No. 19-14065

In the
United States Court of Appeals
For the Eleventh Circuit

MARTIN COWEN et al.,

Plaintiffs-Appellants

v.

BRAD RAFFENSPERGER,
in his official capacity as
GEORGIA SECRETARY OF STATE,
Defendant-Appellee

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

APPELLANTS' BRIEF

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Cowen v. Raffensperger
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Certificate of Interested Persons
and
Corporate Disclosure Statement

Pursuant to Eleventh Circuit Rule 26.1, 26.1-2, and 26.1-3, counsel for the appellants certifies that the following persons and entities have or may have an interest in the outcome of this case:

Buckley, Allen

Carr, Christopher

Correia, Cristina

Cowart, Annette

Cowen, Martin

Gilmer, Aaron

Libertarian Party of Georgia, Inc.

May, Leigh Martin

McGowan, Charlene S.

Cowen v. Raffensperger
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Certificate of Interested Persons
and
Corporate Disclosure Statement
(continued)

Monds, John

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Statement Regarding Oral Argument

This is a constitutional challenge to Georgia's ballot-access restrictions on third-party candidates for U.S. Representative. Those restrictions are by far the most stringent in the nation, and—despite many attempts—no third-party candidate for U.S. Representative has appeared on the general-election ballot since the restrictions were first enacted in 1943.

Notwithstanding what it described as a "robust record" and "compelling arguments" by the plaintiffs, the district court granted the defendant's motion for summary judgment but declined to apply the familiar balancing test set out in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Instead, the court considered the outcome to be controlled by the Supreme Court's older decision in *Jenness v. Fortson*, 403 U.S. 431 (1971), which upheld an earlier version of Georgia's ballot-access restrictions under a different legal standard. The issue necessary for decision in this appeal is thus a narrow one—whether *Anderson* or *Jenness* applies—and it is an issue that this Court has already addressed on two occasions. *See Green Party of Ga. v. Georgia*,

551 F. App'x 982, 984 (11th Cir. 2014); *Bergland v. Harris*, 767 F.2d 1551, 1554 (11th Cir. 1985).

As a result, no oral argument is necessary for this Court to decide this important-but-narrow issue for the third time.

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Statement of Jurisdiction

This is an appeal from a final judgment of the district court entered on September 24, 2019. The plaintiffs filed a notice of appeal in the district court 16 days later on October 10, 2019. This Court therefore has jurisdiction under 28 U.S.C. § 1291.

The district court had subject-matter jurisdiction because this case presents a federal question. 28 U.S.C. § 1331.

Statement of the Issues

The sole issue necessary for decision in this appeal is whether, relying on *Jenness v. Fortson*, 403 U.S. 431 (1971), the district court properly declined to apply the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Because this Court reviews a district court's disposition of cross-motions for summary judgment *de novo*, *Am. Bankers Ins. Group v. United* States, 408 F.3d 1328, 1331 (11th Cir. 2005), the Court also has the authority to reach the issues not addressed by the district court: whether either party here is entitled to summary judgment under the *Anderson* test and whether the plaintiffs are

entitled to summary judgment on their other claims not addressed by the district court. However, this Court will often remand a case to the district court for further proceedings when the district court has granted one party's summary-judgment motion on narrow legal grounds. *See, e.g.*, *Gulf Fishermen's Ass'n v. Gutierrez*, 529 F.3d 1321, 1324 (11th Cir. 2008) (per curiam) (remanding where the districting court had erroneously granted one party's motion for summary judgment for lack of jurisdiction); *Acevedo v. First Union Nat. Bank*, 357 F.3d 1244, 1248-49 (11th Cir. 2004) (remanding where the district court had erroneously granted one party's motion for summary judgment on the ground that the claim was statutorily barred); *Business Dev. Corp. of Ga. v. Hartford Fire Ins. Co.*, 747 F.2d 628, 632 (11th Cir. 1984) (remanding where reversal on one issue "necessitates consideration of the other issues raised in the cross-motions for summary judgment"). In light of the extensive evidentiary record in this case, and because the remaining issues present questions of fact and law not yet ruled on by the district court, a remand for further proceedings would be appropriate here.

Statement of the Case

This is a constitutional challenge to Georgia's ballot-access restrictions on third-party candidates for U.S. Representative. Those restrictions are by far the most stringent in the nation, and—despite many attempts—no such candidates have appeared on the general-election ballot since the restrictions were first enacted in 1943. Among other things, the laws at issue here require third-party candidates for U.S. Representative to gather thousands more signatures on a nominating petition than any such candidate has ever successfully gathered in the history of the United States. Georgia's ballot-access laws also produce the incongruous result that nominees of the Libertarian Party—whose candidates for statewide offices have won the support of millions of Georgia voters over the last ten years—must gather far more signatures to appear on the ballot in any one of Georgia's fourteen congressional districts than are required of Libertarian candidates for Governor, U.S. Senator, or even President.

The plaintiffs are the Libertarian Party of Georgia, prospective Libertarian candidates, and Libertarian voters. They

filed this action against the Secretary of State raising two claims. First, they allege that Georgia's ballot-access restrictions unconstitutionally burden their rights under the First and Fourteenth Amendments to the U.S. Constitution. (I:1 at 37 ¶148.)[1] Second, they allege that Georgia's ballot-access restrictions violate the Equal Protection Clause of the Fourteenth Amendment. (*Id.* at 37 ¶149.)

