No. 13-11816-EE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GREEN PARTY OF GEORGIA and CONSTITUTION PARTY OF GEORGIA,	)	Appeal from the United States District Court for the Northern District of Georgia
Plaintiffs-Appellants	)	
vs.	)	No. 1:12-cv-01822-RWS
STATE OF GEORGIA and BRIAN KEMP, Georgia Secretary of State,	)	The Honorable Richard W. Story, U.S. District Judge, Judge Presiding
Defendants-Appellees.	)	

BRIEF OF PLAINTIFF-APPELLANT

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PLAINTIFFS-APPELLANTS' RULE 26.1 CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

NOW COMES counsel for the Plaintiffs, Richard J. Whitney, and for his Rule 26.1 Certificate of Interested Persons and Corporate Disclosure Statement, states that the following are the names of all persons or entities with an interest in the outcome of this appeal, as required by Circuit Rule 26.1:

Constitution Party of Georgia

Green Party of Georgia (a/k/a Georgia Green Party)

Brian Kemp, Georgia Secretary of State

J.M. Raffauf, Attorney at Law

Steffan Ernst Ritter, Office of State Attorney General, State of Georgia

State of Georgia

Hon. Richard W. Story, U.S. District Judge

Richard J. Whitney, Attorney at Law

GREEN PARTY OF GEORGIA and
CONSTITUTION PARTY OF GEORGIA,
PLAINTIFFS

Dated: May 31, 2013

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is desired by Plaintiffs-Appellants. As a general proposition, this Court can benefit from oral argument in almost any case in which there is at least some doubt as to the appropriate outcome, since oral argument allows counsel to address finer points of the arguments on both sides of a question, and help resolve close questions. Beyond that, however, the instant case raises profound Constitutional issues of potential national import – and impact – insofar as this Court's decision is likely to affect the ability of many thousands of persons nationwide who have devoted years of their lives struggling to provide the nation's voters with alternatives other than the two parties that have dominated the American political system since the Civil War. More broadly, therefore, this Court's decision could affect how the electoral system in the United States is perceived by the majority of its people, as being either fundamentally fair and capable of reflecting shifts in the desires of the electorate -- or fundamentally unfair and tilted in favor of the status quo.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

A. District Court Subject-Matter Jurisdiction

The underlying action was brought pursuant to the Civil Rights of 1871, as amended, 42 U.S.C. § 1983, the First and Fourteenth Amendments to the United States Constitution, and the "Elections" Clause of Art. I, § 4 of the United States Constitution. (Doc. 1, at 1.) The district court had jurisdiction over this cause pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), (4) and the aforementioned statute.

B. Court of Appeals Jurisdiction and Timeliness

On a Motion to Dismiss and supporting Memorandum filed by Defendant, (Docs. 4, 4-1), Plaintiff's Response opposing said Motion, including, therein, a supporting Brief (Doc. 5), and supporting affidavits (Docs. 5-1, 5-2, 5-3, 5-4), the district court, on July 17th, 2012, entered an Order granting Defendants' Motion. (Doc. 10.) On July 24th, 2012 Plaintiffs timely filed a Motion for Reconsideration, with supporting Brief included therein. (Doc. 12.) Although referencing Fed. R. Civ. Proc. 60(b), the Motion is properly characterized as a Motion under Fed. R. Civ. Proc. 59 (e). *Finch v. City of Vernon*, 845 F.2d 256, 258-59 (11th Cir. 1988) (construing motion to reconsider as a Rule 59(e) motion even where it referenced Rule 60(b), holding that "Rule 59 applies to motions for reconsideration of matters encompassed in a decision on the merits of the dispute, and not matters collateral to

the merits," and that motion should be considered a Rule 59(e) motion when filed within 10 days of the judgment being challenged.) The filing of such a motion tolls the period for filing a notice of appeal and a new thirty-day period commences when the court decides the Rule 59 motion. *Id.*

On March 21, 2013, the district court entered an Order denying Plaintiffs' Motion for Reconsideration. (Doc. 14.)[1] This was a final, appealable Order that disposed of all of Plaintiffs' claims, thus establishing the Court' jurisdiction. *Silas v. Sears, Roebuck & Co., Inc*., 586 F.2d 382, 384 n.2 (5th Cir. 1978). On April 22, 2013, Plaintiffs filed a Notice of Appeal, pursuant to Rule 3 and Rule 4 (a)(1)(A) of the Federal Rules of Appellate Procedure, which confers jurisdiction on this Court. (Doc. 15.) Since the 30-day deadline for filing the notice fell on a Saturday, the filing of the Notice on Monday, April 22, 2013, was timely. Fed. R. App. Proc. 26 (a)(1).

