



## Supreme Court of Georgia

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## SUMMARY OF OPINION

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### **BARROW V. RAFFENSPERGER (S20A1029)**

### **BESKIN V. RAFFENSPERGER (S20A1031)**

The Supreme Court of Georgia has upheld a ruling by the **Fulton County** Superior Court that Secretary of State **Brad Raffensperger** cannot be compelled to hold an election this year for the office of Justice Keith R. Blackwell, who announced in February he plans to resign from the Supreme Court on Nov. 18, 2020 before his current six-year term ends on Dec. 31, 2020.

In today's 6-to-2 decision, the state's high court has ruled that under Georgia law, a Justice's prospective resignation, once accepted by the Governor, is irrevocable. Justice Blackwell's office therefore will become vacant when he leaves office on Nov. 18, and under the Georgia Constitution, "when a vacancy arises in a Justice's office, it is filled not by election but rather by gubernatorial appointment."

Justice Blackwell took office in July 2012 after he was appointed to the Supreme Court to fill a vacancy. He was then elected in the nonpartisan general election in May 2014 to serve a standard six-year term that began on Jan. 1, 2015 and ends on Dec. 31, 2020. The nonpartisan election for the next standard term of his office was scheduled as part of the general primary election on May 19, 2020, with that term to begin on Jan. 1, 2021. On Feb. 26, 2020, however, Justice Blackwell submitted a letter of resignation to Gov. Brian Kemp, stating he was resigning

his office effective Nov. 18. The same day, the Governor formally accepted Justice Blackwell's resignation as of Nov. 18. The Governor then notified the Secretary of State that he would be appointing a Justice to fill Justice Blackwell's office, and Raffensperger promptly canceled candidate qualifying for the May 19 election for the next term of Justice Blackwell's office. When **John Barrow** and **Elizabeth A. Beskin** attempted to qualify to run for Justice Blackwell's office, the Secretary of State's staff refused to accept their qualifying documents and fees.

Barrow and Beskin sued Raffensperger in Fulton County Superior Court, filing a "petition for mandamus" to ask the court to order Raffensperger to reopen qualifying and hold the election for the next term of Justice Blackwell's office. (Due to the COVID-19 pandemic, the May 19 election has since been postponed to June 9.) Beskin also claimed that the Secretary's action violated her federal constitutional rights "to qualify as a candidate for office and to vote for the candidate of her choice." On March 16, the trial court denied the mandamus petitions and rejected Beskin's federal claims, stating that under Georgia Code § 45-5-1 (a) (2), a vacancy existed when the Governor accepted Justice Blackwell's resignation, which triggered the Governor's appointment power and meant the election was no longer legally required.

Barrow and Beskin filed appeals to this Court and asked the Court to expedite the briefing and decision process, which the Court did. Barrow and Beskin argued that the trial court should have granted their petitions because no vacancy will exist in Justice Blackwell's for the Governor to fill by appointment before the May 19 election and because the Secretary of State has no authority to cancel an election required by statute.

In today's 71-page majority opinion, written by **Presiding Justice David E. Nahmias**, "we hold that while the trial court's reasoning was mistaken, its conclusion that the Secretary of State could not be compelled by mandamus to hold the May 19 election for Justice Blackwell's office was correct. Under the Georgia Constitution and this Court's precedent, a vacancy in a public office must exist before the Governor can fill that office by appointment, and a vacancy exists only when the office is unoccupied by an incumbent. Because Justice Blackwell continues to occupy his office, the trial court erred in concluding that his office is presently vacant; accordingly, the Governor's appointment power has not yet arisen."

The majority opinion explains, however, that unlike earlier Georgia Constitutions, our current Constitution, which took effect in 1983, "clearly provides that when an incumbent Justice vacates his office before the end of his term, his existing term of office is eliminated, and the successor Justice appointed by the Governor serves a new, shortened term that is unrelated to the previous incumbent's term.

Paragraph IV of the 1983 Constitution's judicial selection section specifies the term of office of a Justice who is appointed to fill a vacancy, the majority opinion points out. The Constitution says that an appointee to an elective judicial office shall serve "until January 1 of the year following the next general election which is more than six months after such person's appointment." That means that whoever is appointed to fill Justice Blackwell's office would serve a shortened term that would require him or her to run for election in 2022 for a standard six-year term that would begin on Jan. 1, 2023.

The 1983 Constitution and the Court's precedents "make it clear that a judge appointed to an elective office does not inherit and serve out the remainder of his or her predecessor's term of office; that unexpired term, we have explained before, is 'eliminate[d]' when the incumbent judge vacates the office," the majority opinion says. "Instead, an appointed judge has an 'entirely

new and shortened initial term of office,' the length of which depends on the date the judge was appointed, the date he or she takes office, and the date of the next nonpartisan general election." Therefore, if Justice Blackwell's office will definitely be vacated on Nov. 18, his term of office will go with him and the next term of his office will never come to be. The Secretary of State cannot be ordered to hold an election for that non-existent term of office, the majority opinion rules, because the election would be legally meaningless, or "nugatory," as well as misleading to voters and the public.

