

**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.

**PETITION FOR REHEARING EN BANC
ON BEHALF OF APPELLANT
SECRETARY OF STATE BRIAN KEMP**

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

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GREEN PARTY, et al., v. KEMP,
DOCKET NO. 16-11689-H

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

The undersigned attorney for Appellant hereby certifies, pursuant to 11 Cir. R. 26.1-1, the following have an interest in the outcome of this case:

Anderson, Julia B., Senior Asst. Attorney General, Attorney for Secretary Kemp;

Campanella, Kelly, Asst. Attorney General, former Attorney for Secretary Kemp;

Carr, Christopher M., Attorney General, Attorney for Secretary Kemp;

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Story, Hon. Richard W., District Court Judge;

Willard, Russell D., Senior Asst. Attorney General, Attorney for Secretary Kemp;

STATEMENT REGARDING EN BANC CONSIDERATION

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this Circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:

Burdick v. Takushi, 504 U.S. 428 (1992);
Storer v. Brown, 415 U.S. 724 (1974);
Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997);
Libertarian Party of Florida v. State of Florida, 710 F.2d 790 (11th Cir. 1983);
Stein v. Alabama Secretary of State, 774 F.3d 689 (11th Cir. 2014).
Swanson v. Worley, 490 F.3d 894 (11th Cir. 2007);

In addition to the above, I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether, and if so, to what extent states retain a significant interest in managing their ballot during a Presidential election?
2. Whether, and if so, to what extent states can require that political body candidates first demonstrate a significant modicum of support before they are constitutionally required to include the candidates' names on the general election ballot for President of the United States?

3. Whether states are required to provide evidence of voter confusion and ballot overcrowding in order to sufficiently justify the imposition of ballot access measures such as a 1% petition signature requirement?
4. Whether, and if so, to what extent the legislative choices of other states have any bearing on whether a particular ballot access statute is constitutional?

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**STATEMENT OF THE ISSUES ASSERTED TO MERIT
EN BANC CONSIDERATION**

1. Whether, and if so, to what extent states retain a significant interest in managing their ballot during a Presidential election?
2. Whether, and if so, to what extent states can require that political body candidates first demonstrate a significant modicum of support before they are constitutionally required to include the candidates' names on the general election ballot for President of the United States?
3. Whether states are required to provide evidence of voter confusion and ballot overcrowding in order to sufficiently justify the imposition of ballot access measures such as a 1% petition signature requirement?
4. Whether, and if so, to what extent the legislative choices of other states have any bearing on whether a particular ballot access statute is constitutional?

**STATEMENT OF COURSE OF THE PROCEEDINGS AND
DISPOSITION OF THE CASE**

Plaintiffs/Appellees filed this action on May 25, 2012, against Secretary of State Brian Kemp and the State of Georgia. R-1. Defendants filed a motion to dismiss on June 22, 2012. R-4. Plaintiffs filed a motion for summary judgment or alternatively a motion for preliminary injunction on June 27, 2012. R-7. On July 17, 2012, the district court granted Defendants' motion to dismiss. R-10. Plaintiffs/Appellees filed a motion for reconsideration on July 24, 2012, which was denied on March 20, 2013. R-12 and R-14. Plaintiffs/Appellees filed a notice of

appeal on April 22, 2013. R-15. On January 6, 2014, this Court affirmed the dismissal of the State of Georgia as a Defendant, reversed the district court's dismissal as to Secretary Kemp, and remanded the case with instructions to apply the standard enunciated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). R-20. This Court's mandate issued on May 2, 2014, and was adopted by the district court on May 6, 2014. R-22 and R-24. On June 10, 2014, Secretary Kemp filed a response to Plaintiffs' first motion for summary judgment. R-29. Secretary Kemp filed his Answer on June 17, 2014. R-32. On May 19, 2015, the district court denied Plaintiffs' first motion for summary judgment. R-35. After discovery, the parties filed cross motions for summary judgment on Dec. 22, 2015, and Dec. 23, 2015. R-75 and R-76. On March 17, 2016, the district court denied Secretary Kemp's motion for summary judgment and granted Plaintiffs' motion for summary judgment. R-92. Judgment was entered on March 18, 2016. R-93. Secretary Kemp filed a timely notice of appeal on April 13, 2016. R-97. On January 26, 2017, oral argument was held. On February 1, 2017, the panel summarily affirmed the district court.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF THE ISSUES

Plaintiffs in this case are the Constitution Party of Georgia and the Green Party of Georgia. R-1. 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 that received at least 20% of the vote is labeled a political party. O.C.G.A. § 21-2-2(25)(A). Additionally, a political organization that at the preceding Presidential election nominated a candidate for President and whose presidential electors received at least 20% of the vote is also labeled a political party. O.C.G.A. § 21-2-2(25)(B). In Georgia, only the Republican and Democratic parties are political parties as defined by this state law structure.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. 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); R-75-3 ¶ 5. Alternatively, 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

¹ Political parties must continue to garner at least 20% of the vote for Governor at each general election, or 20% of the national vote for their presidential electors, to continue their status as a political party. O.C.G.A. § 21-2-2(25).

candidate received votes equal to at least 1% of the total number of registered voters. O.C.G.A. § 21-2-180(2).

