elections if Your Honor were to find in favor of the

> plaintiffs. The discussion of this issue appears on Pages 121 to 125 of the preliminary injunction hearing transcript. Specifically, I want to point the Court to Page 125, Lines 5 to 6 where defense counsel stated "We may appeal based on the merits, but we won't make an appeal based on *Purcell*."

Dkt. 139 at 14:12-20. The Secretary did not argue otherwise, and the word *Purcell* was never uttered again during the five-day bench trial.

Instead, the Secretary assured the district court that a ruling in the Voters' favor by August 12 would pose no *Purcell* problem. He sponsored testimony from Michael Barnes, director of the Secretary's Center for Election Systems, that a decision by that date canceling the November Public Service Commission elections for Districts 2 and 3 would impose little-to-no administrative burden on the Secretary. *See* Dkt. 141 at 453:16-454:1, 454:20-455:15. Mr. Barnes, whose office is responsible for preparing election ballots, also made clear that the August 12 deadline was his office's "preference." *Id.* at 441:18-24. The deadline was not absolute. Mr. Barnes testified that it would be "better" if the November Public Service Commission elections were canceled during the ballot-building phase, which he said would happen from "[m]iddle of August to early September." *Id.* at 442:5-21. If the district court entered an order canceling the November elections in "early September," Mr. Barnes testified, "the work could still be done." *Id.* at 443:17-25.

Even if the ballot proofs had already "been sent to the counties," Mr. Barnes testified that "there is a way to, yes, not count the race[s]" for Public Service Commission. *Id.* at 444:15-445:5. In fact, Mr. Barnes admitted "in honesty" that the district court could wait until the day of the election to rule in the Voters' favor and the votes

for the Public Service Commission could simply not be counted. *Id.* at 445:6-19. Relying on Mr. Barnes's testimony and cognizant of the Secretary's "preference," the district court promised to rule by August 12. Dkt. 142 at 799:21-24. The Secretary reiterated that preference in his proposed findings of fact and conclusions of law filed on July 11. Dkt. 144 ¶ 266.

On August 5, a full week before the Secretary's preferred deadline, the district court issued its sixty-four-page opinion and order concluding that Georgia's at-large method of electing Public Service Commissioners violates Section 2 and permanently enjoining the Secretary from administering future Commission elections using that unlawful method. Dkt. 151 at 1. In its opinion, the district court explained that it had "specifically conducted the trial in this action 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." *Id.* at 60-61. The district court summarized Mr. Barnes's testimony "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." *Id.* at 61. The district court's order, thus, "is entered sufficiently in advance of that deadline to minimize the disruption to the electoral process and the Secretary's operations." *Id.*

Although the Secretary had disclaimed any *Purcell* argument on appeal, the district court addressed any potential "concerns raised by *Purcell*." *Id.* at 62. The district court found that any such concerns were "not present here" because its ruling,

unlike the one in *Purcell*, was "not preliminary"; its ruling, rather, was entered months before the election and "after a full trial" on the merits. *Id.* "As a result," the district court found, there was "no impediment to enjoining the Secretary from conducting elections for PSC Districts 2 and 3 in November" because, according to the Secretary's own witness, there would be "little disruption to the State." *Id.*

Three days later, the Secretary filed a nineteen-page emergency motion in the court of appeals for a stay pending appeal. The Secretary spent one paragraph of that motion on *Purcell*. In that paragraph, he conceded that "the district court correctly analyzed the impact of *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006), on the disruption to the *mechanics* of the election administration process." Sec'y Emergency Mot. to Stay at 16 (11th Cir. Aug. 8, 2022). The Secretary instead argued, for the first time, that the "timing of the ruling effectively prevents the Secretary from obtaining appellate review until after the date for statewide elections has already passed." *Id.* In his reply, the Secretary reiterated that his emergency motion was "not based on timing and the administration of elections, which the Secretary can implement." Sec'y Reply ISO Emergency Mot. to Stay at 8 (11th Cir. Aug. 11, 2022). The Secretary added that he "typically raises *Purcell* issues related to the administration of elections and the attendant difficulties making last minute changes." *Id.* at 8-9. "That is not the case here," the Secretary explained, "where the only administrative issue is cancelling an election, which the Secretary's witness testified is a relatively simple action as long as the timeline is met." *Id.* at 9.

