IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GREEN PARTY OF GEORGIA and CONSTITUTION PARTY OF GEORGIA,	*	
Plaintiffs,	*	CASE NO.: 1:12CV01822-RWS
v.	*	
BRIAN KEMP, Georgia Secretary of State,	*	
Defendant.	*	

DEFENDANT BRIAN KEMP'S
BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND PROCEDURAL HISTORY

Plaintiffs, two political bodies, filed this action on May 25, 2012 asserting that O.C.G.A. § 21-2-170 constitutes an unconstitutional burden on Plaintiffs' associational rights under the First and Fourteenth Amendments, and the Elections Clause, U.S. Const. Art. I, Sec. 4. Plaintiffs assert that they wish to have their candidates on the general election ballot for President of the United States. Doc. 1 ¶¶ 3-4. Plaintiffs bring both facial and as applied challenges to O.C.G.A. § 21-2-170.

Defendants[1] filed a Motion to Dismiss on June 22, 2012. Doc. 4. Plaintiffs then filed a motion for summary judgment on June 27, 2012. Doc. 7. On July 17, 2012 this Court granted Defendant's motion to dismiss and denied Plaintiffs' summary judgment as moot. Doc. 10. Plaintiffs appealed, and on January 6, 2014, the Eleventh Circuit Court of Appeals reversed this Court's Order, rejecting a "litmus-paper test" and holding that "[t]o determine whether a ballot access law violates the First and Fourteenth Amendments, we follow the approach laid out in *Anderson v. Celebreeze*, 460 U.S. 780, 103 S. Ct. 1564 (1983)." Doc. 20 at 4. The Court of Appeals also remanded the case with instructions to dismiss the claims against the State of Georgia as barred by the Eleventh Amendment. Doc. 20 at 6.

On remand, the parties filed response and reply briefs on Plaintiffs' motion for summary judgment without engaging in any discovery. Docs. 29 and 34. On May 19, 2015, this Court denied Plaintiffs' motion for summary judgment. Doc. 35. This Court held that "on the present record, . . . the Court cannot conclude that the challenged provisions unconstitutionally burden Plaintiffs' First and Fourteenth Amendment rights." Doc. 35 at 33-34. The parties have now conducted extensive

[1] Plaintiffs initially sued both Secretary of State Kemp and the State of Georgia. Doc. 1 ¶ 6. The State of Georgia was dismissed as a Defendant on July 17, 2012. Doc. 10.

discovery and Defendant now submits this motion for summary judgment on a more fully developed record.

II. BRIEF SUMMARY JUDGMENT FACTS AND BALLOT ACCESS STATUTES[2]

Plaintiffs, the Constitution Party of Georgia and the Georgia Green Party, are both political bodies as defined by O.C.G.A. § 21-2-2(23). Neither Plaintiff has had its candidates on the general election ballot for a statewide office in Georgia. The Georgia Green Party was organized on December 9, 1995. The Constitution Party of Georgia is a successor party to the U.S. Taxpayers of Georgia. Neither political body has ever succeeded in qualifying to have their candidates' names placed on the general election ballot pursuant to O.C.G.A. § 21-2-170(b) or § 21-2-180.

Under Georgia law, political organizations are divided between political bodies and political parties. O.C.G.A. § 21-2-2(23) through (25). A political organization that at the preceding general election nominated a candidate for Governor, and that candidate received at least 20% of the vote, is labeled a political party. O.C.G.A. § 21-2-2(25). In Georgia, only the Republican and

[2] Defendant has filed a Statement of Material Facts not in Dispute which more fully sets forth the material undisputed facts in the case. Those facts are incorporated herein by reference.

Democratic parties are political parties as defined by state law.[3] Political parties nominate their candidates by primary election and the candidate that gets 50% or more of the primary vote is automatically included on the general election ballot. *See* O.C.G.A. § 21-2-130(1).