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1 Although this Order was signed March 19, 2013 and filed March 20, 2013, the docket sheet indicates it was not entered until March 21, 2013.

STATEMENT OF THE ISSUES

Whether a state statute requiring non-established or minority candidates for President of the United States to gather petition signatures from currently registered voters in a number equal to 1 percent of the total number of registered voters eligible to vote in the last election for statewide office, violates the First and/or Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Nature of the Case

This case arises from a challenge to the constitutionality of a Georgia statute governing the petition signature-gathering requirements for placing a presidential candidate of a "minority" or non-established political party on the general election ballot.

B. Course of Proceedings and Dispositions in the Court Below

On May 25, 2012, Plaintiffs Green Party of Georgia and Constitution Party of Georgia filed a Complaint in the district court against Defendants State of Georgia and Georgia Secretary of State Brian Kemp, pursuant to the Civil Rights of 1871, as amended, 42 U.S.C. § 1983, the First and Fourteenth Amendments to the United States Constitution, and the "Elections" Clause of Art. I, § 4 of the United States Constitution. (Doc. 1.) The Complaint challenged the constitutionality of Ga. Code

Ann. §§ 21-2-170 and 21-2-180, seeking both a declaration that these provisions were unconstitutional and an order enjoining their enforcement. (Doc. 1, at 2, 5.)[2]

These provisions of the Georgia Code essentially require a political "body" whose candidates for state-wide office did not receive at least 1 percent of the vote in the preceding general election, but who seek to place their candidate for state-wide office on the ballot in the *next* general election, to obtain petition signatures from currently registered voters in a number equal to 1 percent of the total number of registered voters eligible to vote in the last election for the office the candidate is seeking, i.e., 1 percent of the registered voter rolls in the state. Section 2-1-170 pertains to non-established party candidates generally, including independent candidates and § 21-2-180 pertains to non-established political body candidates who seek to place their candidate on the ballot via a nominating convention, but the 1 percent requirement is the same under both statutes.

Defendants responded by filing a Motion to Dismiss, (Doc. 4), and supporting Memorandum, (Doc. 4-1), pursuant to Fed. R. Civ. Proc. 12 (b)(1) and (6), arguing primarily that settled case law arising from prior challenges to the Georgia statutes at issue barred relief as a matter of law. Defendants also argued that Defendant State of Georgia was immune from suit under the Eleventh Amendment and that only

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2 At paragraph 8, the Complaint quoted, but failed to correctly cite to § 21-2-180.

Defendant Secretary of State Kemp was a proper party defendant. (Doc. 4-1, at 14-15.)

Plaintiffs filed a Response, with Brief included, contesting Defendants' legal argument on the merits but not contesting Defendants' Eleventh Amendment argument with respect to Defendant State of Georgia (which is not at issue on this appeal). (Doc. 5.) Appended to Plaintiffs' Response was an Affidavit of Hugh Esco, (Doc. 5-1), longtime officer with the Georgia Green Party, verifying the Party's status as a "political body" under Georgia law and alleging a number of facts about the history of that party's ballot-access efforts and obstacles to ballot access, since 1998. Plaintiffs appended similar affidavits from Constitution Party of Georgia officers Ronne G. Haag and Garland Favorito, (Docs. 5-2, 5-3), verifying that Party's status as a "political body" and its own efforts at ballot access since 1996. Plaintiffs also filed a supporting affidavit from expert witness Richard Winger, providing testimony regarding independent and minor party presidential candidates' efforts to appear on the general election ballot in Georgia generally and historically, and comparing such ballot-access success rates in Georgia with those of other states. (Doc. 5-4.)

