No. S21Q0068

In the

Supreme Court of Georgia

Brian Kemp, in his official capacity as Governor of the State of Georgia and Brad Raffensperger, in his official capacity as Secretary of State of Georgia,

Defendants/Appellants,

v.

Deborah Gonzalez, *et al.*,

Plaintiffs/Appellees.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.
No. 1:20-CV-2118-MHC — Cohen, *Judge*

SUPPLEMENTAL BRIEF OF APPELLANTS

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ARGUMENT

The Eleventh Circuit certified to this Court the following question:

> Does O.C.G.A. § 45-5-3.2 conflict with Georgia Constitution Article VI, Section VIII, Paragraph I(a) (or any other provision) of the Georgia Constitution?

As explained in detail in Governor Kemp and Secretary Raffensperger's principal Eleventh Circuit brief, the answer to the Eleventh Circuit's question is an unqualified "no." All agree that the General Assembly is authorized to set the initial term for officials appointed to fill a vacancy as long as the Constitution itself does not set or require a different initial term for appointees to the office in question. *See* Art. V, Sec. II, Para. VIII. And here, the relevant constitutional provision does not set or otherwise require a different initial term for appointees to vacancies in the office of district attorney. *See* Article VI, Section VIII, Paragraph I(a). Instead, that provision sets the *timing* for elections of district attorneys—incumbents must be elected "at the general election held immediately preceding the expiration of their respective terms"—and it sets the *term* to which they are elected—they "shall be elected circuit-wide for a term of four years." *Id.* Section 45-5-3.2(a) is in harmony with these requirements: under that statute, the "successor" of an appointee district attorney (all agree the appointee is an "incumbent" once appointed) will *still* be elected at the general election held immediately preceding the expiration of the appointee's term, and the successor will still be elected to a term of four

years. *See* Vol. 2 R-202-211. So, as a textual matter, there is no apparent conflict between § 45-5-3.2 and the Georgia Constitution.

This supplemental brief makes three additional points that confirm § 45-5-3.2 is consistent with the Constitution and respond to arguments the plaintiffs raised in response before the Eleventh Circuit. *First*, the drafting history of the 1983 Constitution shows that the drafters understood that document to leave the question of initial terms for district attorneys to the legislature's discretion: they agreed that the Constitution itself did not address that issue beyond Paragraph VIII's default rule, which the legislature could modify by statute. *Second*, this Court's recent decision in *Barrow v. Raffensperger* establishes that a provision that requires officials to be elected for specified terms (like Paragraph I(a) requires for district attorneys) does *not* conflict with a "six month provision" that sets shorter initial terms for appointed officials (like O.C.G.A. § 45-5-3.2), as the plaintiffs in this suit contend. And *third*, the plaintiffs' reliance on *Morris v. Glover* is misplaced.

A. The drafting history of the relevant constitutional provisions confirms that O.C.G.A. § 45-5-3.2 permissibly sets the initial term of service for appointed district attorneys.

The people are the true "makers" of the Georgia Constitution, but "considering what the framers of our Constitution understood the words they selected to mean can be a useful data point in determining what the words meant to the public at large." *Olevik v. State*, 302 Ga. 228 (2017) (citing *Gwinnett County School Dist. v. Cox*, 289 Ga. 265,

307 (2011) (Nahmias, J., dissenting) ("In construing our Constitution, we …sometimes look to the understanding expressed by people directly involved in drafting the document…."); *see also Grech v. Clayton County,* 335 F.3d 1326 (11th Cir. 2003) (relying on minutes of meetings of the Select Committee on Constitutional Revision to determine whether the drafters intended to include sheriffs among county officers named in a new paragraph of Article IX).

Transcripts of meetings of the Select Committee on Constitutional Revision confirm that O.C.G.A. § 45-5-3.2 permissibly sets the initial term of service for appointed district attorneys.[1] The committee that drafted what is now the Article V of the 1983 Georgia Constitution (The Committee to Revise Articles IV and V) discussed what term of office should apply to district attorneys appointed to fill a vacancy. After debating the pros and cons of both the "serve out the term" approach (which they feared would be too long for vacancies that occurred early in a district attorney's term) and requiring district attorneys to run for office at the next general election following appointment (which they feared would deter qualified candidates from accepting an appointment

