No. 23-1060

IN THE

Supreme Court of the United States

RICHARD ROSE, ET AL.,

Petitioners,

—v.—

BRAD RAFFENSPERGER, GEORGIA SECRETARY OF STATE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* SIERRA CLUB IN SUPPORT OF PETITIONER

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UNOPPOSED MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 21.2(b), the Sierra Club respectfully requests leave to submit a brief as amicus curiae in support of the petition for writ of certiorari filed by Richard Rose et al. in this case.

Rule 37.2(a) requires that amici notify all parties' counsel of their intent to file an amicus brief in support of a petition for certiorari at least ten days before the due date, and further that the due date is 30 days after the case is placed on the docket or a response is called for, whichever is later. The case was docketed on March 27, 2024, and the Court set a due date for a response of April 26, 2024. On April 12 the Court extended the time for the filing of a response to May 28, 2024.

Due to counsel's oversight, amicus notified the parties of its intent to file this brief on April 18, 2024, eight days before the April 26 deadline for amicus briefs in support of the petition. On April 19, amicus counsel asked all parties whether they would oppose a motion for leave to file this amicus brief, and all responded that they did not oppose the motion.

The Sierra Club has a unique voice to offer the Court on this petition because it is a regular participant before public utility commissions across the country, including the Georgia Public Service Commission, in electric utility proceedings. The Sierra Club regularly interfaces with the Georgia Public Service Commission, and its proposed amicus

brief reflects its understanding of the legislative nature of the Commission.

Accordingly, amicus respectfully asks the Court to grant it leave to file this amicus brief.

April 26, 2024

Respectfully submitted,

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. The Georgia PSC is Analogous to a Legislative Body 5

A. The Georgia PSC's Primary Function Is Policymaking 7

B. The Georgia PSC Operates as a Collegial Body 10

C. The Georgia PSC Is Designed to Be Elected and Accountable to Voters 11

II. The Georgia PSC Will Function Effectively with Districted Elections 17

III. Inadequate Representation at the PSC leads to Devastating Consequences for Georgia's Black Residents 21

CONCLUSION 24

TABLE OF AUTHORITIES

PAGE(S)

Cases

Allen v. Milligan,
599 U.S. 1 (2023) 3

Bradford Cnty. NAACP v. City of Starke,
712 F. Supp. 1523 (M.D. Fla. 1989) 17

Carr v. S. Co.,
438 S.E.2d 357 (Ga. 1994) 15

Chisom v. Roemer,
501 U.S. 380 (1991) 3, 12, 16

Cox v. Barber,
568 S.E.2d. 478 (2002) 13, 20

Davis v. Chiles,
139 F.3d 1414 (11th Cir. 1998) 3, 10

Dekalb Cnty. Sch. Dist. v. Ga. State Bd. of Educ.,
751 S.E.2d 827 (Ga. 2013) 16

Ga. Power Co. v. Allied Chem. Corp.,
212 S.E.2d 628 (Ga. 1975) 12, 15, 16

Ga. Power Co. v. Campaign for a Prosperous Ga.,
336 S.E.2d 790 (Ga. 1985) 14

Ga. Pub. Serv. Comm'n. v. S. Bell,
327 S.E.2d 726 (Ga. 1985) 8

Greyhound Lines, Inc. v. Ga. Pub. Svc. Comm'n.,
222 S.E. 347 (Ga. 1976) 8

Hill v. BellSouth Telecomms., Inc.,
364 F.3d 1308 (11th Cir. 2004) 15

Houston Lawyers' Ass'n v. Attorney General of Texas,
501 U.S. 419 (1991) 3

Lasseter v. Ga. Pub. Serv. Comm'n,
319 S.E.2d 824 (Ga. 1984) 15

Meek v. Metro. Dade Cnty.,
805 F. Supp. 967 (S.D. Fla. 1992) 17

Mutual Light & Water Co. v. City of Brunswick,
124 S.E. 178 (Ga. 1924) 8

Nipper v. Smith,
39 F.3d 1494 (11th Cir. 1994) 2, 10, 11

Prentis v. Atl. Coast Line Co.,
211 U.S. 210 (1908) 8

Republican Party of Minn. v. White,
536 U.S. 765 (2002) 16

Rose v. Raffensperger,
619 F. Supp. 3d 1241 (N.D. Ga. 2022), *rev'd sub nom. Rose v. Sec'y*, 87 F.4th 469 (11th Cir. 2023) 2, 9, 13, 17, 20, 21

Rose v. Sec'y,
87 F.4th 469 (11th Cir. 2023) 2, 9

S. Christian Leadership Conf. of Ala. v. Sessions,
56 F.3d 1281 (11th Cir. 1995) 3, 10

San Diego Land & Town Co. v. Jasper,
189 U.S. 439 (1903) 8

Se. Greyhound Lines v. Ga. Pub. Serv. Comm.,
181 S.E. 834 (Ga. 1935) 8

State Farm Fire & Casualty Co. v. S. Bell Tel. & Tel. Co.,
258 S.E.2d 198 (Ga. Ct. App. 1979), *rev'd on other grounds*, 262 S.E.2d 895 (Ga. 1980) 15

Taffet v. S. Co.,
967 F.2d 1483 (11th Cir. 1992), *cert. denied*, 506 U.S. 1021 (1992) 15