On the same day, Plaintiffs also filed a Motion to Expedite Proceedings, (Doc. 6), and a Motion for Summary Judgment or Alternatively Motion for a Preliminary

Injunction, with Brief included. (Doc. 7.) The latter Motion essentially restated the same arguments presented in Document 5, and attached the same affidavits attached to Document 5 but sought immediate relief for Plaintiffs in light of the imminence of the 2012 general election. Plaintiffs also submitted a supporting Statement of Material Facts. (Doc. 8.)

On July 17, 2012, the district court entered an Order granting Defendants' Motion to Dismiss, and therefore denying Plaintiffs' Motions to Expedite Proceedings, and for Summary Judgment, as moot. (Doc. 10.) Plaintiffs responded with a Motion for Reconsideration, pursuant to Fed. R. Civ. Proc. 60 (b), and brief incorporated therein. (Doc. 12.) Plaintiffs' Motion was denied by Order filed March 20, 2013 and entered March 21, 2013, (Doc. 14), and it is from that Order that this appeal follows, (Doc. 15), although this appeal also challenges the underlying dismissal. (Doc. 10.)

C. Statement of Facts

Inasmuch as the instant case was decided on the pleadings, there are no factual issues under consideration, except insofar as the facts alleged in the affidavits appended to Plaintiffs' Response to Defendants' Motion to Dismiss (Docs. 5 and 5-1 – 5-4) may enter into this Court's consideration of the purely legal issues raised on this appeal. In brief, the unrebutted Affidavit of Hugh Esco, (Doc. 5-1), averred that

Plaintiff Green Party of Georgia (historically known as the "Georgia Green Party" and referenced in that manner in the Affidavit) has been unsuccessful in getting its presidential candidate on the ballot in Georgia in each election since 2000, in contrast to most other states in the U.S., despite evidence of substantial support from the electorate.

The unrebutted Affidavit of Garland Favorito, (Doc. 5-3), averred that Plaintiff Constitution Party of Georgia has been unsuccessful in getting its presidential candidate on the ballot in Georgia in each election since 1996, in contrast to most other states in the U.S., despite evidence of substantial support from the electorate. It also recounted a lack of cooperation from the office of Defendant Secretary of State and county authorities in getting a complete and accurate count of write-in votes. (Doc. 5-3, at 2.)

The unrebutted Affidavit of Richard Winger, (Doc. 5-4), averred, among other things, that:

> No statewide petition to place either an independent presidential candidate, or a minor party presidential candidate, has succeeded in Georgia since 2000, when Pat Buchanan qualified as an independent presidential candidate. The only states in the nation in which no statewide procedure for a minor party or independent candidate to get on the ballot was successfully used during the years 2001 through 2010 are California, Georgia, and Indiana. Georgia is one of only four states in which Ralph Nader never appeared on the ballot in any of his presidential runs (the others are Indiana, North Carolina, and Oklahoma). Georgia is one of only five states in which the Constitution Party presidential candidate has never appeared on the ballot (the others are

Arizona, Indiana, North Carolina, and Oklahoma).
(Doc. 5-4, at 1.)

It also averred that the "Green Party, the Constitution Party, and the Libertarian Party, are the only three parties (other than the Democratic and Republican Parties, of course) who have managed to place their presidential nominees on the ballot in states containing a majority of the electoral college, in each of the last three presidential elections," (Doc. 5-4, at 2), provided other facts showing a modicum of voter support for the Plaintiff parties, both nationally and in Georgia, and noted that in the modern history of the state, since the 1920s, Georgia has "never suffered from an over-crowded general election ballot for President." (Doc. 5-4 at 3.)

D. Standard of Review

In considering any argument of error regarding the district court's Order denying Plaintiffs' Motion for Reconsideration, (Doc. 14), such orders are reviewed on an abuse of discretion standard. *Bender v. Mazda Motor Corp*., 657 F.3d 1200, 1202 (11th Cir. 2011).