I. Georgia's Ballot-Access Restrictions

Georgia's ballot-access laws distinguish between three kinds of candidates for partisan public offices: (1) candidates nominated by a political party; (2) candidates nominated by a political body; and (3) independent candidates. (VII:97 at 14 ¶35.)

A "political party" is any political organization whose nominee received at least 20 percent of the vote in the last gubernatorial or presidential election. O.C.G.A. § 21-2-2(25).[2] Political parties choose

[1] Throughout this brief, citations to the Appendix will be in the form "Volume:Tab at Page" unless otherwise noted.
[2] The most important statutes are reproduced in Volume I of the Appendix under the tab "Statutes."

nominees in partisan primaries, and the candidate nominated by the party appears automatically on the general-election ballot for any statewide or district office. O.C.G.A. § 21-2-130(1). The only political parties that meet the current definition of "political party" under Georgia law are the Democratic Party of Georgia and the Georgia Republican Party. (VII:97 at 15 ¶38.)

A "political body" is any political organization other than a political party. O.C.G.A. § 21-2-2(23). Political bodies must nominate candidates for partisan offices by convention, O.C.G.A. § 21-2-170(g), and the nominees' access to the general-election ballot depends on the office being sought (specifically whether the office is a statewide office, a non-statewide office, or the office of President of the United States) and whether the political body has satisfied the requirements of O.C.G.A. § 21-2-180.

Under Section 21-2-180, a political body can qualify to have its nominees for *statewide* offices, including the office of President, appear automatically on the general-election ballot without the need to submit a nominating petition. To do so, the political body must either: (a) submit a qualifying petition signed by at least one

percent of the total number of registered voters at the last general election; or (b) have nominated a candidate for statewide office in the last general election who received votes totaling at least one percent of the total number of registered voters in the election. O.C.G.A. § 21-2-180.

The Libertarian Party of Georgia is a political body under Georgia law and has been qualified under Section 21-2-180 since 1988. (IX:113 at 3.) As a result, it can nominate candidates for all *statewide* offices in Georgia without the need to submit any petition signatures.

Candidates for statewide offices nominated by political bodies that are not qualified under Section 21-2-180 do not appear automatically on the general-election ballot. Each such nominee for statewide offices *other than President* must submit: (1) a notice of candidacy and qualifying fee, O.C.G.A. § 21-2-132(d); and (2) a nomination petition signed by one percent of the number of registered voters eligible to vote for that office in the last general election, O.C.G.A. § 21-2-170(b). Presidential candidates nominated by political bodies that are not qualified under Section 21-2-180

must submit: (1) a notice of candidacy and qualifying fee, O.C.G.A. § 21-2-132(d); and (2) a nomination petition signed by 7,500 registered voters eligible to vote for that office in the last general election.[3] (VII:97 at 20 ¶51.)

Political-body candidates for *non-statewide offices*, including the office of U.S. Representative, do not appear automatically on the general-election ballot. In order to appear on the general-election ballot, such candidates must submit: (1) a notice of candidacy and qualifying fee, O.C.G.A. § 21-2-132(d); and (2) a nomination petition signed by five percent of the number of

[3] Because of recent litigation, the signature requirements for independent presidential candidates and presidential candidates nominated by political bodies that are not qualified under Section 21-2-180 is currently lower than prescribed by Georgia law. In 2016, U.S. District Judge Richard Story ruled that the one-percent signature requirement in O.C.G.A. § 21-2-170(b) is unconstitutional as applied to presidential candidates. *See Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1372 (N.D. Ga. 2016), *aff'd* 674 F. App'x 974 (11th Cir. 2017) (per curiam). As a remedy, he lowered the signature requirement for presidential candidates from one percent (about 50,000 signatures) to 7,500 signatures until the Georgia General Assembly enacts a different measure. *Id.* at 1374. To date, it has not done so. (VII:97 at 20 ¶51.)

registered voters eligible to vote for that office in the last election, O.C.G.A. § 21-2-170(b).

Independent candidates do not appear automatically on the general-election ballot for any office unless the candidate is an incumbent. Non-incumbent independent candidates must follow the same rules as candidates nominated by political bodies that are not qualified under Section 21-2-180. (VII:97 at 19-20 ¶50.)

The qualifying fee for candidates for U.S. Representative is currently $5,220 (which is three percent of the annual salary of the office).[4] Among states with a mandatory nominating petition, Georgia's qualifying fees are higher than any other state in the nation. (IX:113 at 4.) Qualifying fees for political-party candidates for U.S. Representative are paid directly to the state political party,

[4] Georgia law permits candidates to file a pauper's affidavit in lieu of paying an applicable qualifying fee. O.C.G.A. § 21-2-132(g). A pauper's affidavit requires the candidate to swear under oath that the candidate has neither the assets nor the income to pay the filing fee, and it requires the candidate to submit a personal financial statement. *Id*. In addition, a pauper's affidavit for a candidate for U.S. Representative must be accompanied by a petition signed by one percent of the number of registered voters eligible to vote for the office in the last election. O.C.G.A. § 21-2-132(h).

which retains 75 percent and sends 25 percent to the Secretary of State. O.C.G.A. § 21-2-131(b)-(c). Qualifying fees for independent and political-body candidates for U.S. Representative are paid to the Secretary of State. O.C.G.A. § 21-2-131(b)(2). For independent candidates, the Secretary of State retains the entire fee. O.C.G.A. § 21-2-131(c)(4)(B). For political-body candidates, the Secretary of State retains 25 percent and sends 75 percent to the political body. O.C.G.A. § 21-2-131(c)(4)(A). While the statute requires the Secretary of State to distribute the funds "as soon as practicable," the Libertarian Party did not receive their share of the qualifying fees for the 2018 election until after the election was over, in mid-April 2019. (IX:113 at 4.)