Political organizations that are not political parties are defined as political bodies in Georgia. O.C.G.A. § 21-2-2(23). Political body candidates do not have to garner support in a primary election. Rather, political bodies may be included on the general election ballot by demonstrating a modicum of support in other ways.[4] First, a political body or political body candidate may petition to get on the ballot. For elections to statewide office, including the Presidency, the petition must be signed by 1% of the state's "active" registered voters. O.C.G.A. § 21-2-170(b) and § 21-2-180(1);[5] Affidavit of Chris Harvey, attached hereto as

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[3] Of course, political parties must continue to garner at least 20% of the vote at each general election to continue their status as a political party. *See* O.C.G.A. § 21-2-2(25).

[4] As in *Storer v. Brown*, 415 U.S. 724, 725 (1974), "[t]he [political body] candidate need not stand for primary election but must qualify for the ballot by demonstrating substantial public support in another way."

[5] Plaintiffs' complaint appears to challenge only O.C.G.A. § 21-2-170 rather than O.C.G.A. § 21-2-180. One statute, O.C.G.A. § 21-2-170, governs access to the ballot by petition for independent and political body *candidates*. O.C.G.A. § 21-2-180 governs the petition requirements for *political bodies.* As political bodies, Plaintiffs may petition to have an entire slate of statewide candidates placed on the general election ballot via one petition. *See* O.C.G.A. § 21-2-180. While both

Exhibit A, ¶ 5. Second, a political body or political body candidate may be placed on the general election ballot if in the preceding general election that political body nominated a candidate and the candidate received votes equal to at least 1% of the total number of registered voters. O.C.G.A. § 21-2-180(2). Both of these methods allow political bodies with a modicum of support access to the general election ballot.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is proper if there is no genuine dispute regarding any material fact and the defendant is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). The moving party must show that there is an absence of evidence to support the nonmovant's case; the moving party is not required to negate his opponent's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 325 (1986). Once that showing is made, the burden shifts to the nonmovant to demonstrate that there is a material issue of fact. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The mere existence of some factual dispute does

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statutory provisions require the same number of petition signatures, political bodies filing a petition via O.C.G.A. § 21-2-180 have up to fifteen (15) months to collect signatures. O.C.G.A. § 21-2-182. Independent and political candidates submitting a petition pursuant to O.C.G.A. § 21-2-170(b) have six (6) months to collect petition signatures. O.C.G.A. § 21-2-170(e).

not preclude summary judgment; rather, a plaintiff must establish a *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original).

On summary judgment, the court must construe the facts in the light most favorable to the non-moving party, but the court is not required to accept any interpretation "no matter how strained." *Rowe v. Fort Lauderdale*, 279 F.3d 1271, 1277 and 1278 n.6 (11th Cir. 2002). Moreover, "when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). Thus, in *Scott*, the plaintiff's "version of events [was] so utterly discredited by the record that no reasonable jury could have believed him," and should not have been considered on summary judgment. *Id.*

IV. GEORGIA'S STATUTORY SCHEME REGULATING ACCESS TO THE GENERAL ELECTION BALLOT IS CONSTITUTIONAL

The Supreme Court has held that "[w]hen deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons v. Twin Cities*

Area New Party, 520 U.S. 351, 358 (1997) (internal citations and quotation marks omitted). The Court has recognized that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer*, 415 U.S. at 730. "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Timmons*, 520 U.S. at 358 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Here, Georgia's regulatory scheme imposes only reasonable nondiscriminatory restrictions that do not severely burden plaintiffs' constitutional rights.[6]

As this Court noted in its Order denying Plaintiffs' motion for summary judgment, the applicable standard in this case requires that:

> a court must '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.' *Anderson*, 460 U.S. at 789. Next, the court must 'identify and evaluate the precise interests put forward by the State as justification for the burden imposed by its rule.' *Id.* In making this determination, the court must consider 'the legitimacy

[6] There is no claim that Plaintiffs are being discriminated against vis-à-vis any other group or because of their beliefs.

> and strength of each of those interests' as well as 'the extent to which those interests make it necessary to burden the plaintiff's rights.' *Id.*"[7]

Doc. 35 at 17.