On August 12, a split motions panel of the court of appeals nonetheless concluded that *Purcell* required it to grant a stay. In a six-page per curiam order, the panel majority did not mention the standard governing stays pending appeal that this Court established in *Nken v. Holder*, 556 U.S. 418 (2009). It instead began by noting this Court's recent statement that "lower federal courts should ordinarily not alter the election rules on the eve of an election." App. 5a (quoting *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam)). The majority then found that statement dispositive here for three reasons: (1) the election, about three months away, was sufficiently close in time, (2) postponing the Public Service Commission elections would "fundamentally alter[] the nature" of the upcoming elections, and (3) cancellation of the Commission elections "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." *Id.* 6a-7a. Having reached that conclusion, the majority invited this Court to review its analysis: "if we are mistaken on this point, the Supreme Court can tell us." *Id.* 9a.

The majority also excused the Secretary's waiver of any *Purcell* argument. The majority acknowledged that the Secretary "may have disclaimed any argument that an injunction postponing the elections for Districts 2 and 3 would cause disruption or voter confusion." *Id.* 8a. According to the majority, however, the Secretary "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." *Id.*

In a thirty-seven-page dissent, Judge Rosenbaum analyzed the *Nken* factors to conclude that the Secretary had not met his burden to show that a stay was warranted. *Id.* 28a. She then addressed *Purcell* and gave six reasons why the majority's analysis under that principle was flawed. *Id.* 36a. First, Judge Rosenbaum found that the Secretary expressly and purposely waived this argument. *Id.* 36a-37a. "He couldn't have waived this argument more if he tried." *Id.* 36a. Second, she questioned whether *Purcell* even governs this case because there was no showing of administrative burden or risk of voter confusion. *Id.* 37a-39a. Third and fourth, even if *Purcell* were implicated, it "weigh[s] lightly here" because those factors—administrative burden and voter confusion—are absent, and the election is far enough away. *Id.* 39a-42a. Fifth, the Voters satisfied the standard articulated by Justice Kavanaugh in *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). *Id.* 42a-43a. And sixth, she explained that if *Purcell* prevents relief here—where a plaintiff "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, [and] obtain an order postponing the election with no administrative burden on the state"—then the principle has become an absolute bar. *Id.* 43a-44a.

Later on August 12, the Voters sought an administrative stay to facilitate review of the majority's decision in this Court on an emergency basis. The Secretary opposed that relief but made clear that his office had not yet sent out ballot proofs to

the counties and would not do so until "after August 12." Sec'y Response to Admin. Mot. to Stay at 2.

Still later on August 12, the same divided motions panel denied the Voters' request for an administrative stay. App. 1a. Judge Rosenbaum, noting that the Secretary's preferred date of August 12 was "a reasonable deadline" but not "an absolute one," would have granted a short administrative stay through midnight on August 16. *Id.* 2a-3a.

REASONS FOR GRANTING THE APPLICATION

This Court may vacate an appellate court stay where (1) the case "could and very likely would be reviewed here upon final disposition in the court of appeals," (2) "the rights of the parties . . . may be seriously and irreparably injured by the stay," and (3) "the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). It has exercised this authority in voting rights cases before and should do so again here. *See, e.g.*, *Frank v. Walker*, 574 U.S. 929 (2014) (vacating Seventh Circuit stay of permanent injunction).

I. The Court of Appeals' Decision Is Demonstrably Wrong

A. The Secretary Waived Any *Purcell* Argument

The court of appeals' decision is demonstrably wrong because the Secretary waived any *Purcell* argument in the district court. A bedrock principle of appellate review is that arguments expressly disclaimed below are waived. *See, e.g.*, *Wood v. Milyard*, 566 U.S. 463, 466 (2012) (explaining that a "court is not at liberty, we have

cautioned, to bypass, override, or excuse a [party's] deliberate waiver"); *see also United States v. Campbell*, 26 F.4th 860, 872 (11th Cir. 2022) (en banc) ("[I]f a party affirmatively and intentionally relinquishes an issue, then courts must respect that decision.").