Based on the state's voter registration rolls in 2018, the Secretary of State estimates that a political body would need to submit at least 321,713 valid signatures in order to run a full-slate of fourteen candidates for the office of U.S. Representative in 2020. (*Id.* at 5.) That is more signatures than required by any other state in the nation, both as a percentage of votes cast for President in 2016 (which is a common denominator for comparison among the

states) and as an absolute number of signatures. (*Id.*) Georgia's signature requirement is also higher, in absolute terms, than any signature requirement that an independent or third-party candidate for U.S. Representative has ever overcome in the history of the United States. (VII:97 at 32-35 ¶¶83-91.)

In a nutshell, the upshot of Georgia's current ballot-access regime for the appellants is this. The Libertarian Party, which is qualified under Section 21-2-180, can have its nominees for a full slate of *statewide* offices—which include President, U.S. Senator, Governor, Lieutenant Governor, Secretary of State, Attorney General, Commissioner of Agriculture, Commissioner of Insurance, and all five members of the Public Service Commission—appear on the general-election ballot without submitting any petition signatures. All the party has to do is to pay the applicable qualifying fees. But to have a full-slate of nominees for the office of U.S. Representative appear on the general-election ballot, the party would have to pay $73,080 in qualifying fees and submit nominating petitions containing at least 321,713 valid signatures.

II. Support for the Libertarian Party Nationwide and in Georgia

The Libertarian Party was founded in 1971 and is organized in all 50 states plus the District of Columbia. (IX:113 at 6.) It is currently the third-largest political party in the United States. (*Id.* at 6-7.) It runs hundreds of candidates in every election cycle. These candidates seek positions ranging from city council to President. The Libertarian Party had 833 candidates on ballots in 2018. (VII:97 at 89 ¶194.) The party runs numerous candidates for U.S. Representative and has had those candidates on the ballot in every state in the nation except Georgia. (*Id.* at 90 ¶¶ 196-197.)

In the last ten years, Libertarian candidates have received tens of millions of votes. (*Id.* at 91 ¶200.) The party's 2016 nominee for President, Gary Johnson, received 4,489,341 votes—the highest-ever vote total for a Libertarian candidate—which represented 3.28 percent of the popular vote and the third-highest vote total among the candidates. (*Id.* at 91-92 ¶201.) There are currently more than 180 elected officials affiliated with the party nationwide. (*Id.* at 90-91 ¶198.)

The Libertarian Party of Georgia was founded in 1972 and currently has members in each of Georgia's 14 congressional districts. (VII:97 at 4 ¶10; II:69-12 at 5 ¶20.) The party wants to nominate a full slate of candidates for U.S. Representative and to have those nominees appear on the general-election ballot. (VII:97 at 4-5 ¶11.)

In 1988, the party qualified to nominate candidates for statewide office by convention when it submitted a party-qualifying petition signed by at least one percent of the number of total number of registered voters at the preceding general election. *See* O.C.G.A. § 21-2-180(1). The party has retained that qualification under Georgia law in each election cycle since 1988 by nominating at least one candidate for statewide public office who received votes totaling at least one percent of the total number of registered voters who were registered and eligible to vote in that election. *See* O.C.G.A. § 21-2-180(2). (IX:113 at 3.)

In the last ten years, Libertarian candidates for statewide offices in Georgia have received more than five million votes. (VII:97 at 93 ¶205.) In 2016, for example, the Libertarian candidate

for the Public Service Commission, Eric Hoskins, received 1,200,076 votes, which represents 33.4 percent of all votes cast in that contest and 22.0 percent of the total number of registered voters who were registered and eligible to vote in that election. Hoskins carried Clayton and DeKalb counties. (*Id.* at 93 ¶206.)

And the Secretary of State, in his appellate briefs before this Court in *Green Party of Georgia v. Kemp*, repeatedly described the Libertarian Party as a political body "with significant support" in Georgia. (*Id.* at 93-94 ¶209.)

III. The Burdens of Georgia's Ballot-Access Restrictions

The record in this case contains extensive and some never-before-seen evidence of the burdens associated with Georgia's ballot-access scheme. For instance:

- No political-body candidate for U.S. Representative has ever satisfied the requirements to appear on Georgia's general-election ballot since the five-percent petition requirement was adopted in 1943. (IX:113 at 6.)

- Since 2002, more than twenty independent and political-body candidates for U.S. Representative have unsuccessfully attempted to qualify for the general-election ballot. Other potential candidates have been deterred by the signature requirement. (*Id.*)

- Georgia's general elections for U.S. Representative have been among the most uncompetitive in the nation. In the three election cycles from 2012 through 2016, Georgia had 15 unopposed races for U.S. Representative—more than any other state in the nation. (II:69-25 at 6 ¶¶ 21-22; VII:97 at 99-100 ¶222.)