In considering any argument of error regarding the district court's order granting Defendants' Motion to Dismiss for failure to state a claim under Fed. R. Civ. Proc. 12(b)(6), (Doc. 10), this Court reviews such orders *de novo. Thompson v. Relationserve Media, Inc.,* 610 F.3d 628, 633 (11th Cir. 2010).

SUMMARY OF ARGUMENT

The Court below erred in dismissing Plaintiffs' Complaint (and Motion for Reconsideration), because it failed to apply strict scrutiny and engage in the careful balancing of the First Amendment rights of voters to join together in furtherance of common political beliefs and effectively cast ballots for the candidates of their choice as against the state's interest in avoiding ballot confusion. It failed to consider the actual historical record of ballot access efforts by non-majoritarian party candidates in the State of Georgia, as is required. Most importantly, it failed entirely to apply the binding precedent of this Court and the U.S. Supreme Court, finding that the balancing of the above interests is entirely different in the case of U.S. Presidential elections than it is for statewide and local elections, with the state's interest in restricting ballot access accorded less weight in Presidential elections.

ARGUMENT

THE COURT BELOW ERRED IN FAILING TO APPLY STRICT SCRUTINY, IN FAILING TO CONSIDER THE HISTORICAL RECORD OF BALLOT ACCESS EFFORTS IN GEORGIA, AND, ABOVE ALL, IN FAILING TO CONSIDER THAT SPECIAL CONSTITUTIONAL CONCERNS ARISE WITH RESPECT TO CANDIDATES FOR PRESIDENT OF THE UNITED STATES.

A. Scope of this Review

The Notice of Appeal filed by prior counsel in this cause appealed the "final judgment in this case on March 21, 2013, denying the Plaintiff's Motion for

Reconsideration from the July 17, 2012 order dismissing the case." (Doc. 15.) Thus, while it appealed the March 21 Order, (Doc. 14), it also referenced the underlying Order dismissing the case. (Doc. 10.) It should be manifest, both from the nature of the Motion for Reconsideration, (Doc. 12),which focused solely on legal argument contesting the basis for the Order dismissing the case, and from the fact that it was filed less than 10 days after said Order, that the main focus of this appeal is the Order dismissing the case for failure to state a claim upon which relief may be granted. (Doc. 10.) *See, e.g., "R" Best Produce, Inc. v. Disapio*, 540 F.3d 115, 119-122 (2nd Cir., 2008) (surveying case law and holding that filing of motion to reconsider within 10 days of dispositive order, "suffices to bring up for review the underlying order or judgment, at least where the motion renews arguments previously made.") *Accord Borrero v. City of Chicago*, 456 F.3d 698, 700 (2006) (holding that denial of timely Rule 59(e) motion is not appealable separately from the judgment that it seeks to alter or amend, and that the two orders -- the judgment and the denial of the motion to change it – merge); *Artes-Roy v. City of Aspen*, 31 F.3d 958, 961 n.5 (10th Cir. 1994) (holding that appeal from denial of a Rule 59 motion will be sufficient to permit consideration of the merits of the underlying judgment, if the appeal is "otherwise proper, the intent to appeal from the final judgment is clear, and the opposing party was not misled or prejudiced.")

Accordingly, this brief will focus on the July 17, 2012 Order dismissing this case, which should be reviewed *de novo*. *Thompson v. Relationserve Media, Inc.,* 610 F.3d 628, 633 (11th Cir. 2010). Since that Order was itself based on a Fed. R. Civ. Proc. 12(b)(6) Motion to Dismiss, this Court should accept all well-pleaded facts in the complaint and all reasonable inferences drawn from those facts as true. *McGinley v. Houston*, 361 F.3d 1328, 1330 (11th Cir. 2004). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009).

B. Georgia's Statutory Scheme

As Defendants acknowledged in their Memorandum of Law in Support of Motion to Dismiss, (Doc. 4-1, at 4), under Georgia law, persons who wish to run for office in Georgia as independent or political body candidates may do so by meeting the requirements of Ga. Code Ann. § 21-2-170 (b), which provides, in pertinent part:

> A nomination petition of a candidate seeking an office which is voted upon state wide shall be signed by a number of voters equal to 1 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected.