Tamiami Trail Tours, Inc. v. Ga. Pub. Serv. Comm'n,
99 S.E.2d 225 (Ga. 1957).................. 6, 7, 8

Wright v. Sumter Cnty. Bd. of Elections,
301 F. Supp. 3d 1297 (M.D. Ga. 2018), *aff'd*, 979 F.3d 1282 (11th Cir. 2020) 17

Statutes

GA. CODE ANN. § 46-2-1(a) 12

GA. CODE ANN. § 46-2-1(b) 12

GA. CODE ANN. § 46-2-20.......................... 6

GA. CODE ANN. § 46-2-23.......................... 6

GA. CODE ANN. § 46-2-23(a) 6, 7

GA. CODE ANN. § 46-2-59(b) 14

GA. CODE ANN. § 46-2-59(e)(2)................... 14

GA. CODE ANN. § 46-2-59(g) 14

GA. CODE ANN. § 50-13-19....................... 14

GA. CODE ANN. § 50-13-20....................... 14

Voting Rights Act Section 2 .... 2, 3, 4, 10, 16, 17

Constitutional Provisions

Ga. Const. art. IV, § 1 5

Ga. Const. art. IV, § I, ¶ I 12

Ga. Const. art. VI, § VII, ¶ I. 12

Regulations

Ga. Comp. R. & Regs. 515. 9

Ga. Comp. R. & Regs. 515-2-1-.07 10

Ga. Comp. R. & Regs. 515-1-1-.09 5

Ga. Comp. R. & Regs. 515-2-1-.10 10

Rules

Ga. Code of Judicial Conduct Rule 4.1 12

Other Authorities

Marilyn A. Brown et al., *Energy Burdens of Black Households in Georgia* 3 (2024) 21, 22

Groundswell, *A Call to Action: Analyzing Rural Energy Burdens in Georgia* 3 (Mar. 2022) 22

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Monica Hlinka, Regulatory *Focus Special Report, U.S. Utility Commissions* (Dec. 13, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/blog/us-utility-commissioners-who-they-are-and-how-they-impact-regulation-december-2021 13

Power Plants and Neighboring Communities, U.S. EPA, https://www.epa.gov/power-sector/power-plants-and-neighboring-communities; 20

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Abel Russ & Lisa Evans, *Georgia at a Crossroads* 24 (2018) 20

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae the Sierra Club is a national nonprofit organization dedicated to practicing and promoting the responsible use of the Earth's ecosystems and resources. The Sierra Club consists of 64 chapters across the country with over 3 million members and supporters, including over 10,000 in Georgia. One important area of focus for the Sierra Club is addressing the critical problems of climate change, air pollution, and our nation's dependence on fossil fuels. To that end, the Sierra Club is a regular participant before public utility commissions across the country, including the Georgia Public Service Commission ("PSC" or "Commission"), in electric utility proceedings. In Georgia, the Sierra Club regularly interfaces with the Commission by presenting testimony on behalf of the Club and its members, and organizing events and letter-writing campaigns on behalf of supporters and members in utility rate making, fuel cost, and resource planning proceedings. The Sierra Club's interest in this case stems from its active involvement before the Commission on issues involving the disproportionate costs and environmental burdens borne by low-income communities and communities of color in Georgia.

The Sierra Club respectfully requests that the Court grant Petitioners' petition for certiorari and summarily reverse the Eleventh Circuit's decision.

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[1] No parties or their counsel had any role in authoring or made any monetary contribution to fund the preparation or submission of this brief. No party opposes the filing of this brief.

SUMMARY OF THE ARGUMENT

The PSC is an elected, five-member administrative agency that regulates utilities for the state of Georgia. Georgia's General Assembly has charged the PSC with ensuring reliable and affordable utility services and the safety of energy infrastructure. Its decisions acutely affect every Georgia resident, literally keeping the lights on. By its own admission, there are few other government agencies that have a greater impact on the daily lives of Georgians.

In 2020, Petitioners brought suit against Georgia's Secretary of State under Section 2 of the Voting Rights Act, arguing that the at-large method of electing PSC commissioners dilutes the vote of Black Georgians giving them less opportunity to participate in the political process and elect representatives of their choice. After a five-day bench trial, the district court held that the state's at-large method of electing PSC commissioners violated Section 2 and enjoined the Secretary from administering any future PSC elections using the state-wide, at-large method. *See Rose v. Raffensperger*, 619 F. Supp. 3d 1241, 1272 (N.D. Ga. 2022), *rev'd sub nom*. *Rose v. Sec'y*, 87 F.4th 469 (11th Cir. 2023). On appeal, the Eleventh Circuit reversed, holding that Plaintiffs had not satisfied the first *Gingles* precondition because their single-member district demonstration plan "impermissibly altered Georgia's chosen form of government," violating the principles of federalism and the circuit's precedents. *Rose v. Sec'y*, 87 F.4th 469, 472 (11th Cir. 2023). Because some aspects of the PSC appear quasi-judicial, the court extended its textually unmoored rule insulating elected trial judges from Section 2 liability to the PSC, a multi-member policymaking body. *See Nipper v. Smith,* 39 F.3d 1494

(11th Cir. 1994) (en banc); *S. Christian Leadership Conf. of Ala. v. Sessions*, 56 F.3d 1281 (11th Cir. 1995) (en banc); *Davis v. Chiles*, 139 F.3d 1414 (11th Cir. 1998).