[1] A complete repository of the meeting minutes the Select Committee on Constitutional Revision is available here: https://dlg.usg.edu/records?f%5Bcreator_facet%5D%5B%5D=Georgia.+Select+Committee+on+Constitutional+Revision&only_path=true&q=select+committee+constitutional+revision+transcript+of+meetings&search_field=both

if a general election was approaching),[2] the committee decided not to include a constitutional provision setting the term for appointed district attorneys at all. Their discussion shows that they understood that this approach would mean that the default "serve out the term" rule of Article V, Section II, Paragraph VIII—they called this the "catchall" provision—would apply, but that the legislature would have the discretion to provide a different initial term by statute:

> CHAIRMAN SMITH: Okay. What are your wishes? The question is do we provide for the appointment of district attorneys under the catchall, or do we have a special provision for some other form of earlier election before the expiration of the unexpired term?
> SENATOR GILLIS: Mr. Chairman, I think you're going to find the General Assembly won't appoint it until the next election.
> CHAIRMAN SMITH: Until the next general election?
> SENATOR GILLIS: Yes.
> CHAIRMAN SMITH: Well, we could put it in here or let them put it in there.
> SENATOR GILLIS: You can recommend anything you want to.
> MS. NONIDEZ: Under your Paragraph VIII the General Assembly could provide by law, by statute for that.
> CHAIRMAN SMITH: *That's true.*
> MS. NONIDEZ: So you're okay, you could introduce a –

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[2] *See* Select Committee on Constitutional Revision, Transcripts of Meetings, Committee to Revise Articles IV & V, Vol. II at p. 702-705 (discussing competing concerns over long appointment terms that could occur under a serve out of the term approach and difficulties filling short appointment terms if the appointee were to stand for re-election at the next general election following the appointment). This volume may be accessed at http://dlg.galileo.usg.edu/ggpd/docs/1981/ga/c675_pc6/m1/1981/t7/v_p6.con/1.pdf

> CHAIRMAN SMITH: *You could do it by statute instead of having to put it in the constitution anyway, and that's probably the best course.* That's in keeping with what we have been doing. *In other words, the Governor would do it that way unless the General Assembly provided simply by an Act*; that's probably the best way.

Transcript of Meeting of the Select Committee on the Revision of Articles IV and V, Nov. 28, 1979, p. 156-57 (emphases added).[3] In short, it was the drafters' understanding that Paragraph VIII would apply to set a default rule for the initial term of appointed district attorneys, and that the General Assembly could pass a law that replaced Paragraph VIII's "serve out the term" rule with a different one.

The drafters of the 1983 Constitution also rejected the objection, repeated by Appellees here, that by making the appointee district attorney's term begin on the date of appointment (as opposed to the date a vacancy is created), the Governor could in some circumstances postpone an appointment so the appointee could avoid running in an upcoming election. The committee discussed this possibility and viewed that flexibility as a positive. Indeed, it was their view that when a vacancy occurred close enough to an upcoming general election that it

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[3] *See also Id.* at 133–34 ("CHAIRMAN SMITH: So something needs to be done with the district attorney on this question, and the question is do we reinsert in the provision on a district attorney's appointment until the next general election, or do we follow the program here where the incoming Governor could appoint for the whole term…. MR. GOWEN: *Couldn't you leave the district attorneys to the legislature to provide how vacancies would be filled?* CHAIRMAN SMITH: *You could put our catchall in there. Okay.*")

might deter someone from accepting the appointment (because they would have to run for election too soon), the governor could—and should—simply wait to make the appointment "until the general election goes by the board or until all qualifying has gone by, then they make the appointment and then they get a two-year shot at it because a really good man will not take it for a few months." *Id.* at 155–56.

Finally, in drafting the default appointment rules of Paragraph VIII, the drafters considered and rejected proposals to require that a governor be given a 60- or 90-day deadline to fill a vacancy, deciding instead to use the term "promptly": recognizing again that if the General Assembly wished to place such a time limit on a governor's power of appointment, it would be free to do so. *Id.* at 141-42.

All of these discussions confirm what the constitutional text already indicates: the "catchall" provision of Article V, Section II, Paragraph VIII sets the default rule for the appointment and initial term of district attorneys appointed to fill vacancies, but the General Assembly retained the authority to pass a law like it did with O.C.G.A. § 45-5-3.2 that sets a different initial term for appointees.