Similarly, Ga. Code Ann. § 21-2-180 contains an almost identical provision regarding a political body seeking to place its candidate on a state-wide ballot:

> Any political body which is duly registered as provided for in Code Section 21-2-110 is qualified to nominate candidates for state-wide public office by convention if:
>
> (1) The political body files with the Secretary of State a petition signed by voters equal in number to 1 percent of the registered voters who were registered and eligible to vote in the preceding general election; or
>
> (2) At the preceding general election, the political body nominated a candidate for state-wide office and such candidate received a number of votes equal to 1 percent of the total number of registered voters who were registered and eligible to vote in such general election.

Georgia law distinguishes between a political "body" and a political "party." A political body becomes a "party" (and its candidates are entitled to be placed on a ballot) if the body's gubernatorial or presidential candidate draws at least twenty percent (20%) of the votes cast in the state or in the nation, respectively, in the previous election. Ga. Code Ann. § 21-2-2(21).

Plaintiffs' allegations that they each are qualified political "bodies," within the meaning of this statutory scheme, (Doc. 1 at 1-2), has not been contested in this litigation and is not at issue.

C. The Constitutional Framework: Strict Scrutiny Applies

The right of citizens to form a political party is a fundamental right of the First Amendment. "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. . . . Consistent with this

tradition, the Court has recognized that the First Amendment protects 'the freedom to join together in furtherance of common political beliefs.'" *California Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S. Ct. 2402 (2000), *citing Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 214-215, 107 S. Ct. 544 (1986). Accordingly, "[r]estrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively, and may not survive scrutiny under the First and Fourteenth Amendments." *Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 107 S. Ct. 533 (1986), *citing Williams v. Rhodes,* 393 U.S. 23, 30, 89 S. Ct. 5, 10 (1968).

Defendants will doubtlessly point out that "States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office." *Id.* Thus, courts must engage in a balancing test to weigh the rights of States to condition access to the general election ballot against the rights of citizens to form political parties that can vie for election and the rights of citizens to cast votes effectively for their chosen candidate. As the Supreme Court explained in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564 (1983):

> Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any 'litmus-paper test' that will separate valid from

> invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

460 U.S. at 789. (Internal citation omitted.)

Overall, the Court's "primary concern is with the tendency of ballot access restrictions 'to limit the field of candidates from which voters might choose.' Therefore, '[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.'"*Anderson*, 460 U.S. at 786. (Internal citation omitted.) Where, as in the case at bar, "the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest." *Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S. 214, 222, 109 S.Ct. 1013 (1989). (Internal citation omitted.)

In other words, strict scrutiny applies. To the degree that a State would thwart "the opportunities of all voters to express their own political preferences" by "limiting the access of new parties to the ballot," the Court has "called for the

demonstration of a corresponding interest sufficiently weighty to justify the limitation." *Norman v. Reed*, 502 U.S. 279, 288-89, 112 S. Ct. 698 (1992). Further, even where states can show a compelling state interest, they must "adopt the least drastic means to achieve their ends." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185, 99 S. Ct. 983 (1979).

D. The Court Below Erred in Failing to Consider the Actual and Comparative History of Ballot Access Efforts in Georgia.

In assessing the constitutionality of ballot access restrictions, "[W]hat is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot. The Constitution requires that access to the electorate be real, not 'merely theoretical.'" *American Party of Texas v. White*, 415 U.S. 767, 783, 94 S. Ct. 1296 (1974). In that connection, the Court should consider "ballot access history" as "an important factor in determining whether restrictions impermissibly burden the freedom of political association." *Lee v. Keith,* 463 F.3d 763, 769 (7th Cir. 2006), *citing Storer v. Brown*, 415 U.S. 724, 742, 94 S. Ct. 1274 (1974).

Thus, ballot access requirements that raise the bar so high as to virtually prevent the candidates of new or minority parties from appearing should not survive strict scrutiny analysis. "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an

equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. . . . Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past." *Williams*, 393 U.S. at 31-32.