- The Secretary of State's signature-validation process results in signatures being improperly rejected and signature-validation rates that are well below industry norms and those of other states. The most recent petition by an independent candidate for U.S. Representative resulted in a validation rate of only two percent. As a result, independent and political-body candidates for U.S. Representative must gather signatures far in excess of the number of valid signatures required to obtain ballot access under Georgia law. (VII:97 at 63-72 ¶¶132-149; VIII:105-1 at 90-100 ¶¶ 136-149; VIII:105-2 at 27-29.)

- The cost of using paid petition circulators to gather enough signatures to qualify a full slate of candidates for U.S. Representative would likely exceed $1 million and could exceed $2.5 million. (VII:97 at 76 ¶161; VIII:105-1 at 105 ¶161.) But federal campaign-finance law prohibits the Libertarian Party from contributing more than $10,000 per election cycle to any candidate for that effort. (VII:97 at 78 ¶166.) Individual donors can give only $5,600. (*Id.* at 78 ¶167.)

- An experienced paid petition circulator gathers an average of less than five signatures per hour over the course of a week—a pace that would yield fewer than 5,000 raw signatures working nine-hour days seven days a week over the entire 180-day petitioning window. (VII:97 at 72-73 ¶¶151-152; VIII:105-1 at 100-101 ¶¶151-152.)

- Georgia law prohibits petition-circulating within 150 feet of a polling place or on private property (without the permission of the owner), making it difficult for petition-circulators to access voters in places where large numbers of people congregate. (VII:97 at 81 ¶173; *Id.* at 84 ¶180.)

- The form of a nomination petition calls for a voter to provide a date of birth and residential address (VII:97 at 85 ¶181), both of which are considered confidential, personally identifying information under Georgia law. O.C.G.A. § 21-2-225(b). Many potential petition-signers express reluctance to sign, or refuse to sign altogether, because of the information called-for by the form and the possibility that it could be used for identity theft or other nefarious purposes. (VII:97 at 87 ¶188; VIII:105-1 at 119-20 ¶188; VIII:105-2 at 14-15, 17-18, 22, 24-25.)

The plaintiffs' summary-judgment papers include 51 exhibits covering hundreds of pages, and the evidence contained in those pages demonstrates that Georgia's ballot-access laws impose heavy burdens on the plaintiffs' First and Fourteenth Amendment rights. The district court even described the record as "robust." (IX:113 at 15.) Because the court did not apply the *Anderson* test, however, none of that evidence mattered.

IV. Proceedings in the District Court

The plaintiffs filed this action in late November 2017. After an extended period of discovery, the parties filed cross-motions for summary judgment in early June 2019.

The plaintiffs raised three arguments. First, the plaintiffs argued that this case is controlled by the Supreme Court's decisions in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), and *Norman v. Reed*, 502 U.S. 279 (1992), both of which forbid a state from requiring third-party candidates to gather more signatures to get on the ballot for an office in a district or political-subdivision than for a statewide office. (I:69-1 at 25-30.) Second, the plaintiffs argued that Georgia's ballot-access restrictions impose an unjustified burden on the plaintiffs' First and Fourteenth Amendment rights and therefore violate the Constitution under the test set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). (I:69-1 at 30-41.) Finally, the plaintiffs argued that Georgia's ballot-access laws violate the Equal Protection Clause of the Fourteenth Amendment by treating Libertarian

Party candidates for U.S. Representative differently from Libertarian Party candidates for statewide offices. (*Id.* at 41-44.)

The defendant raised two arguments. First, the defendant argued that this case is controlled by *Jenness v. Fortson*, 403 U.S. 431 (1971), and other cases that have previously upheld Georgia's ballot-access laws against various challenges. (V:73-2 at 7-10) Second, the defendant argued that Georgia's ballot-access laws impose only reasonable and non-discriminatory burdens and therefore survive constitutional scrutiny under the *Anderson* test. (*Id.* at 10-28.)

The district court ruled promptly on the motions after briefing was complete. Following a brief recitation of the facts, the court turned first to *Jenness* and the other cases relied on by the defendant. (IX:113 at 10.) Finding itself "bound by such rulings" the court granted the defendant's motion for summary judgment on all of the plaintiffs' claims. (*Id.*)

Before reaching that conclusion, the district court acknowledged that this Court has twice held that "cases which have upheld the Georgia provisions against constitutional attack by

prospective candidates and minor political parties do not foreclose the parties' right to present the evidence necessary to undertake the balancing approach outlined in *Anderson v. Celebrezze*." *Bergland v. Harris*, 767 F.2d 1551, 1554 (11th Cir. 1985); *accord Green Party of Ga. v. Georgia*, 551 F. App'x 982, 984 (11th Cir. 2014) (per curiam). (IX:113 at 11-12.) But the court distinguished those cases on the ground that they both involved presidential elections, and it concluded that "the case law in this circuit simply does not support Plaintiff's [sic] argument that this Court must analyze Plaintiffs' claims under *Anderson*, notwithstanding the clear ruling in *Jenness*." (*Id.* at 13) The court also found that the facts and the law regarding Georgia's ballot-access restrictions have not changed enough since 1971 to distinguish the cases on which the defendant relied. (*Id.* at 13-14.)