Both the Constitution Party of Georgia and the Green Party of Georgia are political bodies as defined by O.C.G.A. § 21-2-2(23). R-75-1 ¶¶ 3 and 4, and R-79-1. Neither political body has succeeded in qualifying its candidates to appear on the general election ballot for either a statewide or state legislative office in Georgia. R-75-1 ¶¶ 38, 45, 48, 50, 66-69, 79 and R-79-1. Another political body, the Libertarian Party, has been successful in getting on the general election ballot continuously since 1988. R-75-1 ¶ 35 and R-79-1; R-75-3 ¶¶ 7-8.

ARGUMENT AND CITATIONS OF AUTHORITIES

I. Georgia has a Significant Interest in Managing its Ballot For Office of the President of the United States, Including an Interest in Limiting the Ballot to Political Bodies That Have Demonstrated Significant Support.

The panel's summary affirmance left in place a district court order holding that "the State's regulatory interest is not sufficiently important to justify" a 1% petition signature requirement for candidates seeking the office of President of the United States. R-92 at 61. The district court found, and the panel summarily affirmed, that because the election at issue here is a national election, "Defendant's interest [was] outweighed by a national interest." R-92 at 61. This holding is contrary to *Storer v. Brown*, 415 U.S. 724 (1974). There, the Supreme Court recognized, in the context of a Presidential election, that states have a "compelling interest in a manageable ballot." 415 U.S. at 743. The challenged statute in *Storer*

was more restrictive than the Georgia statute invalidated by the district court. The challenged statute in *Storer* contained a 5% petition signature requirement, roughly 325,000 signatures. Second, California voters that had voted in a party primary were disqualified from signing the candidate petition; no such prohibition is in place for signatories on Georgia ballot petitions. Additionally, all signatures for access to the California ballot had to be collected within a 24 day period beginning after the party primaries. 415 U.S. at 740. The Supreme Court accepted that California's justification for the petition requirement was "its interest in having candidates demonstrate substantial support in the community so that the ballot, in turn, may be protected from frivolous candidacies and kept within limits understandable to the voter." 415 U.S. at 743. The Court suggested that on remand the district court should consider whether, *if* the disqualification of voters that voted in party primaries significantly reduces the available pool of voters so that "the required signatures approach 10% of the eligible pool of voters, is it necessary to serve the State's compelling interest in a manageable ballot to require that the task of signature gathering be crowded into 24 days?" *Id.*

Nothing in the Supreme Court's subsequent opinion in *Anderson* changed the Court's recognition of the specific interests advanced in *Storer*. In fact, *Anderson* confirms that "[t]he 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.” 460 U.S. at 788 n. 9. In *Anderson*, the Supreme Court held, in the context of a challenge to a filing deadline for independent candidates for the office of President that was five (5) months earlier than the deadline for major parties to identify their nominees, 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.

Anderson, 460 U.S. at 795. *Anderson* applied this principle to the three interests advanced by Ohio. The interest of ballot management raised by Georgia, specifically the requirement that candidates first demonstrate a significant modicum of support, was not before the Court in *Anderson*. That interest was before the Court in *Storer* and was accepted as a compelling interest – regardless of it being a presidential race. No part of *Anderson* can reasonably be read as a retreat from the tenets set out in the *Storer* decision. *Anderson* not only did not, it could not have overruled *Storer* on this point. The district court erred by interpreting *Anderson*’s language about Presidential elections as reversing *Storer* as to Georgia’s interest in requiring candidates to first demonstrate a significant modicum of support, being a compelling interest.

Anderson proceeded to address the three interests advanced by Ohio: “voter education, equal treatment for partisan and independent candidates, and political stability.” 460 U.S. at 796. First, the Supreme Court recognized that Ohio had a

legitimate interest in voter education but determined that the filing deadline was unreasonable. 460 U.S. at 796-797. Second, with respect to the equal treatment of partisan and independent candidates, the Court recognized that because “the burdens and the benefits of the respective [qualifying date] requirements are materially different, and the reasons for requiring early filing for a primary candidate are inapplicable to independent candidates in the general election,” having the same deadline for both was *not* equal treatment. 460 U.S. at 799-800. Finally, the Court recognized because “no State could singlehandedly assure ‘political stability’ in the Presidential context,” the State’s regulatory interest was not as strong. 460 U.S. at 804. However, the Court was addressing a regulation which treated candidates of parties and non-parties unequally, thereby imposing a severe burden on independent candidates. “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 v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Unlike Ohio in the *Anderson* case, the burden imposed by Georgia’s petition requirement does not treat political bodies and political parties differently. Rather, each must demonstrate significant support before their candidates’ names are added to the general election ballot.