The court below gave no consideration to the real-world operation and impact of the statutory scheme at issue, a scheme that has so constricted ballot access for presidential candidates in the state that no independent or minor party presidential candidate, has successfully petitioned to achieve ballot access in Georgia since 2000, when Pat Buchanan qualified as an independent presidential candidate.[3] (Doc. 5-4, at 1), despite concerted, sustained efforts by the Plaintiff Parties and despite demonstrable levels of more than a modicum of support from the electorate, both nationally and in Georgia. (Docs. 5-1, 5-3, 5-4.)

Defendants have cited to the State's legitimate interest "in avoiding

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3 Although not a fact of record, Plaintiffs acknowledge that the Court may take judicial notice of the fact that Libertarian Party presidential candidate Gary Johnson did achieve ballot status in Georgia in 2012, based on that party securing more than one percent of the vote in a previous statewide election, per Ga. Code Ann. § 21-2-180, the latter fact noted in Doc. 4-1, at 4 n. 5.

confusion, deception, and even frustration of the democratic process at the general election." (Doc. 4-1, at 10, *citing Jenness v. Fortson,* 403 U.S. 431, 442, 91 S. Ct. 1970 (1971). This is sometimes described as an interest in "avoiding overcrowded ballots." *Storer*, 415 U.S. at 732. But by failing to examine the actual record, the court below failed to engage in the balancing test required of it under the First Amendment, to determine whether the law in question is "narrowly tailored" to serve the state's interest. *Eu*, 489 U.S. at 222.

E. The Court Below Failed to Consider the Special Constitutional Considerations That Arise in Presidential Elections.

In dismissing the Complaint, the court below relied principally on three authorities upholding Georgia's 5 percent (of registered voters in a jurisdiction) petitioning requirement for offices other than statewide office, holding that if the 5 percent rule passed constitutional muster, a 1 percent rule must also pass:

> Challenges to Georgia statutory scheme similar to those asserted by Plaintiffs have been unsuccessful in the past. *Jenness v. Fortson*, 403 U.S. 431 (1971) (upholding the 5 percent petition requirement under Georgia law); *Cartwright v. Barnes*, 304 F. 3d 1138 (11th Cir. 2002) (upholding 5 percent petition requirement under Georgia law); *Coffield v. Kemp*, 599 F. 3d 1276 (11th Cir. 2010) (upholding Georgia's 5 percent petition rule as not "too burdensome"). In each of these instances, the Courts held that the requirement under O.C.G.A. § 21-2-170 for a petition containing at least 5 percent of the registered voters for certain elections was not unconstitutional. Accordingly, the Court concludes that the requirement that a petition contain 1 percent of the registered voters would not be unconstitutional.
>
> (Doc. 10, at 3-4.)

While logical on its face, this analysis not only ignores differences of scale that a candidate for statewide office must face (i.e., 1 percent of an entire state's registered voters presents a challenge of a different order of magnitude than 5 percent of the registered voters in a single county); it not only ignores the historical record in Georgia, as presented in the previous section of this Argument, and it not only ignores other changes in the American political landscape since *Jenness* was decided in 1971.[4] Most significantly, it completely fails to account for settled precedent holding that a national election for president of the United States presents an entirely different constitutional calculation.

This was first recognized by the U.S. Supreme Court when it struck down an Ohio statute that overly restricted the ability of independent presidential candidates to appear on the general election ballot:

> [I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing

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4 For example, in the year after *Jenness* was decided, the Supreme Court ruled that the Fifth Amendment protects the right of private owners of shopping centers to restrict First Amendment rights of citizens on their premises, thus limiting the ability to petition at shopping malls, absent special permission from the owners. *Lloyd Corp., Limited v. Tanner*, 407 U.S. 551, 569-70, 92 S. Ct. 2219 (1972).

deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries.