On its face, the Eleventh Circuit's idiosyncratic doctrine immunizing judicial and (now) quasi-judicial bodies contravenes this Court's precedents in *Chisom v. Roemer*, 501 U.S. 380 (1991), and *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991), and disregards the Court's recent affirmance of the *Gingles* preconditions in *Allen v. Milligan*, 599 U.S. 1 (2023). *See also Davis*, 139 F.3d at 1424 ("We recognize that this doctrinal development appears to conflict with the Supreme Court's initial pronouncements on this subject in *Chisom* and *Houston Lawyers*'."). Beyond these flaws, the Eleventh Circuit's dubious case law does not actually apply here. This case is not novel. And the court's reasoning for extending its precedent concerning elected trial judges to the PSC is misplaced.

Petitioners and other Amici demonstrate why, as a legal matter, the Eleventh Circuit's decision contravenes Section 2. This brief does not repeat those arguments, but rather seeks to illuminate the nature of the PSC to dispel the notion that the PSC is merely a quasi-judicial body that falls neatly within the Eleventh Circuit's jurisprudence. Amicus also submits this brief to highlight the policy consequences of diluting the votes of Black residents. The PSC's decisions profoundly impact who reaps the benefits and who bears the burdens of the state's energy policy, and the evidence shows that Georgia's Black residents disproportionately incur these costs.

This brief first explains how the PSC is functionally equivalent to a legislative body. The PSC

is a policymaking agency that exercises extensive quasi-legislative power. While the PSC utilizes adversarial *procedures* in its proceedings, those proceedings are an exercise of the PSC's quasi-legislative *powers*. As a collegial body, the PSC functions like a legislative body, and does not raise the concerns that animate the Eleventh Circuit's jurisprudence on elected trial judges. Moreover, the PSC is democratically elected through partisan contests, and thus, like a legislature, is designed to be directly accountable to the people. Given its legislature-like qualities, the panel's reliance on the PSC's "distinctly judicial" nature is misplaced, and the court's attempt to shoehorn an elected policymaking body into this narrow exception is unwarranted.

The brief then demonstrates that the PSC would function efficiently, perhaps even more effectively, if the legislature were to remedy the Section 2 violation with single-member districts. Commissioner Pridemore's concerns about avoiding favoritism and maintaining safety are wholly unsubstantiated. Additionally, Commissioner Pridemore's concerns about in-fighting are misguided. Current residency requirements indicate an existing commitment to localism, and districted elections will enable advocacy on behalf of, and responsiveness to, all of Georgia's communities.

Finally, this brief contextualizes the detrimental consequences of inadequate representation for Georgia's minority residents, underscoring the importance of representation on the PSC. The PSC is tasked with setting affordable rates, but Georgia's Black residents spend a much higher share of their household income on utilities than white residents. This forces Black Georgians, struggling to make ends

meet, to confront the difficult choice between heat and electricity and paying for other necessities. The PSC ignores the issues that are important to Georgia's Black residents, and unable to elect their representatives of choice, Black Georgians have no recourse. Therefore, the Sierra Club respectfully urges this Court to summarily reverse the Eleventh Circuit's decision or set the matter for full merits consideration.

ARGUMENT

I. The Georgia PSC is Analogous to a Legislative Body.

The PSC is a five-member commission, tasked with regulating utilities across the state of Georgia. Established in 1879 as the Georgia Railroad Commission, the agency was renamed the Public Service Commission in 1922, in recognition of the PSC's expanded authority, conferred by Georgia's General Assembly, over utility providers. In 1943, the General Assembly enshrined the PSC in Georgia's Constitution as the entity responsible for the "regulation of utilities" and mandated that it "shall consist of five members who shall be elected by the people." Ga. Const. art. IV, § 1.

Currently, the PSC has jurisdiction over several utilities including telephone, electric power, and gas utility companies. As the agency responsible for the reliability, affordability, and safety of these services, the PSC possesses substantial regulatory power. Ga. Comp. R. & Regs. 515-1-1-.09. To fulfill its mission, the PSC supervises common carriers and utilities under its jurisdiction, promulgates rules and regulations, hears consumer complaints, inspects and regulates utility sites, conducts hearings and

investigations, and exercises the exclusive power to determine rates and charges. GA. CODE ANN. §§ 46-2-20; 46-2-23.

As an administrative agency, the PSC exercises both quasi-legislative and quasi-judicial functions. *See Tamiami Trail Tours, Inc. v. Ga. Pub. Serv. Comm'n*, 99 S.E.2d 225, 232-33 (Ga. 1957). At first blush, and as the Eleventh Circuit presumed, the PSC appears to exercise certain quasi-judicial functions, including holding hearings, listening to witnesses, making evidentiary determinations, and issuing orders. However, this superficial understanding of the PSC conceals its true nature. A closer evaluation reveals that the PSC primarily exercises quasi-legislative powers delegated to it by the General Assembly.