B. Upholding § 45-5-3.2 is consistent with this Court's recent decision in *Barrow v. Raffensperger*.

Appellees have argued that *Barrow v. Raffensperger*, 842 S.E.2d 884 (2020), suggests that a "six-month provision" may only be applied to district attorneys by a constitutional provision. They extrapolate that position from two points made in *Barrow*: First, that Article VI, Section

VII, Paragraph IV's "six month provision" was a "significant change from prior constitutions," and second, that the terms of "most other public officials" would be determined by the "serve out the existing-term" approach. Vol. 1 R-41. But their conclusion that the Constitution thus requires a "serve out the term" approach for district attorneys does not follow.

That Article VI, Paragraph VII, Section IV was a change from prior constitutions is not remarkable. Many such departures were made in drafting the 1983 Constitution, including Article V, Section II, Paragraph VIII's default rule for the initial terms of appointees to fill vacancies in public offices. Nor does the absence of a similar "six month provision" in the provisions of the Georgia Constitution related to district attorneys suggest anything other than the drafters of the 1983 Constitution chose not to constitutionally specify an initial term for appointed district attorneys.

Further, the *Barrow* Court's comment that the "serve-out-the-existing-term way of determining the initial term of appointed officials remains applicable to most other appointed public officials in Georgia" (*Id.*) (emphasis added) is true. But it is true not because the Constitution requires it, but rather because most other constitutional provisions related to vacant offices that are filled by gubernatorial appointment also do not specify initial terms for appointees, so the default rule of Article V, Section II, Paragraph VIII applies. Nothing in

Barrow suggests that *only* a constitutional provision could apply as six-month provision to appointed district attorneys.

Instead, the main point from *Barrow* that applies to this case is this: there is no conflict between a six-month provision setting the initial term of an appointee and a constitutional provision that says an official shall be *elected* for a term of specified length. The Georgia Constitution describes the term of office for *elected* Supreme Court justices and Court of Appeals judges in much the same way as it does for *elected* district attorneys: "All Justices of the Supreme Court and Judges of the Court of Appeals shall be elected on a nonpartisan basis for a term of six years." Ga. Const. Art. VI, Section VII, Paragraph I(a). *Barrow* rejected the argument, similar to the one made by Appellees here, that the "six month provision" found in Article VI, Section VII, Paragraph IV would conflict with Paragraph I's provision for elected terms of six years if the application of the six-month provision resulted in a change in the elections schedule. Even though the "six month provision" might postpone (or, in many cases, accelerate) the date of the election to a date different from when the election would have been held absent a vacancy, the two provisions worked in tandem. *See Barrow*, 842 S.E.2d at 894. In short, *Barrow* thus supports the conclusion that § 45-5-3.2 does not conflict with the similar election-term provision of Article VI, Section VIII, Paragraph I.

C. The plaintiffs' reliance on *Morris v. Glover* is misplaced.

Appellees have argued that this Court's decision in *Morris v. Glover*, 121 Ga. 751 (1905) means that only a constitutional provision can set the term of office for an appointed district attorney. *See* Vol. 1 R-51. They are wrong. *Morris* did not announce a blanket prohibition against defining an appointed district attorney's term by statute. Instead, it simply applied the long-standing rule that if the Constitution specifies one thing, the Legislature cannot by statute specify another. *Morris* held that the Legislature cannot abolish the office of district attorney; nor, by extension, may it otherwise modify "those rights and those things concerning which the Constitution itself has made provision." *Jones v. Fortson*, 223 Ga. 7, 14–15 (1967). In other words, *Morris* and *Jones* reiterate the basic limitation placed on legislative power by Article III, Section VI, Paragraph I of the Georgia Constitution: "The General Assembly shall have the power to make all laws not inconsistent with this Constitution, and repugnant to the Constitution of the United States, which it shall deem necessary and proper for the welfare of the state."

So, had the Constitution itself specified that that appointed district attorneys were to serve out the predecessor's unexpired term, or that they should serve until the next general election following their appointment, or that a six month provision like the one found in Article VI, Section VII, Paragraph IV should apply, then the General Assembly could not provide a different initial term for appointed district

attorneys by statute. But the Constitution did not set an initial term for appointed district attorneys. Instead, the Constitution provided a default rule (the "catchall" provision) and left it to the legislature to set a different initial term if it desired. Nothing in the Constitution nor any precedent of this Court supports the notion that the legislature nonetheless lacked the power to exercise its discretion to do so, as it did in O.C.G.A. § 45-5-3.2.

CONCLUSION

For the reasons set out above, this Court should answer "no" to the certified question.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2020, I have served a copy of this motion by emailing a copy to be delivered electronically, addressed as follows:

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