Georgia requires that a political body have a modicum of support *before* they are placed on the general election ballot.[8] "While there is no 'litmus-paper test' for deciding a case like this, [*Storer*, 415 U.S. at 730], it is now clear 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." *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986). In other words, a State may "reserve the general election ballot 'for major struggles.'" *Id.* at 196 (quoting *Storer*, 415 U.S. 724). By every indicia available, petition signatures, volunteers, and convention attendees, Plaintiffs, political bodies, have failed to demonstrate anything more than a handful of adherents.

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[7] In *Anderson*, the Supreme Court struck down an Ohio filing deadline for independent candidates. Ohio required independent candidates to declare their candidacies in March, 75 days before party primaries, and 229 days before the general election. 460 U.S. at 783.

[8] Plaintiffs' expert, Richard Winger, concludes that Plaintiffs enjoy a modicum of support, but defines "modicum" as "a small amount." Winger Depo, Exh. D p. 35 lns. 5-17. The Supreme Court however, has held that "States have an 'undoubted right to require candidates to make a preliminary showing of *substantial support* in order to qualify for a place on the ballot. . . .'" *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986) (emphasis added) (quoting *Anderson*, 460 U.S. at 788-789 n. 9).

A. Prior Cases Upholding Georgia's Ballot Access Statutes Precludes Any Facial Challenge

As an initial matter, Plaintiffs' facial challenge to O.C.G.A. § 21-2 -170 must fail as this statute has been previously held constitutional in a number of applications. Generally, a facial challenge can succeed only when a plaintiff shows that "no set of circumstances exists under which the [statute] would be valid, i.e., that the law is unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).[9]

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation.. . . Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander v. TVA*, 297 U.S. 288, 346–347, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring) (quoting *Liverpool, New York & Philadelphia S. S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S. Ct. 352, 28 L. Ed. 899 (1885)). Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.

[9] An exception to this general rule applies only for First Amendment overbreadth challenges. Plaintiffs do not bring such a challenge here, however.

Wash. State Grange, 552 U.S. at 450-451. Here, the challenged statute, O.C.G.A. § 21-2-170, has been repeatedly upheld by both the United States Court of Appeals for the Eleventh Circuit and the Supreme Court of the United States. *See Jenness v. Fortson*, 403 U.S. 431 (1971) (challenging 5% petition requirement under former Georgia Code § 24-1010 (1970); *McCrary v. Poythress*, 638 F.2d 1308 (5th Cir. 1981) (same); *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002) (challenge, pursuant to the Qualifications Clause, U.S. Const. Art I, Sec. 2, cl. 2, to 5% petition requirement in O.C.G.A. § 21-2-170(b) for congressional elections); *Coffield v. Handel*, 599 F.3d 1276 (11th Cir. 2010) (challenge to 5% petition requirement for congressional elections).[10] As the Eleventh Circuit explained in *Coffield*, "[o]ur Court and the Supreme Court have upheld [O.C.G.A. 21-2-170(b)] before . . . [and] [t]he pertinent laws of Georgia have not changed materially since the decisions in *Jenness* and *Cartwright* were made." *Coffield*, 599 F.3d at 1277. These prior holdings preclude any possibility that the challenged statute is unconstitutional in *all* of its applications.

[10] O.C.G.A. §21-2-170(b) sets out the petition requirements for candidates petitioning for both statewide (1%) and non-statewide (5%) elective offices.

B. The Burdens Imposed by Georgia's Ballot Access Laws Are Reasonable and Non Discriminatory

Both the Eleventh Circuit and the United States Supreme Court have recognized that States may provide alternate methods of getting on the general election ballot for political parties, whose candidates must run in party primaries, and other political organizations.

> The fact is, of course, that from the point of view of one who aspires to elective public office in Georgia, alternative routes are available to getting his name printed on the ballot. He may enter the primary of a political party, or he may circulate nominating petitions either as an independent candidate or under the sponsorship of a political organization. We cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths, neither of which can be assumed to be inherently more burdensome than the other.

