IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

16-11689-H

GREEN PARTY OF GEORGIA and
CONSTITUTION PARTY OF GEORGIA,

Plaintiffs/Appellees,

v.

BRIAN KEMP, GEORGIA SECRETARY
OF STATE,

Defendant/Appellant.

SECRETARY OF STATE, BRIAN KEMP'S REPLY BRIEF OF APPELLANT

On Appeal from the United States District Court
For the Northern District of Georgia

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"The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." *Anderson v. Celebreeze*, 460 U.S. 780, 788 n. 9 (1983) (citation omitted). Secretary Kemp set out in his initial brief that the district court erred by measuring the severity of the burden imposed by a 1% petition requirement without any regard to whether Appellees demonstrated substantial support. Blue Brief at 10-16.[1] Appellees in turn argue they only need to have "a small amount or portion" of support before a state is constitutionally required to put their names on the general election ballot.[2] Red Brief at 46. Appellees'

[1] All page citations are to the page number at the bottom of each page in the brief and *not* to the ECF page number.

[2] Appellees contend further that "[i]f a party can't get on the ballot it will necessarily not get broad recognition and support." Red Brief at 47. However, as this Court has observed, "[b]allots serve primarily to elect candidates, not as forums for political expression." *Stein v. Ala. Sec'y of State*, 774 F.3d 689, 695 (11th Cir. 2014) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997)). "[T]o the extent Plaintiffs argue their associational rights [are] burdened because the Party Plaintiffs and their candidates could not use the ballot

position is clearly contrary to precedent from this Court and the United States Supreme Court. *Munro v. Socialist Workers Party*, 479 U.S. 189, 193-194 (1986) (referring to both "significant modicum of support" and "substantial support" interchangeably); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) ("significant modicum of support"); *Swanson v. Worley*, 490 F.3d 894, 902 n. 9 (11th Cir. 2007) ("significant modicum of support"); *Cartwright v. Barnes*, 304 F.3d 1138, 1140 (11th Cir. 2002) ("significant modicum of support"); *Green v. Mortham*, 155 F.3d 1332, 1339 (11th Cir. 1998) ("significant modicum of support"); *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 793 (11th Cir. 1983) ("significant modicum of support"); *Mathews v. Little*, 498 F.2d 1068, 1070 (5th Cir. 1974)[3] ("significant modicum of support").

Nor do Appellees' references to *Williams v. Rhodes*, 393 U.S. 23, 34 (1968) and *Moore v. Ogilvie*, 394 U.S. 814 (1969) somehow eliminate the legitimacy of the Supreme Court requirement that independent and political body candidates first demonstrate a significant modicum of support before having access to the general election ballot. Neither *Williams* nor *Moore* addressed the "significant modicum of support" standard, but rather addressed Equal Protection challenges to election

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as a vehicle to communicate with voters . . . the burden they shouldered was not severe." *Stein*, 774 F.3d at 695.

[3] In *Bonner v. Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this Court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

structures that severely burdened the rights of candidates by either making it virtually impossible for an independent or minor party candidate to qualify or by including a distribution requirement for petition signatures that gave less populous counties greater power than more populous counties.

As Secretary Kemp set out in his initial brief, the statute at issue in *Williams v. Rhodes* made it "virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties." 393 U.S. at 25. The statute required third party candidates to collect signatures equal to 15% of the vote in the prior gubernatorial election but only required Republican and Democratic Party candidates to garner 10% of the gubernatorial vote in the prior election. 393 U.S. at 26. By simultaneously restricting those voters that could sign the petition and requiring third parties to garner greater support than major parties, the statute effectively kept anyone other than the two major parties off the ballot and froze the status quo. *See* Blue Brief at 21-22 for detailed description of the challenged Ohio statute. Here, there is no similar structure that effectively freezes the status quo. *Williams v. Rhodes* does not stand for the proposition that a state may not require independent and minor political party candidates to demonstrate a significant modicum of support. That question was simply not an issue in *Williams*.

Similarly, *Moore v. Ogilvie*, was an Equal Protection challenge to an Illinois statute that required a nominating petition for statewide office, including

presidential elector, to contain at least 200 signatures from each of 50 counties, regardless of the disparity in population among rural and urban counties.[4] As the Supreme Court noted, 93.4% of the state's voters resided in the 49 most populous counties with the 53 remaining counties containing only 6.6% of the state's voters. 394 U.S. at 816. It was this inequality in ballot access that offended the Fourteenth Amendment. 394 U.S. at 819. Nothing in *Moore* suggests a state may not require independent and political body candidates to demonstrate significant support before those candidates are placed on the general election ballot.