Here, the panel affirmed a district court order that measured the severity of the burden on the Plaintiff political bodies without any regard to whether they enjoyed significant public support in Georgia. While addressing the issue of modicum of support, the district court relied solely on evidence of national support for these political bodies and failed to address the extent of support for these political bodies or candidates *in Georgia*. R-92 at 49. The Supreme Court in *Storer* accepted that the states have an “interest in having candidates demonstrate substantial support *in the community*.” 415 U.S. at 743 (emphasis added). Additionally, both the Supreme Court and this Court have 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) (emphasis added) (quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)); *Am. Party of Tex. v. White*, 415 U.S. 767, 789 (1974) (“requiring independent candidates to evidence a significant modicum of support is not unconstitutional.”) (internal quotation omitted); *Stein v. Ala. Sec’y of State*, 774 F.3d 689, 700 (11th Cir. 2014) (this Court adopted the opinion of the Middle District of Alabama as its own) (explaining in a challenge to the petition requirement for presidential candidates, 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.”); *Anderson*, 460 U.S. at 789 n. 9 (substantial support required); and *Munro v.*

Socialist Workers Party, 479 U.S. 189, 193-194 (1986) (referring to both “significant modicum of support” and “substantial support”).

Here, the evidence before the district court showed that political bodies with substantial support in Georgia are regularly capable of accessing the general election ballot.² See R-75-3 ¶ 7. The Libertarian Party, also a political body in Georgia, has been successful in having its nominees for president on *every* presidential general election ballot since 1988. This success is because the Libertarian Party, which initially got on the ballot by petition, has been able to garner sufficient votes (1% of the registered voters) at every general election since 1988. The district court, like Plaintiffs’ expert Richard Winger, failed 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. R-92 at 13 n. 9; R-75-17 at p. 28 lns. 13 - p. 29 ln. 4; p. 50 ln. 21 – p. 51 ln. 24.

Additionally, 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 by petition to run for a state legislative seat on the general election ballot.

² The lack of a significant modicum of support for the Georgia Green Party is further evidenced by their inability to collect even the 7,500 valid petition signatures ordered by the district court. See Appellees’ Request for Judicial Notice, Oct. 12, 2016 and Order Granting Request for Judicial Notice, February 1, 2017. Georgia had more than six (6) million registered voters as of the 2014 general election, making a 7,500 signature requirement roughly a .125% requirement. R-75-3 ¶ 4.

See R-75-3 ¶ 7. By contrast, no Green Party of Georgia or Constitution Party of Georgia candidates have ever qualified by petition for a state legislative district. R-75-3. This is significant because it demonstrates that a party with significant support, like the Libertarian Party, *can* successfully petition to get on the ballot. The reality is that the Plaintiffs are political bodies with little support in Georgia. While that reality does make it difficult for them to collect the requisite number of petition signatures needed, it does not support a contention that the petition requirement is severe. Several characteristics of Georgia's ballot access laws lessen the burden of collecting petition signatures.

First, a political body has *fifteen (15) months* to collect petition signatures. O.C.G.A. § 21-2-182; *see also* R-75-21 at pp. 3-4. This Court has held that a 188 day period to collect 144,492 petitions compared favorably to shorter periods found to be constitutional. *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 794 (11th Cir. 1983); *see also 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.”).

Second, there is no geographic distribution requirement for petition signatures that is imposed by the State. *See generally* O.C.G.A. § 21-2-182 and

§ 21-2-183; R-75-21 p. 4; R-75-3 ¶ 34; *Libertarian Party of Florida*, 710 F.2d at 794 (recognizing that a lack of geographic distribution requirement eases the burden on the party).

Third, a voter may sign an unlimited number of candidate and political body petitions in Georgia, even if the voter previously voted in a party primary during that election cycle. *See generally* O.C.G.A. § 21-2-182 and § 21-2-183; R-75-21 p. 4. Again, this Court in *Libertarian Party of Florida* recognized that permitting voters to sign multiple petitions eases the burden of collecting petition signatures. 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)); *American Party of Texas*, 415 U.S. at 782 n. 14; *Munro*, 479 U.S. at 194. Georgia also has no limit on how many petition signatures a political body or candidate may submit, and there is no cost imposed to verify the petition signatures. R-75-3 ¶ 28-29. *Cf. Libertarian Party of Florida*, 710 F.2d at 794 (holding that a cost of 10 cents per signature to verify the petition was not impermissibly burdensome). These measures result in the pool of voters available, to sign the qualifying petitions, being as large as possible.