The court noted finally that the "Plaintiffs present a robust record and some compelling arguments" but concluded that it was bound by *Jenness* and similar cases notwithstanding that record. (*Id.* at 15). The district court did not address the plaintiffs' Equal Protection claim or their argument that this case is controlled by

the Supreme Court's decisions in *Socialist Workers' Party* and *Norman*.

Standards of Review

This Court reviews a district court's disposition of cross-motions for summary judgment *de novo*, applying the same legal standards used by the district court. *Am. Bankers Ins. Group v. United* States, 408 F.3d 1328, 1331 (11th Cir. 2005).

Under Rule 56 of the Federal Rules of Civil Procedure, a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A fact is "material" if it is "a legal element of the claim under the applicable substantive law which might affect the outcome of the case." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). A dispute about a material fact is genuine if the evidence would allow a reasonable jury to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In determining whether to grant or deny summary judgment, the court's role is not to weigh the evidence or to determine the truth of the matter, but rather to determine only whether a genuine issue exists for trial. *Id.* at 249. In doing so, the court must

view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Summary of the Argument

This Court could not have been clearer. Twice the Court has held that "cases which have upheld the Georgia provisions against constitutional attack by prospective candidates and minor political parties do not foreclose the parties' right to present the evidence necessary to undertake the balancing approach outlined in *Anderson v. Celebrezze*." *Bergland v. Harris*, 767 F.2d 1551, 1554 (11th Cir. 1985)*; accord Green Party of Ga. v. Georgia*, 551 F. App'x. 982, 984 (11th Cir. 2014) (per curiam). And yet the district court nonetheless declined to apply the *Anderson* test and ruled that those earlier cases which upheld Georgia's ballot-access restrictions under a different legal standard foreclosed all of the plaintiffs' claims. That was error.

This Court can stop there and remand the case to the district court for further proceedings. Or, if it chooses, the Court can rule on summary judgement in the first instance.

The undisputed facts in the robust record are overwhelming. They show that Georgia requires Libertarian candidates for U.S. Representative to submit tens of thousands more signatures than

Libertarian candidates for President, U.S. Senator, Governor, or any statewide office—a result that the Supreme Court has twice found to be unconstitutional. The undisputed facts also show that Georgia's ballot-access laws impose heavy constitutional burdens that violate the First and Fourteenth Amendment. And the undisputed facts show that Georgia's ballot access laws violate the Equal Protection Clause by creating an absurd and unjustified distinction between Libertarian candidates for statewide offices and Libertarian candidates for U.S. Representative.

Argument

I. The district court erred when it declined to apply the *Anderson* test.

In 1983, the Supreme Court articulated a new balancing test for evaluating whether a challenged ballot-access restriction violates the First and Fourteenth Amendments:

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

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). Under this test, the level of scrutiny varies on a sliding scale with the extent of the asserted injury. When, at the low end of the scale, the law "imposes only 'reasonable, nondiscriminatory restrictions' upon First and Fourteenth Amendment rights of voters, 'the State's important

regulatory interests are general sufficient to justify' the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788, 788-89 n.9). But when the law places "severe" burdens on the rights of political parties, candidates, or voters, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). By allowing for the possibility of heightened constitutional scrutiny, the *Anderson* test represented a significant departure from the less-stringent analytical framework applied in some earlier ballot-access cases. *See Anderson*, 460 U.S. at 817 (Rehnquist, J., dissenting) (distinguishing the standard used in *Jenness v. Fortson*, 403 U.S. 431 (1971), from the "narrowly tailored" standard applied in *Anderson*); *Graveline v. Johnson*, 747 F. App'x 408, 414 (6th Cir. 2018) (recognizing that *Anderson* superseded *Jenness*).

The Eleventh Circuit adopted the now-familiar *Anderson* test two years later in *Bergland v. Harris*, 767 F.2d 1551, 1553-54 (11th Cir. 1985), and it has routinely applied that test in ballot-access cases since then. *See, e.g., Green Party of Ga. v. Georgia*, 551 F.

App'x 982, 983 (11th Cir. 2014) (per curiam); *Swanson v. Worley,* 490 F.3d 894, 902-03 (11th Cir. 2007); *Green v. Mortham*, 155 F.3d 1332, 1336 (11th Cir. 1998); *Fulani v. Krivanek,* 973 F.2d 1539, 1543 (11th Cir. 1992).

In this case, however, the district court declined to apply the *Anderson* test. (IX:113 at 10.) Instead, the court considered the outcome to be controlled as a matter of law by the Supreme Court's older decision in *Jenness*, which upheld an earlier version of Georgia's ballot-access restrictions under a different legal standard. Because the district court should have applied the *Anderson* test to the robust record in this case, this Court should now reverse.