Here, the challenged statute imposes only a "generally applicable and evenhanded restriction[]." *Anderson*, 460 U.S. at 788 n. 9. That restriction, in turn, allows parties with significant support to appear on the ballot. The record below demonstrated that the Libertarian Party, a political body with significant support in Georgia, regularly places its candidates on the general election ballot. In measuring the burden imposed by the petition requirement, the district court erred by not taking into account the repeated success of the Libertarian Party in

[4] The Illinois statute in *Moore* required that the petition be signed by a total of 25,000 registered voters. 394 U.S. at 815. Appellees contend that "a slate of independent candidates for Presidential electors . . . obviously had little or no support since they were unpledged to any candidate." Red Brief at 47. However, the slate had submitted "the names of 26,500 qualified voters." 394 U.S. at 815. The challenge stemmed only from the distribution requirement, not the requirement that the candidates first demonstrate significant support.

gaining access to the general election ballot both by petition and by garnering votes in the general election equal to 1% of the registration.[5] *See* Blue Brief at 11-14.

The comparison to the Libertarian Party also shows why Appellees' contention that petition efforts for state legislative races are not an appropriate measure because "the burdens of qualifying by petition for a state legislative district are less than for the office of President" falls flat. Red Brief at 50. The point of the comparison is that despite the lower requirement for legislative seats neither the Georgia Green Party nor the Constitution Party of Georgia has been successful in petition efforts for state legislative seats.[6] By contrast, the Libertarian Party of Georgia has repeatedly fielded candidates for state legislative races by petition, *and* has had statewide candidates on the ballot every election since 1988 by garnering votes equal to 1% of the statewide registration for at least one candidate in every general election. R1-75-3 ¶¶ 7-8.[7]

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[5] By contrast, neither the Georgia Green Party nor the Constitution Party of Georgia were successful in collecting even the 7,500 valid petition signatures required in the district court's remedial Order striking down the 1% requirement. R7-92 at 79.

[6] Indeed, the only successful petition attempts identified by Appellees are for one county commission race and one school board race. Red Brief at 51.

[7] References to the 7 volume Appendix will include the volume number followed by the document number. For example, R1-75-3 refers to Doc. 75-3 which is included in volume I of the Appendix filed in this case. Any page number reference refers to the ECF page number which may differ from the document page number.

These undisputed facts compel a finding that the state's ballot measures do *not* freeze the status quo. Therefore, 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 v. Takushi*, 504 U.S. 428, 434 (1992)).

Here, in contrast, both the district court and Appellees insist that Secretary Kemp must demonstrate that the petition requirement was "narrowly tailored" to further the state's interests in avoiding voter confusion and ballot overcrowding. Red Brief at 39; R7-92 at 55-57. But this argument misapprehends the proper test for reasonable, nondiscriminatory regulations. . . . the test is not whether the regulations are necessary but whether they rationally serve important state interests. *Swanson*, 490F.3d at 912.

Here, the district court required that Secretary Kemp prove that "the danger of voter confusion in this case is [ ] more than theoretical." R7-92 at 64. The Supreme Court, in fact, has explained that States do *not* need to prove such confusion:

> [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.

Munro, 479 U.S. at 195-196 (emphasis added). Here, in contrast, the district court's decision required that Secretary Kemp prove that the petition requirement was necessary to avoid ballot confusion and overcrowding. That was error.

In summary, the district court erred in its application of the *Anderson* balancing test: first, by measuring the burden on Appellees' rights without regard to whether they enjoy significant support in Georgia, and second, by requiring Secretary Kemp to prove that the petition requirement is necessary to avoid ballot confusion and overcrowding.

II. The Green Party's Expert Testimony Was Unreliable and Its Lay Witness Testimony Was Inadmissible.

A. The District Court Erred by Relying on Richard Winger's Report.

Secretary Kemp set out in his initial brief that the district court also erred by relying on the testimony of Appellees' expert Richard Winger that a petition requirement of 5,000 was sufficient to avoid ballot overcrowding. It was error to accept Winger's testimony because Winger looked only at the number of times candidates actually appeared on the ballot via petition without considering whether any candidate tried to get on the ballot and whether independent and minor party candidates successfully accessed the general election ballot by some means other than a petition. *See* Blue Brief at 17-19 and 33-40. Appellees suggest that

Secretary Kemp's expert, Dr. Lawrence, agreed with Winger's testimony. Red Brief at 57. At his deposition, Dr. Lawrence was asked whether he *disputed* any of the factual allegations contained in Winger's reports. He stated he did not. R7-82-1 at 8. Dr. Lawrence was not asked to verify Winger's numbers, he was asked to offer an opinion on the severity of any burden imposed by the petition requirement and to comment on two of Wingers conclusions. R3-75-21 at 3. Commenting on Winger's conclusions did not require Dr. Lawrence to verify all of Winger's data, but rather comment on opinions Winger drew from that data. The problem with Winger's testimony is what he failed to consider. Blue Brief at 17-19 and 33-40. Appellees simply restate Winger's conclusions without addressing the problem inherent in failing to look at what efforts, if any, candidates took to get on the general election ballot. Appellees assert that "[r]egardless of whether anyone wanted to be on the ballot, or the efforts the candidates and/or party made to get on the ballot, . . . the fact is that states which required more than 5,000 signatures for candidates, but almost always fewer than 50,000, never had a crowded general election ballot." Red Brief at 59. The problem with this statement is that it *assumes*, without any evidence, that the high petition number *caused* the result, i.e., no candidates. But this Court has held that whether and to what extent candidates have sought access to the ballot *is* necessary to the determination of whether a restriction severely burdens the rights of a candidate.