The panel majority ignored this accepted rule here. It found that the Secretary's argument—concerning insufficient time for appellate review of the merits—was a "*Purcell*-type" argument. App. 8a. Assuming the majority is correct, the Secretary expressly and unequivocally disclaimed that argument in the district court. As explained above, the parties and the district court had a lengthy discussion of *Purcell* at the preliminary injunction hearing on February 25, 2022. Counsel for the Secretary assured the district court that the "best approach here" to avoid *Purcell* problems would be to cancel the Public Service Commission elections for Districts 2 and 3 if the Voters prevailed at the June trial on the merits. Dkt. 108 at 118:5-15. The Secretary's attorney then stated, in no uncertain terms:

> I just would want to note for the record . . . that we may appeal based on the merits, **but we won't make an appeal based on *Purcell*** so we can at least get that put down. . . . I wanted to make that clear.

Id. at 125:4-8 (emphasis added). At the June trial, counsel for the Voters reminded everyone in opening statement of the Secretary's *Purcell* waiver. Dkt. 139 at 14:12-20. The Secretary said nothing in response. In fact, over the five days of trial, the

Secretary's attorneys never even uttered the word *Purcell*. As Judge Rosenbaum put it, the Secretary "couldn't have waived this argument more if he tried." App. 36a.[3]

Even aside from the Secretary's *Purcell* disclaimer, his argument is still waived because he never raised it below. The panel majority found that although he "may have disclaimed any argument that an injunction postponing the elections for Districts 2 and 3 would cause disruption or voter confusion," the Secretary "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." App. 8a. Respectfully, the majority's statement is demonstrably wrong. The Secretary ***never*** "maintained" below—not at the preliminary injunction stage, not at trial, not in his proposed findings, not ever—that the district court should issue its bench trial order before mid-August because otherwise he could not obtain effective appellate review of the merits. The first time the Secretary ever raised that argument was in his emergency motion for a stay in the court of appeals. Arguments raised for the first time on appeal are waived. *See, e.g.*, *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 56 n.4 (2002); *see also Feldman v. Am. Dawn, Inc.*, 849 F.3d 1333, 1344 (11th Cir. 2017) ("We will not consider arguments raised for the first time on appeal.").

[3] Citing only the Secretary's post-trial proposed findings of fact and conclusions of law, the panel majority asserted that the Secretary "raised *Purcell* at trial." App. 8a (citing Dkt. 144 at 65). But the Secretary mentioned *Purcell* there only to explain that there would be ***no*** *Purcell* problem if the district court ruled by the Secretary's preferred deadline of August 12.

The majority was obligated to hold the Secretary to his waiver. *See Wood*, 566 U.S. at 466. The unfairness to the district court (and the Voters) by not doing so demonstrates why. The district court built a case schedule and adopted the Secretary's proposed trial dates in reliance on the Secretary's representations that a ruling by mid-August would be sufficient. The district court denied the Voters' preliminary injunction motion because, based on the Secretary's representations, the court understood that it had "scheduled trial sufficiently in advance of the election" so that the Voters would "still have an opportunity to obtain injunctive relief related to the 2022 election cycle." Dkt. 112 at 9. And the district court promised and delivered a ruling on the merits by August 12 in reliance on testimony the Secretary sponsored at trial and reiterated in his proposed findings of fact and conclusions of law. Dkt. 141 at 453:16-454:1, 454:20-455:15; Dkt. 142 at 799:21-24; Dkt. 144 ¶ 266. Had the Secretary ever advised the district court that he needed a ruling far sooner than mid-August to obtain effective appellate review, the district court might have adopted a different case schedule or granted the Voters' motion for a preliminary injunction. Moreover, the Voters, who filed this case more than ***two*** years ago, would have insisted on a different case schedule from the outset to account for the Secretary's alleged concerns. His silence deprived the district court and the Voters of those opportunities. The court of appeals should not have rewarded it.

Because the Secretary waived his *Purcell* argument under accepted standards and because *Purcell* is the only reason why the divided motions panel granted a stay, the court of appeals' decision is demonstrably wrong and must be vacated.