Cartwright, 304 F.3d at 1142 (quoting *Jenness*, 403 U.S. at 440-441).

1. Plaintiffs Do Not Have a Modicum of Support

As explained above, Georgia provides two routes for political bodies to get on the general election ballot, by petition or by garnering sufficient votes at the preceding general election. *See* O.C.G.A. § 21-2-180(1) and (2).[11] Both methods require the political body to demonstrate a modicum of support equal to 1% of the total number of registered voters at the preceding general election. *Id.* Importantly,

[11] Since Plaintiffs are political bodies, and not candidates, Defendant will focus on O.C.G.A. § 21-2-180 rather than O.C.G.A. § 21-2-170. However, as noted above, the 1% rule is the same under both statutes.

once a political body has qualified by petition, and one petition can include an entire *slate* of candidates for *all* statewide offices, they need only garner support equal to 1% of all registered voters for any *one* candidate, to remain on the general election ballot for *all* statewide races in the following general election. *See* O.C.G.A. § 21-2-180(2). This threshold showing of support that is needed to remain continuously on the general election ballot is relatively modest. Deposition of Plaintiff's Expert, Richard Winger, Exh. D, p. 30 lns. 4 -14. Georgia's Libertarian Party, a political body, has succeeded in having statewide candidates on the general election ballot in Georgia since 1988. Affidavit of Chris Harvey, Exh. A ¶¶ 7-8.

Additional statewide candidates that have appeared on the general election ballot by petition in Georgia include Lenora Fulani and Joyce Dattner, New Alliance candidates for president and vice president in 1988; Calvin Peterson, New Alliance candidate for Public Service Commission in 1988;[12] Ross Perot and James Stockdale, Independent candidates for president and vice president in 1992; Ross Perot and Pat Choate, Reform Party candidates for president and vice

[12] As noted in the Affidavit of Chris Harvey, it is believed that these candidates were on the general election ballot as a result of one petition filed pursuant to O.C.G.A. § 21-2-180. Exh. A ¶ 7 n. 1. Plaintiffs' expert witness, Richard Winger, also testified that only one petition was submitted to the State. Winger Depo, Exh. D, p. 92, lns. 9-11.

president in 1996; and Pat Buchanan, Independent candidate for president in 2000.[13] *See* Exh. A ¶ 7. Of course, the Libertarian Party, a political body, has been successful in having its nominees for president and vice president on *every* presidential general election ballot since 1988. It is because the Libertarian Party has been able to garner sufficient votes (1% of the registered voters) at every general election since 1988 that they remain on the general election ballot without the need to gather petition signatures for any statewide office. Therefore, statements that no party or independent candidate has "successfully" petitioned to get on the general election ballot for statewide office since 1988 must be viewed in the context of the political reality that the Libertarian Party does not *need* to file petitions. In other words, the lack of political body petitions does not mean that these bodies have been excluded from the political process by Georgia's regulatory scheme.[14]

One measure of the difference in support for the Libertarian Party of Georgia and Plaintiffs, the Georgia Green Party and the Constitution Party of Georgia, is their petition efforts and success for state legislative races. The

[13] While Pat Buchanan ran as a Reform Party candidate in some states, he appeared on the general election in Georgia as an Independent. Exh. A ¶ 7.

[14] Plaintiffs' expert witness, Richard Winger, fails to take both the Libertarian Party's success *and* Plaintiffs' lack of significant petition attempts into account in measuring the burden of Georgia's ballot access laws on Plaintiffs. *See* Winger Depo, Exh. D, p. 28 lns. 13 - p. 29 ln. 4; p. 50 ln. 21 – p. 51 ln. 24.