The Commission is substantially similar to a legislative body in three important ways. First, the PSC exercises quasi-legislative power in promulgating policies, including the rules and regulations that ensure safe, reliable, and affordable utility service. This legislative function also extends to its important and exclusive power to set utility rates. GA. CODE ANN. § 46-2-23(a). Moreover, many of its seemingly judicial functions are merely the procedures of inherently legislative proceedings. Second, the PSC operates as a collegial body, much like a legislature, where decision-making is a collective enterprise. Third, by Georgia's design, the PSC is meant to be democratically accountable for the policy decisions it makes. Given this backdrop, the PSC is qualitatively different from a judicial body. The Eleventh Circuit's extension of its flawed precedent regarding at-large trial judge elections to the PSC commissioners is thus inapposite.

A. The Georgia PSC's Primary Function Is Policymaking.

While the Commission "does not possess legislative powers" per se, the PSC "performs quasi-legislative functions by virtue of the express powers conferred upon it by the General Assembly." *Tamiami*, 99 S.E.2d at 232. These powers comprise the bulk of the PSC's work including ratemaking, the issuance of certificates of public convenience and necessity, the development and approval of Integrated Resource Plans, and the promulgation of rules and regulations to ensure the safety, reliability, and affordability of utility services. Each of these functions is policymaking at its core.

One of the PSC's most consequential functions is setting the rates that utility companies can charge for their services. Under Georgia law, the Commission "shall have the exclusive power to determine what are just and reasonable rates and charges to be made by any person, firm, or corporation subject to its jurisdiction." GA. CODE ANN. § 46-2-23(a). A ratemaking "case" proceeds in the following manner. Typically, a utility files a petition with the Commission to request a rate increase. On receipt of the petition, the PSC appoints staff to investigate the petition and advocate on behalf of Georgians. Formal hearings are conducted before the Commission that include examination of witnesses and presentation of testimony by intervening parties, including Amicus. Once the hearings are completed, the Commission takes the rate case under advisement and determines what, if any, increases are warranted.

Despite this superficially adversarial process, ratemaking is not judicial. The trappings of judicial procedure—a hearing, cross-examination, fact-

finding, and a final determination based upon evidence in the record—do not define its qualities. Rather, it is the "nature of the final act" that determines whether it is a legislative or judicial function. *Se. Greyhound Lines v. Ga. Pub. Serv. Comm.*, 181 S.E. 834, 838 (Ga. 1935) (quoting *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 227 (1908); *Mutual Light & Water Co. v. City of Brunswick,* 124 S.E. 178, 179-80 (Ga. 1924) ("The real test as to the legislative or judicial character of the proceeding is not to be found in the fact of a hearing being afforded, but depends upon the subject of the inquiry. . . . It is legislative to make a rule for future conduct, and judicial to punish for infraction of, or to enforce, an existing rule.").

Ratemaking is by its terms "a rule for future conduct," as it determines the prices that consumers will pay in the future for their utility services. *Mutual Light.*, 124 S.E. at 180. Under Georgia (as under federal) law, ratemaking lies in the legislative domain. *See Ga. Pub. Serv. Comm'n. v. S. Bell*, 327 S.E.2d 726, 728 (Ga. 1985); *Greyhound Lines, Inc. v. Ga. Pub. Svc. Comm'n.*, 222 S.E. 347, 350 (Ga. 1976); *see also San Diego Land & Town Co. v. Jasper*, 189 U.S. 439, 446 (1903); *Minnesota Rate Cases*, 230 U.S. 352, 433 (1913). Similarly, the commission's authority to grant and revoke certificates of public convenience and necessity is an "exercise of administrative or legislative power." *Tamiami*, 99 S.E.2d. at 233; *Se. Greyhound Lines*, 181 S.E. at 843. Even though this process requires the Commission to engage in fact-finding and make final determinations after a hearing by interested parties, it is a discretionary administrative procedure for future application, and is quasi-legislative at its core. The same is true for the development and approval of Integrated Resource

Plans, which entail hearings to determine utilities' future, long-term plans to ensure reliable electricity. Further substantiating the PSC's legislative qualities, the Commission promulgates rules and regulations regarding the safety and operation of the state's utilities and common carriers. *See generally* Ga. Comp. R. & Regs. 515. Overall, the PSC exercises substantial policymaking authority, and most of its quasi-judicial functions are subsumed within its legislative prerogatives. Fundamentally, the PSC is about policymaking, not adjudication.

The district court accurately represented the PSC's role and properly distinguished the Eleventh Circuit's precedent on judicial elections. While noting its "quasi-legislative" and "quasi-judicial" functions, the court found that "[the PSC] is by and large an administrative body with policy-making responsibilities that make it qualitatively different than courts." *Rose*, 619 F. Supp. 3d at 1268. Without deference to the district court's findings, the Eleventh Circuit held otherwise, claiming that the PSC operates in a "distinctly judicial fashion" when it "hears rate cases, holds hearings, listens to witnesses, makes evidentiary rulings, and weighs testimony from stakeholders to come to a decision." *Rose*, 87 F.4th at 485. But as Amicus has explained, the Eleventh Circuit's categorization of the PSC as a quasi-judicial body is incorrect. The PSC operates primarily as a quasi-legislative, administrative body, and the "distinctly judicial" procedures that the Eleventh Circuit cited as proof of its judicial character fall within the PSC's quasi-legislative functions. With this more accurate understanding of the PSC's operations, this Court should not allow the Eleventh Circuit to extend its questionable precedent

to an administrative agency that functions as a legislative body.