Barrow and the dissent argue that the Governor's power to appoint Justices is an exception to the general rule that Justices are to be elected. "That is true, but only in a broad sense," the majority opinion says. "[T]o continue in office for more than a couple of years, every Justice must win election to one or more standard six-year terms, and over time Justices of this Court have served many more elected, six-year terms than appointed, shorter terms. But the second way by which Justices (and other judges) *initially* take and hold their offices – by gubernatorial appointment – is not some sort of constitutionally inferior alternative," the majority opinion says. Georgia has a judicial electoral system that involves both election and appointment, and since 1983, all but one Justice has initially reached the bench by appointment. The majority opinion notes that the dissent relies on cases decided under the pre-1983 judicial selection system, which were interpreting Constitutions that did not include Paragraph IV.

The majority opinion explains that Barrow's and Beskin's cases ultimately turn on whether Justice Blackwell's unequivocal resignation effective on Nov. 18 is irrevocable after the Governor unequivocally accepted it. Beskin argued that accepted resignations cannot be lawfully withdrawn, but Barrow argued that Justice Blackwell could withdraw his resignation before Nov. 18 and thus remain in office until his current term ends on Dec. 31, 2020, which would require the Secretary of State to hold an election for the next term of his office. But the majority opinion concludes that Justice Blackwell's resignation "cannot be lawfully revoked, even if both the Justice and the Governor consent to its purported withdrawal before its effective date. All existing Georgia law indicates that a Justice's resignation, once accepted, cannot be lawfully withdrawn." Beskin's federal claims are based on alleged violations of state election laws and therefore fail along with her state claims, the majority opinion adds, noting that the Georgia Supreme Court's interpretation of the Georgia Constitution and Georgia election law is binding on the federal courts.

"To the extent that the judicial selection system is subject to the possibility of manipulation by the relevant officials (as almost all government systems are), the checks against such machinations come in forms other than courts altering the Constitution by judicial fiat, including the selection of Justices with integrity, the political risks to Governors who make poor appointments, and of course the ultimate authority of the people of Georgia to change the Constitution that governs them," the majority opinion concludes. "For the reasons discussed above, the trial court reached the right result in denying Barrow's and Beskin's petitions for mandamus and Beskin's federal claims, and those judgments are therefore affirmed." Joining the majority opinion are Chief Justice Harold Melton, Justice Sarah H. Warren, and Judges Richard M. Cowart, Sarah F. Wall, and Timothy R. Walmsley (who were designated along with the two dissenting Judges to sit on these cases in place of recused Justices).

In a short concurrence, **Chief Justice Harold D. Melton** agrees with everything said in the majority opinion but writes separately "to emphasize that this case is not about this Court's

choice between elections and appointments. To the contrary, this case is about applying the language of Georgia's Constitution and corresponding statutory law to determine whether Governor Kemp may appoint a new Justice to this Court following a vacancy in Justice Blackwell's office or whether an election must be held. Because the merits of appointments and elections *have already been weighed* by the people of Georgia when they ratified the Georgia Constitution of 1983 and by the General Assembly when it enacted laws regulating the orderly transition of Justices onto and off the Georgia Supreme Court, our job as judges is limited to applying the law the people of Georgia and their elected representatives have provided to us." Regardless of the public debate surrounding judicial elections and appointments, the concurrence says, "the existing law which this Court must apply to the present controversy is clear: the Governor has the constitutional authority to appoint a new Justice to this Court in response to the vacancy created by Justice Blackwell's resignation. The genius of our democracy is that, to the extent the people of Georgia now second-guess the system of elections and appointments they ratified in the 1983 Constitution, they have the power to seek amendment to that foundational document. But it is not the job of judges to usurp that power by rewriting constitutional provisions ratified by the people, or by rewriting laws enacted by the people's democratically elected representatives." Joining the concurring opinion are Justice Warren and Judges Cowart and Walmsley.

In a 25-page dissent, **Judge Brenda Holbert Trammell** writes that she agrees with much of the majority opinion. "However, because an appointment is unlawful in this circumstance, I must respectfully dissent. We must reconcile two constitutional provisions. One guarantees the rights of the voters to determine the next Justice of the Georgia Supreme Court. The other grants to the Governor the right to fill vacancies in such office by appointment." In this case, the dissent says, the "majority gives the greater weight to the provisions allowing appointment. Because I feel that this denies the people the right to elect their Justice as provided by the Constitution, I cannot agree with the majority position."

The dissent says that under the Georgia Constitution, the power of appointment "is an *exception* to the general rule requiring that Justices be elected. Appointment is, in fact, 'constitutionally inferior.' The majority seems to indicate that the provisions regarding appointment prevail over the more general provisions regarding election." The dissent agrees with the majority that the Governor cannot make an appointment until Justice Blackwell's office becomes vacant on Nov. 18, 2020. The majority would allow the Secretary of State to cancel the scheduled election "to allow the Governor to make an appointment that cannot be made until after the scheduled election," the dissent says. "Why? The majority says that the winner would not be permitted to take office because of the anticipated appointment, so the election need not be held. For the first time since the enactment of this constitutional provision, the majority is ruling that the appointment power of the Governor trumps the voting power of the public. Let me be clear. This ruling means that even were the election to go forward and a winner be declared, the appointee defeats the electee." The dissent also disagrees that Justice Blackwell's resignation could not be rescinded by mutual agreement of the Governor and Justice Blackwell. Finally, the dissent concludes that because Justice Blackwell's resignation will not result in a vacancy in the office until almost six months after the election, "I cannot in good conscience agree that the election should be cancelled and the will of the people thrust aside as 'fruitless and nugatory.'" Joining the dissent is Judge Scott L. Ballard.

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