Libertarian Party's access to the general election ballot, for *statewide* candidates, has been repeatedly secured, since 1988, without the need of a petition. However, the Libertarian Party must still submit a petition to get its candidates for state legislative offices, i.e., non-statewide offices, on the general election ballot.[15] Since 1990, the Libertarian Party has repeatedly had candidates on the general election ballot. *See* Exh. A ¶ 7. At least one Libertarian and/or Independent candidate appeared on the general election ballot for a state legislative district in 1990, 1996, 2000, 2002, 2004, 2006, 2008, 2010, and 2014. *Id.* In 2000 alone, six candidates qualified for the general election ballot, for a state legislative seat, by petition. *Id.*

In contrast, no Georgia Green Party or Constitution Party of Georgia candidates have ever qualified by petition for a state legislative district. In fact, members of the Georgia Green Party have debated how best to grow their party, including by the use of election campaigns, and whether petition efforts for candidates on the top of the ticket is an effective strategy. *See* Exhibit A-7, Minutes of the Georgia Green Party 2008 Convention, p. 12[16] (member suggesting

[15] For offices that are not statewide, a candidate must get a petition signed by 5% of the active registered voters in the district for which they are seeking election. O.C.G.A. § 21-2-170(b); Exh. A. ¶ 5.

[16] The page numbers correspond with the page number of the document on the bottom right corner, and not any ECF page number.

"running for office as a tool to build the GGP [and] . . . remind[ing] the GGP not to sink all of its money and time into top-of-ballot races like President."); p. 12 (member "[c]ommenting on the founding history of the GGP," and how "in 1998, he first ran statewide as a Lt. Governor candidate in GA, and his whole campaign was about identifying other candidates."); p. 13 (member stating that "money for the campaign was a lesser problem than having enough people (volunteer or paid) to circulate the petition door-to-door."); p. 13 (member "continues to believe that with the enthusiasm and loyalty McKinney can inspire, the GGP could still mobilize forces to get her on the ballot. *If the GGP had built a ballot access effort*, then the McKinney campaign could plug into it with its volunteers.") (emphasis added); p. 14 (member "explained that she had accepted her role with the McKinney campaign, as state volunteer coordinator, because no one else had stepped up."); p. 14 (member stating that "some folks stepped down or became inactive on the CC because they felt that GGP's emphasis on ballot access petitioning is not an organizing strategy.") (emphasis added). All of these statements suggest the Georgia Green Party is having an internal struggle on how to grow its party and the Georgia Green Party lacks sufficient membership willing to do the work.[17] Dr. Lawrence suggests that the internal struggles of the Georgia

[17] *See Stein v. Ala. Sec'y of State*, 774 F.3d 689, 695 (11th Cir. 2014) (explaining

Green Party hampered its efforts to collect sufficient petition signatures in support of Ralph Nader's candidacy. Exh. H pp. 12-13. In fact, the Georgia Green Party's 2000 delegation was evenly split between Ralph Nader and Stephen Gaskin. *Id.* and Exh. A-5 p. 18. The Georgia Green Party has never supported the National Green Party's presidential candidates with 100% of its delegates. *See* SMF nos. 1, 53, 58, 60, 62, and Exhibits A-5 through A8. In the most recent presidential election, the Georgia Green Party split their delegate votes with nine (9) supporting Roseanne Barr, and only three (3) supporting the National Green Party candidate, Jill Stein. *See* Exh. A-8 p. 3 of Minutes. Nor have the Georgia Green Party's petition efforts demonstrated support by more than a handful of volunteers. *See* Exh. A ¶¶ 9-12 and 15 (describing petition efforts); SMF nos. 38-47.

Similarly, the Constitution Party of Georgia does not have wide support. The Constitution Party has never submitted a nomination petition to the Secretary of State's Office.[18] Exhibit A ¶ 20-21. In 2000 the party collected only 1,000

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that "[b]allots serve primarily to elect candidates, not as forums for political expression.") (quoting *Timmons*, 520 U.S. at 363). "[T]o the extent Plaintiffs argue their associational rights [are] burdened because the Party Plaintiffs and their candidates could not use the ballot as a vehicle to communicate with voters . . . the burden they shouldered was not severe. *Id.*

[18] The U.S. Taxpayer's Party, the predecessor party to the Constitution Party, did collect approximately forty thousand (40,000) signatures in three weeks during a

signatures in support of its nominating petition.[19] Exh. C no. 1. In 2004 the party collected approximately 2,000 signatures in support of its nominating petition. *Id.* In 2008 the party collected approximately 1,000 signatures in support of its nomination petition. *Id.* In 2012, the Constitution Party of Georgia had "a small effort to collect signatures but it really wasn't that organized." Depo of Ricardo Davis, Exh. F, p. 32 ln. 25 – p. 33 ln. 2.