B. The Georgia PSC Operates as a Collegial Body

A collegial body is a multi-member entity whose power is vested within its membership. Collegial bodies—legislatures, school boards, commissions, and appellate courts—make decisions collectively, typically by majority votes of their members. The PSC, as a collegial body, makes decisions about utility regulation by majority vote. Ga. Comp. R. & Regs. 515-2-1-.10; 515-2-1-.07.

In the context of a collegial body like the PSC, the Eleventh Circuit's sui generis doctrine about elected trial judges is inapposite. *Nipper*, *SCLC*, and *Davis* were all challenges to the state's at-large method of electing trial judges, who exercise independent authority over matters within their jurisdiction. In each case, the court found that the unique circumstances surrounding the election of trial judges required the plaintiff to propose a Section 2 remedy "within the confines of the state's judicial model," *Nipper*, 39 F.3d at 1531 (en banc); *see SCLC*, 56 F.3d at 1296–97; *Davis*, 139 F.3d at 1421. With respect to trial judges, the state had an interest "in maintaining a link between a trial judge's jurisdiction and the judge's elective base," to preserve the independence of the judiciary and reduce incentives to favor constituents over others (i.e., home-cooking). *Nipper* 39 F.3d at 1541-42 (Tjoflat, J.); *see SCLC*, 56 F.3d at 1296–97; *Davis*, 139 F.3d at 1421.

The *Nipper* court conceded that the calculus could well be different when the state's chosen model of government is a collegial body. The collegial decision-making process naturally counteracts any real or

perceived individual bias, favoritism, or home-cooking that might undermine judicial independence. Unlike trial judges, who exercise independent authority over their cases, and may have an incentive to prioritize their constituents to the detriment of judicial neutrality, a collegial body moderates any individual member's bias or favoritism. *See Nipper*, 39 F.3d at 1534-35 (en banc). The fear of home-cooking is also greatly reduced where "all citizens continue to elect at least one person involved in the decision-making process and are, therefore, guaranteed a voice in most decisions." *Nipper*, 39 F.3d at 1543–44 (Tjoflat, J.). PSC commissioners do not exercise independent authority but rather engage in collective decision-making in carrying out their administrative responsibilities. Under *Nipper*'s own logic, the concerns that motivate *Nipper*, *SCLC*, and *Davis* dissipate in the context of a quasi-legislative, collegial body.

Moreover, unlike a trial judge who is meant to serve as a neutral decisionmaker over cases between adversaries, the PSC is not meant to operate with the same level of detachment. In fact, the PSC's current electoral model already bakes in a modicum of home-cooking with residency districts. Because the PSC is a collegial policymaking body, the Eleventh Circuit's extension of its case law—even on its own flawed terms—is not warranted.

C. The Georgia PSC Is Designed to Be Elected and Accountable to Voters

In 1906, the General Assembly passed legislation to change the then-Georgia Railroad Commission's method of selection from appointment to statewide election. In 1945, Georgia added to its Constitution that commissioners "shall be elected by the people."

Ga. Const. art. IV, § I, ¶ I. Implicit in the choice to elect commissioners is the decision to make them democratically accountable to the people. *See Ga. Power Co. v. Allied Chem. Corp.*, 212 S.E.2d 628, 632 (Ga. 1975) ("It is said that Public Service Commissions and legislatures should be 'collectively responsive to the popular will.'" (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)).

Further underscoring their democratic accountability, PSC commissioners are elected by a method distinct from Georgia's judges. Under Georgia law, PSC commissioners are elected in partisan elections in the same manner as the Governor. GA. CODE ANN. § 46-2-1(a). While Georgia's Constitution mandates non-partisan judicial elections, Ga. Const. art. VI, § VII, ¶ I, PSC commissioners are free to run their elections as partisan candidates for elected office. In addition, PSC candidates are not bound by the Code of Judicial Conduct that places restrictions on judicial candidates' ability to affiliate with political parties and endorse candidates. *See* Ga. Code of Judicial Conduct Rule 4.1. By Georgia's very rules, PSC commissioners are meant to "vie for popular support just as other political candidates do." *Chisom*, 501 U.S. at 400.

And Georgia did not stop at merely electing PSC commissioners on a statewide basis. The PSC's jurisdiction is split among five residency districts. PSC candidates must run for particular seats and reside in those districts prior to and during their terms in office. *See* GA. CODE ANN. § 46-2-1(b). Among public utility commissions nationwide, the PSC is unusual in sub-districting the state while retaining

at-large elections.[2] In light of these rules, Georgia's alleged interest in retaining this model of representation to dispel actual or apparent home-cooking falls flat. Instead, as Georgia's Supreme Court articulated, the residency requirements for PSC commissioners "serve the important state interest of supporting our representative form of government. Requiring candidates to live in a district for a reasonable period of time before the election encourages them to become familiar with the problems, needs, and concerns of the people they seek to represent; it also exposes voters to the character, experience, and views of the individuals who seek to represent them." *Cox v. Barber*, 568 S.E.2d. 478, 481 (2002).