Anderson v. Celebrezze, 460 U.S. 780, 794-795, 103 S. Ct. 1564 (1983)

In *Bergland v. Harris*, 767 F.2d 1551 (11th Cir.1985), this Court noted that the prior Supreme Court holding in *Jenness* did not relieve the district court of its responsibility to conduct the careful balancing test required by *Anderson* and other authorities – in part because of the unique considerations present in a presidential election:

Contrary to the State's argument, the two cases which have upheld the Georgia provisions against constitutional attack by prospective candidates and minor political parties do not foreclose the parties' right to present the evidence necessary to undertake the balancing approach outlined in *Anderson v. Celebrezze*. *Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 29 L.Ed.2d 554 (1971), and *McCrary v. Poythress*, 638 F.2d 1308 (5th Cir.), *cert. denied*, 454 U.S. 865, 102 S.Ct. 325, 70 L.Ed.2d 165 (1981), both involved candidates for statewide or local office. *McCrary* expressly noted that the analysis of a challenge by a presidential candidate might compel a different result. *McCrary*, 638 F.2d at 1314 n. 5. . . . The Supreme Court emphasized in *Anderson* that "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." The difference between state and local offices and federal offices, stressed by plaintiffs in this case, requires a different balance than that used in weighing the state interests against the burdens placed on candidates for statewide and local offices in in *Jenness* and *McCrary.*

767 F.2d at 1554-55.

This Court recognized the vital distinction between presidential races and other statewide races, in *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007). In

upholding Alabama's three percent signature-gathering requirement in the context of a State Senate race, *id.* at 896, this Court again cited to and distinguished *Anderson*:

> *Anderson* is different in two material ways. First, *Anderson* involved a presidential election where the Supreme Court noted that "the State has a less important interest in regulating Presidential elections than statewide or local elections. . . ." *Anderson,* 460 U.S. at 795, 103 S.Ct. at 1573. In contrast, the Alabama statute, challenged by plaintiffs, addresses only statewide and local elections, and a separate Alabama statute not at issue on appeal governs independent *presidential* candidates.

490 F.3d at 907. *See also* 905 n.12 (further noting that lower signature gathering requirement for presidential candidates in Alabama is appropriate under *Anderson*, since "presidential elections call for a different balancing of interests than statewide or local races.)

More recently, in *Shugart v. Chapman*, 366 Fed. Appx. 4, No. 09-14250 (11th Cir. Feb 10, 2010), this Court rejected a similar challenge by two congressional candidates seeking access to the ballot in Alabama, reiterating the above passages from *Swanson*, and adding that the distinction between ballot access requirements for election to a U.S. Congressional District and U.S. President "is critical," because:

> Alabama's interests in regulating an office elected entirely by Alabama voters (House District 6) are much greater than its interests in regulating an office elected only in small part by Alabama voters (the U.S. President). *See Swanson*, 490 F.3d at 905 n.12 (citing *Anderson*, 460 U.S. at 795, 103 S. Ct. at 1573); *see also Wilson v. Firestone*, 623 F.2d 345, 346 (5th Cir. 1980) (distinguishing *Illinois State Board* and rejecting equal protection challenge to a Florida law requiring fewer signatures on the petition of an independent candidate for U.S. President than for an independent candidate for a statewide office).

No. 09-14250 at 4.

Nowhere did the district court engage in the kind of balancing test, specific to presidential election contests, required by *Anderson* and this Court's binding precedent in *Bergland*, *Swanson* and *Shugart*. Instead, it relied on the inapposite precedent of *Jenness*, which concerned candidates for Governor and Congress, 403 U.S. at 432 n. 3, *Cartwright v. Barnes*, 304 F. 3d 1138 (11th Cir. 2002), concerning a challenge by Congressional candidates, *id.* at 1139, and *Coffield v. Kemp*, 599 F. 3d 1276 (11th Cir. 2010), another challenge by yet another Congressional candidate. *Id.* at 1277.

The lower court's reliance on these authorities was misplaced. Its error is plain and its order dismissing the Complaint should be reversed.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants Green Party of Georgia and Constitution Party of Georgia respectfully request that this Court reverse and vacate the district court's Order denying Plaintiffs' Motion for Reconsideration, (Doc. 14), and its prior Order dismissing Plaintiffs' Complaint, (Doc. 10), and either enter an Order finding the statutes at issue unconstitutional, or, in the alternative, remanding this cause back to the district court with instructions to reinstate this cause, and for further proceedings consistent with its holding.

Respectfully Submitted,
GREEN PARTY OF GEORGIA and
CONSTITUTION PARTY OF
GEORGIA, PLAINTIFFS

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