A. The *Anderson* test is the law of this circuit.

For more than 30 years, it has been the law of this circuit that "cases which have upheld the Georgia provisions against constitutional attack by prospective candidates and minor political parties do not foreclose the parties' right to present the evidence necessary to undertake the balancing approach outlined in *Anderson v. Celebrezze*." *Bergland*, 767 F.2d at 1554. The specific

"cases" to which this Court was referring are *Jenness* and *McCrary v. Poythress*, 638 F.2d 1308 (5th Cir. 1981), two of the cases upon which the district court relied in this case. And this Court reaffirmed *Bergland*'s holding just five years ago when it reversed a district court for failing to apply the *Anderson* test in a challenge to Georgia's one-percent signature requirement for presidential ballot access. *Green Party*, 551 F. App'x at 984. The *Anderson* test is thus emphatically the law of this circuit.[5]

The court below distinguished that law, however, on the ground that *Bergland* and *Green Party* both involved challenges to ballot-access restrictions on presidential candidates, and it pointed to two post-*Bergland* cases—*Coffield v. Handel*, 599 F.3d 1276 (11th Cir. 2010), and *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002)—where, according to the court, the Eleventh Circuit had rejected challenges to Georgia's restrictions on candidates for U.S.

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[5] The *Anderson* test is the law of other circuits as well. *See, e.g., Graveline*, 747 F. App'x at 414; *Lee v. Keith*, 463 F.3d 763, 768 (7th Cir. 2006); *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 880 (3d Cir. 1997). No circuit of which the appellants are aware has ever held that a court need not apply the *Anderson* test in ballot-access cases not involving presidential candidates.

Representative without applying the *Anderson* test. (IX: 113 at 13.) But the district court's analysis is deeply flawed.

First, neither *Bergland* nor *Green Party* support the proposition that the *Anderson* test does not apply except in cases involving presidential candidates. Rather, those cases demonstrate how to weigh a state's asserted interests in the third step of the *Anderson* balancing test when the case involves presidential candidates. They stand for the uncontroversial proposition that a state has "a less important interest in regulating Presidential elections than statewide or local elections." *Bergland*, 767 F.2d at 1554 (citing *Anderson* 460 U.S. at 795); *Green Party*, 551 F. App'x at 984 (same). In no way does this mean that the *Anderson* test does not apply to other kinds of elections. *See, e.g., New Alliance Party of Ala. v. Hand*, 933 F.2d 1568, 1574 (11th Cir. 1991) (per curiam) (applying the *Anderson* test to a petition requirement affecting candidates for U.S. Representative and state offices).

Second, neither *Bergland* nor *Green Party* draw the constitutional line at presidential elections. Both cases emphasize "[t]he difference between state and local offices and *federal offices*."

Bergland, 767 F.2d at 1554 (emphasis added); *accord Green Party*, 551 F. App'x at 984 (noting that the *Anderson* test requires a different balance for "state elections"). And this is for good reason. Decisions made by Congress and the President affect the entire nation. And while the States have almost plenary authority over elections for state and local offices, the U.S. Constitution gives them only partial authority over elections for members of Congress. *See* U.S. Const. art. I, §§ 1, 4, 5 (establishing federal law as the ultimate authority over elections for U.S. Representative); *see also* U.S. Const. amend. XIV, § 2, XXIV (same). It would therefore make no sense to give equal weight in the *Anderson* test to a state's asserted interest in regulating ballot access for congressional candidates as compared to candidates for, say, county commissioner.

Third, the district court's reliance on *Cartwright* is entirely misplaced because that case involved the Qualifications Clause—not the First and Fourteenth Amendments. The *Anderson* test does not apply to cases involving the Qualifications Clause, so the fact that this Court resolved *Cartwright* without applying the *Anderson*

test is unremarkable. It does not mean, as the district court suggested, that the *Anderson* test does not apply to First and Fourteenth Amendment cases involving candidates for U.S. Representative.

Fourth, and finally, the district court reads too much into this Court's short *per curiam* decision in *Coffield*. The Court concluded that the plaintiff had failed to state a claim that Georgia's ballot-access rules are too burdensome because "she does not allege how many candidates have tried" to meet it. 599 F.3d at 1277. In reaching that conclusion, the Court relied on *Swanson v. Worley*, 490 F.3d at 910, which had upheld Alabama's ballot-access statutes under the *Anderson* test, in part, because the plaintiffs had not produced evidence that similar candidates had sought unsuccessfully to satisfy the challenged requirements. *Coffield* thus does not support the proposition that the *Anderson* test does not apply. At best, it could be read to indicate that a plaintiff does not get to the *Anderson* test without sufficient allegations of a constitutional burden, and that is certainly not an issue here. As *Swanson,, New Alliance,* and many other cases illustrate,

moreover, this Court has routinely applied the *Anderson* test in non-presidential cases.

The *Anderson* test is thus the law of this Circuit, and the district court should have applied it. This does not mean that the district court could not reason from *Jenness* in applying the *Anderson* test to the evidence in the record. What it does mean, however, is that the district court erred when it declined to apply the *Anderson* test at all and consequently refused even to consider the robust record before it.

B. *Jenness* does not control the outcome of this case.

In addition to the fact that *Jenness* applied a now-obsolete and less-stringent legal standard, *Jenness* is also not controlling here because it is distinguishable on the facts and the law. The plaintiffs' claims here are different, and material facts upon which the Supreme Court relied in that case no longer hold true. So not only did the district court err when it declined to apply the *Anderson* test, but it also erred when it held, as a matter of law, that *Jenness* forecloses all of the plaintiffs' claims.