Finally, one additional example of the Constitution Party's lack of support is the small number of attendees at the party's annual conventions. Only fifty-two people attended the Constitution party of Georgia's 2004 state convention. Exhibit A-10 p. 1 ¶ 1 of Minutes. The average attendance at the Constitution Party of Georgia's annual conventions has been fifty people or less. Favorito Depo, Exh. G, p. 34 lns. 11-23.

2. The Petition Requirements Are Not Unduly Burdensome

Several characteristics of Georgia's ballot access laws lessen the burden of collecting petition signatures. First, a political body has *fifteen (15) months* to

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1996 ballot effort. Davis Depo, attached hereto as Exhibit F, p. 15 ln. 15 – p. 17 ln. 12. Many of the petition pages were invalidated because persons acting as notaries on the petition pages also circulated the petition. *See* Exh. 1 to Interrogatory Responses of Constitution Party of Georgia, attached hereto as Exh. C.

[19] The Secretary of State's Office has no records of any petitions being submitted by the Constitution Party of Georgia.

collect petition signatures.[20] O.C.G.A. § 21-2-182; *see also* Report of Dr. Christopher Lawrence, Exh. H, pp. 3-4.[21] There is no geographic distribution requirement for petition signatures that is imposed by the State.[22] *See generally* O.C.G.A. § 21-2-182 and §21-2-183; Report of Dr. Lawrence, Exh. H, p. 4; Exh. A ¶ 34. A voter may sign as many different petitions as they wish.[23] *Id.* Voters that voted in a party primary may still sign the petition. *See generally* O.C.G.A. § 21-2-182 and § 21-2-183 ; Report of Dr. Lawrence, Exh. H, p. 4.[24] There is also no

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[20] *See Libertarian Party of Florida v. Florida*, 710 F.2d 790, 794 (11th Cir. 1983) (noting that a 188 day period to collect 144,492 petitions compared favorably to shorter periods found to be constitutional); *Storer*, 415 U.S. at 740 ("Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden. Signatures at the rate of 13,542 per day would be required, but 1,000 canvassers could perform the task if each gathered 14 signers a day. On its face, the statute would not appear to require an impractical undertaking for one who desires to be a candidate for President.")

[21] Dr. Lawrence's report was previously filed with the Court as part of Defendant's expert disclosures. *See* Doc. 61-1.

[22] *See Libertarian Party of Florida*, 710 F.2d at 794 (recognizing that a lack of geographic distribution requirement eases the burden on the party).

[23] The Eleventh Circuit has recognized permitting voters to sign multiple petitions eases the burden of collecting petition signatures. *See Libertarian Party of Florida*, 710 F.2d at 794 (comparing Florida's requirement with the "New York law providing that a person may not sign a nominating petition if he or she has signed a petition of another candidate for same office," which was upheld. *See Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 997 (S.D.N.Y.), *aff'd mem.*, 400 U.S. 806 (1970)).

[24] In *American Party of Texas v. White*, 415 U.S. 767, 782 n. 14 (1974), the Supreme Court upheld a petition requirement where:

> [v]oters signing [ ] supplemental petitions had to swear under oath that they had not participated in another party's primary election or

limit on how many petition signatures a political body or candidate may submit, and there is no cost imposed to verify the petition signatures.[25] Chris Harvey Aff., Exh. A ¶ 28-29. These measures result in the pool of available voters, to sign the qualifying petitions, being as large as possible.