II. States Are Not Required to Provide Evidence That Their Ballot Access Measures Are Necessary or the Least Drastic Measure to Accomplish Their Stated Goals.

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, the district court held that the State was required to provide evidence of voter confusion to justify its regulatory scheme. R-92 at 64.

The district court, like Winger, considered the State’s interest in the particular number of petition signatures required, not whether the State had a legitimate interest in having *some* number of petitions required for ballot access. R-92 at 66-67; R-75-17 at 55 ln. 4-7; p. 99 ln. 15 – p. 100 ln. 4. This Court has already rejected that position.

[T]his argument misapprehends the proper test for reasonable, nondiscriminatory regulations. Because any percentage requirement or filing deadline is ‘necessarily arbitrary’ and ‘impossible to defend

. . . as either compelled or least drastic,’ the test is not whether the regulations are necessary but whether they rationally serve important state interests. *Libertarian Party*, 710 F.2d at 793 (quotation marks omitted); *see also Timmons*, 520 U.S. at 358, 117 S. Ct. at 1370 (noting that a state [a]dditionally does not need to establish that ballot access restrictions are narrowly tailored and necessary to promote its interests unless the restrictions severely burden rights).

Swanson v. Worley, 490 F.3d 894, 912 (11th Cir. 2007). 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%.³ 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). Moreover, as this Court has recognized:

[T]he Supreme Court has ‘never required a State to make a particularized 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 194-95, 107 S. Ct. at 537. Because state legislatures ‘should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively.’

Swanson, 490 F.3d at 912. The panel’s summary affirmance leaves in place a district court order contrary to this Court’s holding in *Swanson* and the Supreme Court’s holding in *Munro*.

³ 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, while the pool of available potential petition signatories includes *both* active and inactive voters. O.C.G.A. § 21-2-235(a); R-75-3 ¶ 5.

III. The Constitutionality of Georgia's Ballot Access Measures Does Not Depend on the Legislative Choices of Other States.

As this Court has recognized, the test of whether a state election law violates the Constitution is not dependent on how other states choose to run their elections. *Libertarian Party of Florida*, 710 F.2d at 794 (explaining that “[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.”). Rather:

[A] court must determine whether the challenged laws ‘freeze’ the status quo by effectively barring all candidates other than those of the major parties, and provide a realistic means of ballot access. The focal point of this inquiry is whether a ‘reasonably diligent [] candidate [can] be expected to satisfy the signature requirements.’ Thus, the test is whether the legislative requirement is a rational way to meet [the State’s] compelling state interest. The least drastic means test becomes one of reasonableness, i.e., whether the statute unreasonably encroaches on ballot access.

Libertarian Party of Florida, 710 F.2d at 793 (internal citations omitted). Here, the district court erred in measuring the burdensomeness of Georgia’s ballot access statute by comparing it to other states, both as to the number of petition signatures needed and the number of Presidential candidates appearing on the ballot. R-92 at 11-12, 58-59, 65-67. Relying on Winger’s report, the district court considered that “[t]hirty-eight states plus the District of Columbia allow presidential ballot access with 10,000 or fewer signatures.” R-92 at 66. Again relying on Winger’s report, the district court considered that “[n]o state had fewer candidates [than Georgia] on its ballot from 1968 to 1988,” and “[o]nly Oklahoma had fewer candidates from

1992 to 2012.” R-92 at 66-67. First, this candidate counting proves nothing about causation. If there were fewer candidates in Georgia than in other states, the causation for that reality may be just as likely due to routine political realities, such as lack of support for the political body both in lack of volunteers and fund raising capacity. None of the considerations the district court recited are relevant to whether the burden on Plaintiffs’ rights is severe. *Libertarian Party of Fla.*, 710 F.2d at 794. Second, this Court has previously rejected similar expert witness testimony from Richard Winger which does nothing but compare the legislative choices of one state against those of another. *Swanson*, 490 F.3d at 910 (confining its inquiry to “whether Alabama’s election scheme is constitutional, not whether Alabama’s scheme is the best relative to other states.”). The panel’s summary affirmance of the district court is thus contrary to this Court’s opinions in *Libertarian Party of Florida* and *Swanson*.

CONCLUSION

For the reasons set forth above, Secretary Kemp respectfully requests rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2017, I electronically filed the foregoing **PETITION FOR REHEARING EN BANC** 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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