See Swanson, 490 F.3d at 910 (rejecting claim that Alabama statute severely burdened Plaintiff's rights where "there [was] no evidence in the record in this case that any independent or minor party candidate sought and failed to gain ballot access. . . [therefore] the evidence in this particular record does not establish any severe burden on rights.").

Here, the district court erred in accepting Winger's conclusions that Georgia's signature requirement caused a lack of political body and independent candidates on the general election ballot because he failed to produce evidence showing that any party attempted to get on the ballot, even while claiming that 33% of the time "no candidate was able to access the ballot." R7-92 at 12. Appellees suggest that Winger simply "examined 'past experience' in determining the impact of petition requirements on access to the ballot." Red Brief at 59 (citing *Storer v. Brown*, 415 U.S. 724 (1974)). But nothing in *Storer* suggests that past success by independent and minor party candidates should be considered in a vacuum. To the contrary, *Storer* requires considering factors that Winger entirely failed to weigh. *See Storer*, 415 U.S. at 740 (explaining that the pool of available voters to sign a petition is relevant). The Supreme Court accepted that a candidate for President could be required to gather 325,000 signatures in 24 days. However, the Court's concern was whether the statutory structure left the available pool of voters "so diminished in size by the disqualification of those who voted in the

primary that the 325,000-signature requirement, to be satisfied in 24 days, is too great a burden on the independent candidates for the offices of President and Vice President." *Storer*, 415 U.S. at 740. As the *Storer* Court held, the relevant inquiry is whether "in the context of [the State's] politics, could a *reasonably diligent* independent [or political body] candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Id.* (emphasis added). Winger's failure to consider the pool of available voters to sign the petition, and his failure to consider whether any candidates even tried to access the ballot render his opinions entirely unreliable, and not responsive to the inquiries laid out by the Supreme Court.

Finally, Winger's measure of the severity of Georgia's petition requirement was premised largely on a comparison with the petition requirements of other states. The district court erred in adopting this comparison as a proper measure. R7-92 at 11-12, 58-59, 65-67. As Secretary Kemp explained in his initial brief, this Court has previously rejected similar expert witness testimony by Richard Winger. *See Swanson*, 490 F.3d at 910 (rejecting Winger testimony that "Alabama had the second toughest ballot access restrictions among all states in the 2002 election."). "[T]the legislative choices of other states are irrelevant, however, because a court is 'no more free to impose the legislative judgments of other states on a sister state than it is free to substitute its own judgment for that of the state

legislature.'" *Swanson*, 490 F.3d at 910 (quoting *Libertarian Party of Florida*, 710 F.2d at 794).

Because Winger's conclusions were not rooted in evidence, and because his comparisons went to factors that the Supreme Court and the Eleventh Circuit have both deemed "irrelevant," the district court erred adopting Winger's unreliable conclusions.

B. The Green Party and Constitution Party's Lay Witnesses Cannot Provide Expert Testimony.

The lay witnesses offered by the Georgia Green Party and Constitution Party of Georgia gave expert testimony that was not admissible. The Parties contend in their response brief that the district court properly considered all of the lay witness testimony because it "was based upon facts the witnesses perceived or observed." Red Brief at 61. But the lay witness affidavits themselves state otherwise. The affidavits of Ricardo Davis, Hugh Esco, and Dorn Swerdlin, affirmatively state that they are based on "personal experience and knowledge *and research* that [the witness has] conducted." R4-76-5 ¶ 1; R4-76-6 ¶ 1; R5-76-11 ¶ 1 (emphasis added). As set out in Secretary Kemp's Objections to the affidavits, R7-81, the affidavits are replete with hearsay testimony and lay witness testimony regarding matters which are limited to expert testimony. For example, Hugh Esco, a co-chairman of the Georgia Green Party, offered his "lay opinion" that a 1943 statute adopting a 5% petition requirement in Georgia was intended to keep "Republicans,

Communists, and Black people from accessing the Georgia ballot." R4-76-2 ¶ 11 (Plaintiffs' SMF relying on Affidavit of Hugh Esco (R-7-1 ¶ 24)). Defendant objected to the Statement of Material Fact. R7-80-2 ¶ 11; R7-81 ¶ 9. The district court adopted the statement as "fact" and Appellees repeat the statement as "fact" in their brief in this Court. R7-92 at 7; Red Brief at 15. Hugh Esco, a lay witness, has no personal knowledge of this "fact" and his opinion on the matter is not admissible. F.R.E. 701(c). The district court erred in relying on these affidavits. *See* R7-92 at 6, 15, 18, 20, 48, 49.