C. Georgia has a Legitimate Interest in Limiting the General Election Ballot to Political Bodies and Parties That Have Demonstrated a Modicum of Support

The Supreme Court has repeatedly held that "in order to avoid burdening the general election ballot with frivolous candidacies, a State may require parties to demonstrate 'a significant modicum of support' before allowing their candidates a place on that ballot." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) (quoting *Jenness*, 403 U.S. at 442); *Am. Party of Tex.*, 415 U.S. at 789 ("requiring independent candidates to evidence a *significant* modicum of support is not unconstitutional.") (internal quotation omitted); *see also Stein*, 774 F.3d at 700 (the Eleventh Circuit adopted the opinion of the Middle District of Alabama as its own)

> nominating process. In rejecting a First Amendment challenge to the 1% requirement, [the Supreme Court] asserted that the State's interest in preserving the integrity of the electoral process and in regulating the number of candidates on the ballot was compelling and reiterated the holding in *Jenness* that a State may require a preliminary showing of significant support before placing a candidate on the general election ballot.

Munro, 479 U.S. at 194.

[25] *See Libertarian Party of Florida*, 710 F.2d at 794.

(explaining that "it is settled law that [a State] can demand 45,000 signatures on a petition before it lets a minor party on the ballot."). Importantly, States are not required, prior to regulation, to make a showing "of the existence of voter confusion, ballot overcrowding, or the presence of "frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." *Munro*, 479 U.S. at 194-195. As the Supreme Court has explained,

> [t]o require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Id. at 195-196.

Here, Georgia has enacted measures to limit ballot confusion and overcrowding in the general election by providing that only those political organizations that can garner support from more than 1% of the state's active registered voters will appear on the general election ballot. Even Plaintiff's expert witness, Richard Winger, concedes that without some regulatory measures, Georgia would likely have a crowded general election ballot. Winger Depo, Exh.

D, p. 47 lns. 13-20; p. 55 ln. 4-7; *see also* Report of Dr. Christopher Lawrence, Exh. H, pp. 8-9 (describing elections in Florida and California and noting that over 200 candidates have qualified with the FEC for the 2016 Presidential election.)[26]

Plaintiffs take issue with the number of petition signatures required, not with the premise that some restrictions are needed. Winger Depo, Exh. D. p. 55 ln. 4-7; p. 99 ln. 15 – p. 100 ln. 4. However, Georgia has chosen to make the petition requirement a percentage of the active registered voters, and it has already dropped the percentage requirement to 1%.[27] Prior to 1986, Georgia had a 2.5% petition requirement. *See Bergland v. Harris*, 767 F.2d 1551, 1553 n. 3 (11th Cir. 1985); *Libertarian Party of Georgia v. Harris*, 644 F. Supp. 602 (N.D. Ga. 1986); *see also* Winger Depo, Exh. D, p. 15 ln. 17 – p. 16 ln. 4 (Winger testifying that after the

[26] Plaintiffs suggest that because Georgia does not limit candidates in the primary, it lacks an interest in doing so in the general election. Doc. 46 p. 3. As Dr. Lawrence explained however, the presidential primary in Georgia "is held on a separate date from all other elections. . . [therefore] the incremental burden of additional candidates on the State and on voter decision-making and ballot casting is likely to be low." Exh. H at 11. The presidential *general election* on the other hand, will have numerous statewide and county office elections. "[T]he fact that the State is willing to have a long and complicated ballot at the primary provides no measure of what it may require for access to the general election ballot. The State . . . [is] clearly entitled to raise the ante for ballot access, to simplify the general election ballot, and to avoid the possibility of unrestrained factionalism at the general election." *Munro*, 479 U.S. at 196.

[27] In reality, the petition requirement is less than 1% as only "active" registered voters are counted for purposes of determining the number of petition signatures required, but *both* active and inactive voters may sign the petition. Exh. A ¶ 5.

Georgia legislature dropped the petition signature requirement to 1%, the *Bergland* challenge was dismissed by Plaintiffs). Moreover, where, as here, the regulation is *not* severe, a less exacting review is triggered, "and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Timmons*, 520 U.S. at 358 (quoting *Burdick*, 504 U.S. at 434).