This is most readily apparent when one considers the plaintiffs' claim that this case is controlled by the Supreme Court's decisions in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), and *Norman v. Reed*, 502 U.S. 279 (1992), both of which forbid a state from requiring third-party candidates to gather more signatures to get on the ballot for an office in a district or political-subdivision than for a statewide office. (I:69-1 at 25-30.) *Jenness* says nothing about this claim because both *Socialist Workers* and *Norman* came years later. And, at the time of *Jenness*, Georgia law did not produce the incongruent result that it does now: third-party candidates for U.S. Representative must submit tens of thousands more signatures than third-party candidates for President. Yet the district court did not address the plaintiffs' claim or even cite either case on which it is based.

Similarly, while the *Jenness* plaintiffs did raise an Equal Protection claim, the plaintiffs' Equal Protection claim in this case is quite different. In *Jenness*, the plaintiffs argued that Georgia could not constitutionally treat political-body candidates differently

from political-party candidates. 403 U.S. at 434. Not so in this case. Here, the plaintiffs claim that Georgia violates the Equal Protection Clause when it treats Libertarian candidates for U.S. Representative differently from *Libertarian* candidates for statewide office including U.S. Senator. The latter have automatic ballot access. The former, of course, must petition. *Jenness* did not address this different treatment because the disparity did not exist at the time of that case, and it therefore cannot control the outcome of the plaintiffs' claim. And yet the district court did not separately address this claim beyond an assertion that the Equal Protection analysis in *Jenness* is still binding. (IX:113 at 14.)

Finally, *Jenness* is also distinguishable on its facts. The Supreme Court found, based on the record, that Georgia's ballot-access laws "do not operate to freeze the political status quo." 460 U.S. at 438. As support for that conclusion, the Court observed that two statewide candidates had petitioned onto the ballot in the preceding five years: "a candidate for Governor in 1966 and a

candidate for President in 1968." *Id.* at 439.[6] But when the undisputed record shows that (1) no political-body candidate for U.S. Representative has ever satisfied the requirements to appear on Georgia's general-election ballot since the five-percent petition requirement was adopted in 1943; (2) more than 20 independent and political-body candidates for U.S. Representative have unsuccessfully attempted to qualify for the general-election ballot since 2002, including candidates nominated by the nation's third-largest political party, whose candidates for statewide office in Georgia have won millions of votes; and (3) Georgia's signature requirement is higher, in absolute terms, than any signature requirement that an independent or third-party candidate for U.S. Representative has ever overcome in the history of the United States—then it can no longer be said that Georgia's laws do not

[6] The Supreme Court did not mention that the gubernatorial candidate was the Republican nominee, Bo Callaway, who had completed an *optional* petition because the Republican Party preferred not to hold a primary election. *See* Richard Winger, *The Supreme Court and the Burial of Ballot Access: A Critical Review of Jenness v. Fortson*, 1 Election L.J. 235, 241 n.19 (2002). The presidential candidate was a former Democrat, George Wallace.

freeze the status quo. There is no comparable record of recent success here.

The Supreme Court also relied heavily on the fact that Georgia had "no limitation whatever … on the right of a voter to write-in on the ballot the name of a candidate of his choice and to have that write-in counted." 403 U.S. at 434; *see also id.* at 438 (distinguishing Ohio and Georgia law). That is also no longer true. Georgia law now requires write-in candidates to file and publish a notice of candidacy in advance of the election, O.C.G.A. § 21-2-133(a), and votes cast for a person who has not so qualified are not counted, Ga. Comp. R. & Regs. 183-1-15-.02(5).

Other important circumstances have changed as well. At the time of *Jenness*, Georgia law did not have a one-percent threshold for demonstrating sufficient voter support for a political body to remain on the statewide ballot. Judge Story had not yet struck down Georgia's one-percent signature requirement for presidential candidates as unduly burdensome and set the requirement at only 7,500 signatures. Georgia's qualifying-fee statute did not expressly discriminate between political-party candidates, political-body

candidates, and independent candidates. And federal campaign finance laws did not limit a party's ability to fund petition drives as they do now.

Jenness therefore should not have controlled the outcome of *any* of the plaintiffs' claims even if it had not been superseded by *Anderson*. It simply does not speak to the plaintiffs' claim under *Norman* and *Socialist Workers* or to the plaintiffs' Equal Protection claim in this case. And the facts of Georgia's ballot-access regime have changed so dramatically in the almost 50 years since *Jenness* that the district court should have given them a fresh look.

II. The Court should remand for further proceedings or grant summary judgment for the plaintiffs.

There is no question that this Court has jurisdiction to tackle the summary-judgment motions in their entirety if it determines that the district court applied the wrong legal standard. *See Am. Bankers Ins. Group v. United* States, 408 F.3d 1328, 1331 (11th Cir. 2005) (cross-motions for summary judgement are subject to *de novo* review). A common practice, however, when there remain issues of law and fact not yet ruled on by the district court, is to remand the

case for further proceedings. *See, e.g., Gulf Fishermen's Ass'n v. Gutierrez*, 529 F.3d 1321, 1324 (11th Cir. 2008) (per curiam) (remanding where the districting court had erroneously granted one party's motion for summary judgment for lack of jurisdiction); *Business Dev. Corp. of Ga. v. Hartford Fire Ins. Co.*, 747 F.2d 628, 632 (11th Cir. 1984) (remanding where reversal on one issue "necessitates consideration of the other issues raised in the cross-motions for summary judgment"). That would be an appropriate resolution here, particularly given the time-sensitive nature of election cases. The district court may be in a better position to rule quickly on the full record.