B. The Court of Appeals Misapplied *Purcell*

The Court should also vacate the stay because the panel majority's analysis fundamentally misreads *Purcell* and its progeny. As Justice Kavanaugh recently explained, the *Purcell* principle is "a sensible refinement of ordinary stay principles for the election context." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring); *see also id.* at 883 n.1 (Kagan, J., dissenting). It is based on "a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Id.* at 880-81 (Kavanaugh, J., concurring). As a result, federal courts ordinarily should not enjoin a state's election laws in the period close to an election. *See, e.g.*, *Republican Nat'l Comm.,* 140 S. Ct. at 1207. But the majority's decision to grant a stay based on *Purcell* is demonstrably wrong in at least three ways.

First, the panel majority adopted an entirely new basis for invoking the *Purcell* principle that this Court has never countenanced: when an injunction is issued too close to an election to allow for "meaningful appellate review" of the merits.[4] App. 7a. But that is not what *Purcell* is about. Nowhere does *Purcell* or its progeny mention

[4] The majority's assertion that cancellation of the November elections for Districts 2 and 3 "has to be done by August 12, 2022" misconstrues the record. App. 7a. Director Michael Barnes—the person in charge of finalizing the election ballots—testified that August 12 was his office's "preference." Dkt. 141 at 441:18-24. But Mr. Barnes conceded that this was a soft deadline. 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." *Id.* at 442:5-21. If the district court entered an order in "early September," he testified, "the work could still be done." *Id.* at 443:17-25. In fact, Mr. Barnes agreed, the district court could wait to rule until the day of the election and the votes for Public Service Commission could simply not be counted. *Id.* at 445:6-19.

the availability of pre-election appellate review of the merits as part of the *Purcell* principle. *See, e.g.*, *Republican Nat'l Comm.*, 140 S. Ct. at 1207-08; *Purcell*, 549 U.S. at 4-5. *Purcell* is a refinement of traditional stay principles—not an invitation to invent new ones—and the availability of pre-election appellate review is not a traditional stay principle. *See Nken*, 556 U.S. at 425-26. Appellate review of the merits can add years to litigation. This unprecedented basis for invoking the *Purcell* principle would give defendants a strong incentive to appeal regardless of the merits and to slow-walk those appeals once taken. It would also mean that voting practices could almost never be enjoined before all appeals have run. But that has never been this Court's practice under *Purcell*. *See, e.g.*, *McCrory v. Harris*, 577 U.S. 1129 (2016) (denying a stay of an election-related injunction prior to appellate review in this Court); *Wittman v. Personhuballah*, 577 U.S. 1125 (2016) (same).

Second, the panel majority failed to consider the feasibility of the injunction in question before determining that it came too close to the election. "How close is too close to an election may depend in part on the nature of the election law at issue, and how easily the State could make the change without undue collateral effects. Changes that require complex or disruptive implementation must be ordered earlier than changes that are easy to implement." *Milligan*, 142 S. Ct. at 881 n.1 (Kavanaugh, J., concurring). Simply put: the facts on the ground matter. In *Milligan*, for example, Justice Kavanaugh explained that, with primary elections happening the following month, the district court's 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).

Not so here. Everyone agrees that removing two Public Service Commission elections from the ballot is feasible without significant cost, confusion, or hardship to the State or voters. Dkt. 151 at 61-62. But the majority undertook no analysis of the facts on the ground, opting instead to invoke the *Purcell* principle based on a strict four-month rule derived from circuit precedent. App. 6a (citing *League of Women Voters of Fla. v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022)). The majority also pointed to the "fundamental[]" nature of the change even though it acknowledged that "the mechanics of implementing the injunctive relief" are "relatively straightforward." *Id.* 6a-7a. Those bright-line rules are inconsistent with this Court's *Purcell* precedents. *See, e.g.*, *Frank v. Walker,* 574 U.S. 929 (2014) (vacating the Seventh Circuit's stay of a district court's permanent injunction issued just twenty-six days before an election); *Harris,* 577 U.S. at 1129 (denying a stay of an injunction prohibiting a state from using its enacted district map about six weeks before an election). And the majority's application of those bright-line standards here—to a case where the defendant has conceded the absence of any administrative burden or voter confusion—finds no support in this Court's precedents because it does not serve the interests *Purcell* is meant to address.