At trial, PSC commissioners echoed this reasoning. Commissioner Echols testified that the purpose of residency requirements is "[t]o make sure that the state is fully represented geographically," as 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." *Rose*, 619 F. Supp. 3d at 1256. Commissioner McDonald also testified that he "believes the residency districts were created to ensure that the PSC represents all parts of Georgia." *Id.* at 1257. Fundamentally, the residency requirements reinforce the idea that the PSC is designed to function like a legislative body

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[2] Ten states elect members of their respective Public Utility Commissions. Of states that elect their commissioners, four do so by district and six elect their members at-large. Monica Hlinka, Regulatory *Focus Special Report, U.S. Utility Commissions*, (Dec. 13, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/blog/us-utility-commissioners-who-they-are-and-how-they-impact-regulation-december-2021.

whose members are responsive to the interests of the districts they represent. Perversely, by electing commissioners at-large, candidates who garner majorities of their districts' votes may still lose their elections to candidates supported mainly by voters outside the districts. If residency districts are meant to ensure representativeness, commissioners should reflect the interests of the people they purport to represent.

Such representation is especially important given that Georgians have little recourse to hold the PSC accountable outside of the ballot box. While Georgia's General Assembly provided an opportunity for Georgians to intervene in the PSC's proceedings, leave for intervention is only mandated when a party possesses an unconditional statutory right to intervene. *See* GA. CODE ANN. § 46-2-59(b). Without that statutory right, the Commission has discretion to permit intervention when a party "demonstrates a legal, property, or other interest in the proceeding." *Id.* § 46-2-59(e)(2). That discretion is guided by "whether the person's interest is adequately represented by other parties and whether the intervention will unduly delay the proceedings or prejudice the rights of other parties." *Id.* Without intervention, a person may appear to provide an oral or written statement but may not otherwise participate. *See id.* § 46-2-59(g).

Under Georgia's Administrative Procedure Act, a person who has exhausted administrative remedies, in this case intervention, and who is aggrieved by a PSC order may seek judicial review. *See* GA. CODE ANN. §§ 50-13-19; 50-13-20; *see also Ga. Power Co. v. Campaign for a Prosperous Ga.*, 336 S.E.2d 790, 793 (Ga. 1985). Yet Georgia's courts recognize strong presumptions in favor of the PSC's final

determinations. First, Georgia courts hold that "[t]he legislative function of ratemaking . . . is essentially a matter for the Public Service Commission, and not the judiciary." *State Farm Fire & Casualty Co. v. S. Bell Tel. & Tel. Co.*, 258 S.E.2d 198, 199 (Ga. Ct. App. 1979), *rev'd on other grounds*, 262 S.E.2d 895, (Ga. 1980). Accordingly, a court will not "substitute its judgment for that of the [PSC] if there is any evidence to support its findings." *Lasseter v. Ga. Pub. Serv. Comm'n*, 319 S.E.2d 824, 829 (Ga. 1984).

Second, although a consumer has a right to request intervention in the PSC's proceedings, a consumer "has no legal right to pay any rate other than the one established by the PSC." *Taffet v. S. Co.*, 967 F.2d 1483, 1494 (11th Cir. 1992), *cert. denied*, 506 U.S. 1021 (1992). Thus, a consumer cannot challenge the unreasonableness of the rate outside the context of a due process or equal protection violation. *See Allied Chem. Corp.*, 212 S.E.2d at 631 (reiterating that "the consumer's remedy against the general application of allegedly unreasonably high rates lies at the ballot box").

Third, Georgia has adopted the federal common law filed-rate doctrine, which provides that where a legislature has crafted a scheme for utility ratemaking, "the rights of the rate-payer in regard to the rate he pays are defined by that scheme," *Taffet* 967 F.2d at 1490, which "precludes any judicial action which undermines agency ratemaking authority." *Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1317 (11th Cir. 2004); *see also Carr v. S. Co.*, 438 S.E.2d 357, 358 (Ga. 1994) (applying the filed-rate doctrine as articulated in *Taffet*). Just as the General Assembly "is absolutely unrestricted in its power to legislate, so long as it does not undertake to enact measures prohibited by the State or Federal

Constitution," the courts will not invade the PSC's plenary power to set utility rates. *Dekalb Cnty. Sch. Dist. v. Ga. State Bd. of Educ.*, 751 S.E.2d 827, 831 (Ga. 2013). Because ratemaking is largely insulated from judicial review, the only mechanism to influence these important decisions that affect how much Georgians pay for their necessary utilities "lies at the ballot box." *Allied Chem. Corp.*, 212 S.E.2d at 631.

Fundamentally, Georgia's General Assembly made the intentional decision to elect its PSC commissioners. If Section 2 conflicts with the state's interest in maintaining its chosen form of elected government, the wound is self-inflicted. *Cf. Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."). Georgia's deliberate choice to elect the PSC, a multi-member, quasi-legislative body, necessarily requires that PSC elections comply with Section 2. *Cf. Chisom*, 501 U.S. at 401 ("[The State] could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed, and, in that way, it could enable its judges to be indifferent to popular opinion. The reasons why Louisiana has chosen otherwise are precisely the reasons why it is appropriate for § 2 . . . to continue to apply to its judicial elections."). Georgia's PSC commissioners are not independent trial judges but rather members of a collegial body with important quasi-legislative power. Accordingly, this case clearly falls within Section 2's ambit.

