



**Supreme Court of Georgia**  
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## **SUMMARIES OF OPINIONS**

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### **KEMP ET AL. V. GONZALEZ ET AL. (S21Q0068)**

Under an opinion today by the Supreme Court of Georgia, voters in **Clarke** and **Oconee counties** will have the opportunity to vote in November 2020 for District Attorney for the Western Judicial Circuit, rather than having to wait until November 2022.

With today's unanimous opinion, written by **Chief Justice Harold D. Melton**, the high court has concluded that a Georgia statute (Georgia Code § 45-5-3.2) violates the Georgia Constitution to the extent that it "authorizes a district attorney appointed by the Governor to

serve beyond the remainder of the unexpired four-year term of the prior district attorney without an election as required by Article VI, Section VIII, Paragraph I (a) of the Georgia Constitution of 1983.”

The case came to the Georgia Supreme Court as a certified question by the United States Court of Appeals for the Eleventh Circuit. The state Supreme Court agreed to expedite the proceedings and heard arguments in the case on Sept. 15, 2020.

The facts are as follows: On March 6, 2020, former state representative **Deborah Gonzalez** attempted to qualify for the Nov. 3, 2020 election to the office of district attorney for the Western Judicial Circuit, which includes Clarke and Oconee counties, after Ken Mauldin resigned from the post effective Feb. 29. Georgia Secretary of State Brad Raffensperger determined that Gonzalez could not qualify for the November 2020 election for district attorney because under Georgia Code § 45-5-3.2 (a), there would not be an election for that position until November 2022. Georgia Code § 45-5-3.2 (a) states that the governor is to fill any vacancy in the office of district attorney, and the appointee “shall serve until January 1 of the year following the next state-wide general election *which is more than six months after the date of the appointment of such individual*, even if such period of time extends beyond the unexpired term of the prior district attorney.” Gonzalez called on **Governor Brian Kemp** to fill the vacancy before May 3, or less than six months after the date of the appointment so the election could be held Nov. 3, 2020. Instead, Sec. Raffensperger determined that Gonzalez could not qualify for the November 2020 election because under the statute, there would not be an election for the office of district attorney until November 2022 – the statewide general election immediately prior to the expiration of Gov. Kemp’s (yet-to-be-named) appointee’s term.

On May 18, 2020, Gonzalez and four other registered voters sued Gov. Kemp and Sec. Raffensperger in the United States District Court for the Northern District of Georgia. They alleged that Georgia Code § 45-5-3.2 (a) violates Georgia Constitution Article VI, Section VIII, Paragraph I (a), which states: “There shall be a district attorney for each judicial circuit, who shall be elected circuit-wide for a term of four years. The successors of present and subsequent incumbents shall be elected by the electors of their respective circuits at the general election held immediately preceding the expiration of their respective terms. District attorneys shall serve until their successors are duly elected and qualified. Vacancies shall be filled by appointment of the Governor.”

On May 25, 2020, Gonzalez and the four voters filed a motion for preliminary injunction, asking the federal district court to require Gov. Kemp and Sec. Raffensperger to move forward with the November 2020 election for the Western Judicial Circuit district attorney. The federal court granted their request, finding that they likely would succeed on their federal due process claim because § 45-5-3.2 (a) conflicts with Georgia Constitution Article VI, Section VIII, Paragraph I (a). Specifically, the district court found that Georgia Constitution Article VI, Section VIII, Paragraph I (a) “requires the appointed district attorney to run for re-election at the general election prior to the expiration of the existing term of office” and that § 45-5-3.2 (a) conflicts with that provision and is therefore unconstitutional. In July, Gov. Kemp and Sec. Raffensperger appealed to the Eleventh Circuit Court of Appeals, which certified this question to the Georgia Supreme Court: “Does Georgia Code § 45-5-3.2 (a) conflict with Georgia Constitution Article VI, Section VIII, Paragraph I (a), or any other provision of the Georgia Constitution?”

In today’s opinion, the high court answers yes. “Paragraph I (a) of our 1983 Constitution relating to district attorneys first fixes a four-year term for the office of district attorney in each judicial circuit,” the opinion says. “The second sentence of Paragraph I (a) then ensures that the successors of any presently serving and subsequent incumbent district attorneys (whether the incumbent was elected or appointed) ‘*shall be elected*’ by the electors of their respective circuits *at the general election held immediately preceding the expiration of their respective terms.*’ And the third sentence confirms that all district attorneys (again, whether elected or appointed) serve only ‘until their successors are *duly elected* and qualified’ in the election held pursuant to the second sentence.”

“The final sentence of Paragraph I (a) says simply, ‘Vacancies shall be filled by appointment of the Governor.’ It does not say that appointments to fill vacancies do anything to change the existing, fixed, four-year term of office held by the district attorney who vacated the office before the end of that term. We therefore do not construe this language to change the fixed four-year term for district attorneys as established in the other three sentences of Paragraph I (a),” the opinion says. “Accordingly, when the Governor’s appointee fills a vacancy in an office of district attorney, he or she steps only into the remainder of the unexpired fixed four-year term for the office. Because the four-year term runs with the office, and not the individual in the office, the appointee would not begin a new term by being appointed, but would serve out the remainder of the existing term as the new ‘incumbent’ until his or her successor (who could be the incumbent) is *elected* at the general election immediately preceding the expiration of that existing term.”

“By its plain terms, Georgia Code § 45-5-3.2 (a) allows a district attorney who is appointed by the Governor within six months of a general election to remain in office ‘beyond the unexpired term of the prior district attorney,’” today’s opinion says. This conflicts directly with the mandate of Paragraph I (a) of the Georgia Constitution “because the appointee’s tenure in office would circumvent the constitutional requirement that the successor district attorney be chosen in the general election preceding the expiration of the fixed four-year term that the appointee incumbent fills. The General Assembly does not have the authority to extend the terms of appointed district attorneys in this way.”

“In this case, there is no language in the constitutional provision relating to the terms for district attorneys that would allow for appointed district attorneys to serve beyond the remainder of the unexpired terms of their predecessors, and we cannot rewrite the Constitution to insert such language,” the opinion says. The opinion notes that the constitutional provision allowing for the appointment of judges for a time period that may extend beyond the remainder of the unexpired terms of their predecessors “does not apply to district attorneys.”

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