Third, the panel majority failed to properly consider the merits component of the *Purcell* principle. This Court showed in *Milligan* that the merits still matter even when a court issues an injunction close to an election. *See Milligan*, 142 S. Ct. at 881

(Kavanaugh, J., concurring) (a plaintiff can overcome the *Purcell* principle when "the underlying merits are entirely clearcut in favor of the plaintiff"); *id. a*t 882 (a district court's opinion is "the starting point" for determining whether to grant a stay); *id*. at 883 (Roberts, C.J., dissenting) ("I would not grant a stay" because "the analysis below seems correct"); *id*. at 884-88 (Kagan, J., dissenting) (analyzing at length the merits of the district court's decision). *Purcell* is not an absolute bar.

The Voters here prevailed after two years of litigation and a full trial on the merits. Unlike *Milligan* and many of the other cases where courts have applied *Purcell,* this case is not at a "preliminary juncture." *Id.* at 881 (Kavanaugh, J., concurring). The district court's well-reasoned, sixty-four-page opinion colors well within the lines of established precedent. Indeed, the application of Section 2 to at-large elections has been settled for decades, and this Court has not heard a case involving the issue for more than thirty years. *See Houston Lawyers' Ass'n v. Attorney General of Tex.*, 501 U.S. 419 (1991). In her dissent below, Judge Rosenbaum carefully reviewed the district court's decision using the *Nken* factors and concluded that the Secretary "does not have a likelihood of success" on appeal. App. 44a. That should have decided the matter.

It didn't, though, because the panel majority applied a different standard. Rather than assessing the Secretary's likelihood of success on appeal, the majority purported to apply Justice Kavanaugh's gloss on *Purcell* in *Milligan*. App. 7a. To obtain a stay pending appeal as the majority interpreted that gloss, a defendant "need only show" that a plaintiff's position is not entirely clearcut. *Id.* But unlike Justice

Kavanaugh's concurrence in *Milligan*, the majority's analysis here did not start with the district court's opinion. In fact, it did not consider the district court's analysis at all. It asked only, in essence, whether the Secretary could articulate a non-frivolous basis for an appeal. And under that novel standard, it is hard to imagine a scenario where a plaintiff could ever overcome *Purcell*.

The court of appeals' decision here effectively converts *Purcell* into an absolute bar. The majority's approach is unmoored from *Nken*'s traditional stay principles and demonstrably at odds with several of this Court's precedents. The Court should therefore vacate the stay and remand the case to the court of appeals for further proceedings.

II. The Voters Would Be Irreparably Harmed Absent Vacatur

This case is about "one of the most fundamental rights of our citizens: the right to vote." *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009). Absent the emergency relief the Voters seek here, this November's Public Service Commission elections for Districts 2 and 3 will proceed using a method that a federal court found—after a full trial on the merits—unlawfully dilutes the voting power of Black citizens in Georgia. That result, though entirely avoidable, would cause the Voters irreparable harm. *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 conceded in the court of appeals that "vote dilution is an injury." Sec'y Emergency Mot. to Stay at 18. But he argued that the Voters would not be irreparably harmed because they "will still be able to vote for Commissioners for Districts 2 and 3." *Id.* at 17. That is no answer, of course, because those votes would still be unlawfully diluted, in violation of Section 2 of the Voting Rights Act. As Judge Rosenbaum explained, the district court's well-reasoned, sixty-four-page decision finding unlawful vote dilution under Section 2 is "likely" to be affirmed on appeal. App. 43a. The panel majority, which based its ruling exclusively on *Purcell*, made no finding to the contrary. This factor weighs strongly in favor of vacating the stay.

III. There Is a Reasonable Prospect This Court Would Review the Merits

The panel majority found that this case on the merits presents a legal question of "first impression"—to wit, "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." App. 7a (cleaned up). The Voters' position is that this case involves a straightforward application of Section 2 to an at-large method of election. The Department of Justice agrees. Dkt. 86 at 4 (statement of interest). So did the district court. *See* Dkt. 151 at 55-56.

Whether or not it presents a "novel" question, App. 7a, this case is certainly important. Sup. Ct. R. 10. Georgia is home to millions of Black citizens whose voting power has been unlawfully diluted by the at-large method of electing Public Service Commissioners. That will continue for yet another election cycle unless this Court intervenes now to stop it.

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.

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Respectfully Submitted,

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