II. The Georgia PSC Will Function Effectively with Districted Elections

Given that the PSC falls squarely within the scope of Section 2, it will be able to operate effectively using a districted electoral system—just like many other policymaking bodies, including other state public utility commissions. The argument that policymaking bodies need at-large elections to function properly has fallen on deaf ears in various contexts. *See, e.g., Bradford Cnty. NAACP v. City of Starke*, 712 F. Supp. 1523 (M.D. Fla. 1989) (city commission); *Wright v. Sumter Cnty. Bd. of Elections*, 301 F. Supp. 3d 1297 (M.D. Ga. 2018) (county school board), *aff'd*, 979 F.3d 1282 (11th Cir. 2020); *Meek v. Metro. Dade Cnty.*, 805 F. Supp. 967 (S.D. Fla. 1992) (county commission).

The district court appropriately found no persuasive policy justifications for Georgia's at-large voting method for the PSC. *Rose*, 619 F. Supp. 3d at 1267–68. The only evidence offered on this point was the lay testimony of PSC Commissioners, "most notably" Commissioner Pridemore. *Id.* at 1267. The court afforded little weight to her testimony, finding that her opinions were "not tethered to any objective data and they lacked foundation entirely." *Id.* at 1268. Commissioner Pridemore, though "not herself an expert on electoral structure and function," opined that the PSC's at-large elections serve four important purposes. *Id.* at 1267–68. First, avoiding potential favoritism by the consumer affairs staff. *Id.* Second, maintaining the federal and state pipeline safety program. *Id.* Third, avoiding conflict over utility rates. *Id.* And fourth, avoiding conflict over the location of energy infrastructure. These concerns are baseless.

Commissioner Pridemore's first claim about favoritism is unsubstantiated, even contradicted, by evidence of state and local analogues working efficiently with districted elections. A multitude of district-elected policymaking bodies operate with shared services in Georgia—the Atlanta City Council's Office of the Municipal Clerk and the Georgia General Assembly's House Media Services to name a few. Even Commissioner Pridemore agreed that the PSC's consumer affairs office was like the Reapportionment Office at the General Assembly, which is "one office that has to serve all members." Tr., 394:9–12.

Commissioner Pridemore's second concern that federal and state pipeline safety programs could not be maintained if the PSC was elected through districts is unfounded. Commissioner Pridemore could not identify any states, no matter how their commissioners are elected, in which the federal and/or state pipeline safety programs are not working properly. Tr., 397:12–15. Four states also currently elect their PSC-equivalents by district—Louisiana, Mississippi, Montana, and Nebraska—and there is no evidence of dysfunctional safety programs in these states.

Commissioner Pridemore's third and fourth concerns of in-fighting are misguided because the PSC's current residency requirements already indicate a commitment to localism (albeit without any mechanism for accountability). Districted elections will allow the PSC to translate localized interests into policies that better serve all parts of Georgia. Commissioner Pridemore further stated that the at-large system assists efforts to get the "best outcome for the state knowing that, you know, rising tide lifts all ships." Tr., 388:8–9. However, not all

ships are rising under the PSC's current structure. Georgia's low-income residents have an extremely high energy burden, defined as the percentage of household income spent on utilities. In Georgia, families below fifty percent of the federal poverty level spend a striking *thirty-two percent* of their entire household income on energy. In the four states that have districted elections for their utility commissions, which include two neighboring states, the energy burden is lower for residents at all income levels, suggesting a more responsive policy.

	Energy Burden (percent of household income spent on utility costs)				
% of Federal Poverty Level	LA	MS	MT	NE	GA
Below 50%	28%	30%	25%	27%	32%
50 – 100%	15%	16%	13%	15%	17%
100 – 125%	10%	11%	9%	10%	11%
125 – 150%	8%	9%	7%	8%	9%
150 – 185%	7%	7%	6%	7%	8%
185 – 200%	6%	6%	5%	6%	7%

See Home Energy Affordability Gap, Fisher, Sheehan & Colton Public Finance and General Economics (2022), http://www.homeenergyaffordabilitygap.com/03a_affordabilityData.html.

Finally, Commissioner Pridemore opined that a benefit of having at-large elections is that the commissioners "don't fight over which district gets a new gas plant or nuclear plant or a solar farm." Tr.,

387:7–10. However, this consensus about infrastructure siting stems from a lack of advocacy on behalf of certain communities. Specifically, 15 out of the 27 biomass plants in Georgia (59%) are sited in counties whose Black population exceeds the state-wide percentage. *See Power Plants and Neighboring Communities*, U.S. EPA, https://www.epa.gov/power-sector/power-plants-and-neighboring-communities; Q*uickFacts*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/GA,US/PST045223. The Black community is clearly bearing the brunt of these highest polluting plans. Moreover, populations of people of color and/or low-income residents are higher than the state average at seven of the ten Georgia coal plants with residential populations within one mile of their coal ash dumps. *See* Abel Russ & Lisa Evans, *Georgia at a Crossroads* 24 (2018). Plainly, the PSC as currently structured is not responding to the needs of all communities.