Similarly, Plaintiff's witness Tom Yager also offers opinions based in part on research. R4-76-4. In fact, part of Yager's testimony purports to be premised on a recommendation from Richard Winger about the number of total signatures a candidate must collect to make sure they collect a sufficient number of valid signatures. R4-76-4 ¶ 2. In reaching his estimates of what a petition campaign would cost, Yager concludes that a candidate would have to collect 78,000 petition signatures because "[a]n overage of 50% is recommended by Richard Winger." *Id.* Yager then offers his opinions about the cost of a petition campaign and opinions about the threshold number of signatures required to keep a state's ballot from getting overcrowded. R4-76-4 ¶¶ 2-7. Yager's testimony is not admissible lay witness opinion testimony. F.R.E. 701(c). The district court erred in accepting Yager's testimony. R7-92 at 17-19.

The Green Party also takes issue with Secretary Kemp's statement that the district court erred in finding that the Green Party attempted to place its Presidential candidate on the ballot in 2000, 2004, 2008, and 2012. Red Brief at 63 (asserting that "Secretary Kemp produced no evidence" to the contrary). First, the statement of material fact relied upon by the district court only stated that the Green Party had attempted to place some candidates, *not* necessarily a Presidential candidate or even any other statewide candidate, on the ballot in 2000, 2004, 2008, 2012. *Compare* R7-80-2 ¶ 23 with R7-92 at 12-13. Second, the Green Party's own witness testified that the party did *not* make efforts to get their Presidential candidate on the ballot during all of these years. Hugh Esco testified that in 2008 the Green Party leadership "chose *not* to expend their energies on a petition drive." R4-76-6 ¶ 47 (emphasis added). Appellees appear to concede this point elsewhere in their brief. Red Brief at 22-23. Esco also described the 2000 effort by Nader's campaign as "too little, too late." R4-76-6 ¶ 22; and testified that by 2004 "petitioning fatigue had set in." R4-76-6 ¶ 44. Esco testified that in 2012 the Party concentrated its petition efforts on "focus[ing] circulators on the 57th House District where they were asked to carry two petitions, one for [the HD 57] campaign and the other for the Presidential slate." R5-76-7 at ¶ 48. House District 57 is only one of the 180 state house of representative districts in the state. O.C.G.A. § 28-2-1(a)(2). Appellees appear to concede elsewhere in their brief that

no effort was made in 2012. Red Brief at 24. Therefore, the district court erred in finding that the Georgia Green Party participated in efforts to get a Presidential candidate on the ballot in 2000, 2004, 2008, and 2012.

Finally, Appellee suggests that Secretary Kemp's expert witness, Dr. Christopher Lawrence's testimony "confirm[ ] that the . . . lay witness testimony was made on personal knowledge and set out facts the witnesses were competent to testify about." Red Brief at 62. Dr. Lawrence testified in his report that he had reviewed the various discovery responses, Richard Winger's reports, and the affidavit of Jason Kafoury. R3-75-21 at 2. As noted above, Dr. Lawrence was not asked to verify the factual assertions of any witness. R7-75-21 at 3. At his deposition, Dr. Lawrence was asked whether he *disputed* any of the factual allegations contained in those documents. He stated he did not. R7-82-1 at 8-9. Dr. Lawrence did not *confirm* any witness' testimony, and he certainly could not have confirmed any witness' *personal knowledge*. Finally, Dr. Lawrence was asked about discovery responses and one lay witness affidavit, he did not testify at all about the remaining lay witness affidavits and his report reflects that he never reviewed the remaining lay witness affidavits. R3-75-21 at 2-3.

These evidentiary errors require reversal of the district court's grant of summary judgment to the Plaintiffs. On summary judgment, the moving party must show that there is an absence of evidence to support the non-movant's case.

Celotex Corp. v. Catrett, 477 U.S. 317, 323, 325 (1986). Here, both the evidence and proper application of the constitutional standard support summary judgment for the Defendant.

CONCLUSION

For the reasons set forth above and those in Appellant's initial brief, Secretary Kemp respectfully requests that the Court reverse the district court's order and grant summary judgment to Secretary Kemp.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I certify that this reply brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because this brief contains 4,342 words according to the word processing system utilized by the Office of the Attorney General.

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2016, I electronically filed the foregoing **REPLY BRIEF OF APPELLANT** with the Eleventh Circuit Court of Appeals using the CM/ECF system which will which will automatically send email notification of such filing to the following attorneys of record:

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