This Court noted, in its Order denying Plaintiffs' motion for summary judgment, that ballot access measures that are applied to a Presidential election have "an impact beyond [the State's] own borders." Doc. 35 at 33 (quoting *Anderson*, 460 U.S. at 795). There is no question that elections for the presidency are decided at the national level, and the election is "largely determined by voters beyond the State's boundaries." *Anderson*, 460 U.S. at 795. "Even so, states maintain an interest in regulating presidential elections." *Pisano v. Strach*, 743 F.3d 927, 937 (4th Cir. 2014). Here, the state's interests are voter confusion and ballot overcrowding. These interests are not lessened because the election is largely decided outside of Georgia. Therefore, the State maintains its interest in regulating ballot access, despite the fact that the Presidency is a national election.

Additionally, states have an interest which stem from their duty to select Presidential electors. The Supreme Court has recognized that "there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a

particular branch of a State's government. [The selection of presidential electors] is one of them." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (J. Rehnquist concurring). "Art II, § 1, cl. 2 'conveys the broadest power of determination' and 'leaves it to the legislature exclusively to define the method' of appointment."[28] *Id.* (quoting *McPherson v. Blacker*, 146 U.S. 1 (1892)). Here, the State of Georgia's interests in preventing ballot overcrowding and voter confusion outweigh the burdens imposed on political bodies.

Additionally, with respect to elections *other than* the presidency, Georgia has an additional interest in limiting candidates on the general election ballot to those with substantial support in order to limit run-off elections.[29] As Dr. Lawrence explains, run-off elections impose significant burdens on voters, candidates, and the State. Exh. H pp. 11-12.

V. Plaintiffs' Elections Clause Challenge Lacks Merit

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[28] The duty conferred on states to select Presidential electors is in no way related to Plaintiffs' claim pursuant to the Elections Clause. Art. I, § 4, cl. 1.

[29] Georgia's statutes governing ballot access provide for a 1% petition requirement for *all* offices elected statewide and do not differentiate between the presidential election and other statewide offices. *See* O.C.G.A. § 21-2-170(b) and § 21-2-180. Since Plaintiffs have brought a facial challenge, the State's interests in minimizing run-off elections is relevant.

U.S. Const., Art. I, § 4, cl. 1. As the text of the constitution provides, the Elections Clause pertains only to congressional elections. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2268 n. 2 (2013) (J. Thomas, dissenting) (explaining that "the state legislature's power to select the manner for appointing [presidential] electors is plenary.") (quoting *Bush v. Gore*, 531 U.S. at 104). "The Elections Clause has two functions. Upon the States it imposes the duty ('shall be prescribed') to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether." *Arizona*, 133 S. Ct. at 2253 (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-805 (1995)). Here, Plaintiffs' challenge is to the regulation of the general election ballot for President. *See* U.S. Const. Art II, § 1, cl. 2. The Elections Clause has no application.[30] Plaintiffs' claim, pursuant to the Elections Clause, should be dismissed.

CONCLUSION

Here, the Constitution Party of Georgia and Georgia Green Party have not been successful in accessing the general election ballot because neither party

[30] The Supreme Court has held that a private citizen lacked standing to sue for a violation of the Elections Clause where the harm alleged was that the Elections Clause had not been followed. *Lance v. Coffman*, 549 U.S. 437, 442 (2007).

enjoys substantial support in Georgia. "States have an 'undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot. . . .'" *Munro*, 479 U.S. at 194 (quoting *Anderson*, 460 U.S. at 788-789 n. 9). Defendant Secretary Kemp prays that Plaintiffs' claims against him be dismissed.

Respectfully submitted,

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Certificate of Service

I hereby certify that on December 22, 2015, I electronically filed **Defendant Brian Kemp's Brief in Support of Motion for Summary Judgment** using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: NONE

This 22nd day of December, 2015.

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