Commissioner Pridemore's concerns are inconsistent with Georgia's stated intention of having a representative form of government at the PSC, as articulated by the Georgia Supreme Court, *see Cox*, 568 S.E.2d at 481, and Commissioners Echols and McDonald, *see Rose*, 619 F. Supp.3d at 1256–57. District-specific representation does not mean "in-fighting." It means advocacy. By having residency requirements, the PSC has partially committed to localism, but without a mechanism for accountability, Georgians do not benefit from meaningful representation. Districted elections would operationalize the PSC's commitment to local interests, leading to better outcomes for all parts of Georgia.

III. Inadequate Representation at the PSC leads to Devastating Consequences for Georgia's Black Residents

Turning to the effects of the PSC's policies, the Court must consider the disproportionate burdens inflicted on Georgia's Black residents as part of Section 2's totality of the circumstances analysis. In particular, negative economic and health consequences must be considered under Senate Factor 5, the effects of discrimination. The District Court correctly held that this factor weighed in favor of Petitioners. *Id.* at 1266.

The PSC is tasked with ensuring the "safety, reliability, and affordability of utilities." Tr., 388:19–21. However, energy rates in Georgia are decidedly not affordable for many households. These households suffer because of it—forced to make difficult choices between electricity and other necessities and facing shutoffs when the bills are left unpaid. These consequences are worst for Georgia's Black residents, exacerbated by the fact that they do not have representation on the PSC.

Energy burden represents the share of a household's income spent on utilities. It's a simple fraction: spending on household utility bills (the numerator) over the household's total income or household budget (the denominator). Marilyn A. Brown et al., *Energy Burdens of Black Households in Georgia* 3 (2024). Household economic guidelines suggest spending no more than 6% of household income on energy costs, but many families must pay more. *Id*. at 4. Households that spend 7-10% of household income on energy costs are considered "energy burdened," and households that spend more

than 10% of household income on energy costs are considered "energy impoverished." *Id.*

In 2022, 720,000 Georgia households (18%) were "energy impoverished," spending over 10% of their household income on energy costs. *See Home Energy Affordability Gap*, *supra*. An additional 535,000 households (13%) were "energy burdened," spending 7-10% of their household income on utilities. *Id.* The average energy burden for low- and moderate-income Georgia residents is striking—19.4%—meaning nearly a fifth of household income is used for utility costs. Groundswell, *A Call to Action: Analyzing Rural Energy Burdens in Georgia* 3 (Mar. 2022). And there is an additional, more pernicious, relationship between race and energy burden.

The lingering effects of Jim Crow-era policies have led to increased household utility expenditures for Black households, *i.e.*, raising the numerator. As a product of past housing discrimination, Black residents tend to live in older and less energy-efficient housing—"7.5% of the non-Hispanic Black population lives in substandard housing as compared to 2.8% of the White population." Brown et al., *supra* at 5. Additionally, as a consequence of redlining, "lending institutions have issued fewer mortgages to predominantly Black communities," making it difficult for Black homeowners and landlords to invest in energy upgrades and retrofits. *Id*. at 12. The stark disparities in housing quality, and entrenchment of housing decay, mean that Black households have higher overall energy use, higher utility costs, and higher energy consumption per square foot than White households. *Id*. at 5.

Additionally, because of past institutionalized racism and racial segregation, Black Georgians have

lower than average household incomes, *i.e.*, decreasing the denominator. This results in "energy burdens for Black households that are 43% higher, on average than for white households." *Id.* at 5. This is a tangible and serious harm.

A lack of procedural fairness at the PSC also contributes to the correlation between race and energy burden. Studies point to "a lack of informed consent for energy projects," a "lack of representation in energy-related decision-making," and a "lack of access to information on energy rates, programs, and policies." *Id.* at 6. These deficiencies help explain why "Black households have higher energy burdens than [white] households even after controlling for income differences." *Id.*

The racial differences in energy burden across Georgia are striking. Predominantly White census tracts (with 20% or fewer Black residents) "have energy burdens that are clustered around 2 and 3%. Only one of these 828 census tracts has an average energy burden over" the 10% threshold for energy poverty. *Id.* at 11. "In contrast, highly Black census tracts (with 80% or more Black residents) have energy burdens that are clustered around 4 and 5%;" of these 202 census tracts, 16 "have average energy burdens of 10% or higher" and none "have energy burdens below the 3% state average." *Id.*

In a published study of this data, Amicus found that "the racial composition of a census tract (as defined by the percentage of Black households) is a statistically significant predictor of energy burden." *Id.* at 25. This is critical to understanding Georgia's energy burden problem, and why representation on the PSC matters.

These consequences are devastating. High energy burdens force Georgia's Black households to make difficult choices, "such as deciding whether to cool one's home or risk having a heat stroke to save money for other essential services." *Id.* at 8. Additionally, the environmental justice literature has identified links between high energy burdens and health outcomes, access to cleaner air, transportation, and other public services that contribute to overall household well-being. *Id.*

The Eleventh Circuit incorrectly overlooked the detrimental effects of the PSC's current practices on minority voters. Understanding the disproportionate impact on Black households is critical to understand the PSC's function in Georgia, and why representation at the PSC matters.

CONCLUSION

For the foregoing reasons, the Sierra Club respectfully requests that the Court grant the petition for certiorari and summarily reverse the Eleventh Circuit's decision.

April 26, 2024

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