However, if the Court chooses instead to decide the cross-motions without remanding, those motions have been fully and extensively briefed in the district court, and all of the relevant documents have been reproduced in the Appendix. Those papers cover hundreds of pages—the plaintiffs' statement of undisputed material facts alone covers more than 70 pages—and the facts and arguments they contain can only be presented here in condensed form.

A. Georgia may not require more signatures from candidates for U.S. Representative than from candidates for statewide office.

The Supreme Court's decisions in *Socialist Workers* and *Norman* prohibit a state from requiring third-party candidates to gather more signatures to get on the ballot for an office in a district or political-subdivision than for a statewide office.

In *Socialist Workers*, the issue was a provision of Illinois law that required independent candidates and candidates from new political parties[7] seeking to run for office in a congressional district, other district, or political subdivision of the state to gather signatures equaling five percent of the number of persons who voted in the last election in the district or political subdivision. 440 U.S. at 175-76. But Illinois law required only 25,000 signatures for an independent or new-party candidate to appear on the ballot in a

[7] Illinois law distinguished between "established" political parties and "new" political parties. *Socialist Workers,* 440 U.S. at 175-76 n.1. An established political party was any party whose candidate for Governor or for any office in a district or political subdivision received at least five percent of the votes in the last election. *Id.* A new political party was any party that had not met that requirement. *Id.* A "new party" in Illinois is thus analogous to a "political body" in Georgia.

statewide election. *Id.* at 175. In the City of Chicago, this had the "incongruous result" that the Socialist Workers Party's candidate needed 63,373 signatures to appear on the ballot in a special mayoral election—substantially more signatures than the party or its candidate would have needed for a statewide office. *Id.* at 176-77. The Supreme Court held that, although the State had a legitimate interest in ensuring that a party or independent candidate had a "'significant modicum of support,'" there was "no reason, much less a compelling one" justifying a requirement of greater support for Chicago elections than for statewide elections. *Id.* at 185-86.

The Supreme Court reaffirmed the core holding of *Socialist Workers* and reached the same result two decades later in *Norman*. 502 U.S. at 291-94. In that case, the issue was another provision of Illinois law that capped the signature requirement for "any district or political subdivision" at 25,000 signatures. *Id.* at 292. Under that provision, a candidate for Mayor of Chicago would have needed only 25,000 signatures—the same number still required for statewide office. But the plaintiffs in *Norman* sought to run new-party

candidates for the Cook County Board of Commissioners, which consisted of two districts, and the State Supreme Court had construed the new law to require them to submit 50,000 signatures—25,000 for each district—in order to do so. *Id.* at 283-84, 293.

The Supreme Court held that the outcome in *Norman* was controlled by the earlier case: "The State may not do this in light of *Socialist Workers*, which forbids it to require petitioners to gather twice as many signatures to field candidates in Cook County as they would need statewide." *Id.* The Court did so even though the election officials defending the law advanced what they claimed to be a state interest, not addressed in the prior case, in ensuring that a new party has a modicum of support in *each* of Cook County's districts. *Id.* The Court observed that the State could have served that interest by requiring that some minimum number of signatures come from each district as long as the total would not exceed 25,000. And it noted that, because the State did not require any particular distribution of support for new statewide parties, "it

requires elusive logic to demonstrate a serious state interest in demanding such a distribution for new local parties." *Id.* at 294.

It is undisputed that Georgia law, like the Illinois laws at issue in *Socialist Workers* and *Norman*, creates the incongruous result that Libertarian candidates must gather more signatures to run for U.S. Representative in any one of Georgia's fourteen congressional districts than they would need to run for President, U.S. Senator, Governor, or any one of Georgia's other statewide offices. This is precisely what *Socialist Workers* and *Norman* forbid.

B. Georgia's ballot-access laws flunk the *Anderson* test.

The first step in the *Anderson* test requires the Court to weigh the "character and magnitude" of the asserted injury to the plaintiffs' rights. *Bergland*, 767 F.2d at 1553. Georgia's ballot-access restrictions burden "two different, although overlapping kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes,* 393 U.S. 23, 30 (1968). "Both of

these rights, of course, rank among our most precious freedoms." *Id.*

One way to measure the magnitude of those injuries is by reference to other cases. Here, the closest case is *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340, 1362-65 (N.D. Ga. 2016), *aff'd* 674 F. App'x 974 (11th Cir. 2017) (per curiam), which struck down Georgia's ballot-access restrictions for independent and political-body candidates for President. In that case, the signature requirement was one percent of registered voters, and political-body presidential candidates had been absent from Georgia's ballots for just over 15 years. The court also relied heavily on the fact that Georgia's signature requirement was higher than "most other states" and that the restrictions had excluded a presidential candidate in 2000 (Ralph Nader) who had enjoyed "widespread national support."[8] *Id.* at 1363. The district court found that the burden of the signature requirement was "severe," and it therefore applied strict scrutiny to the measure. *Id.*

[8] Nader received nearly three percent (2.74 percent) of the popular vote in 2000. *Green Party*, 171 F. Supp. 3d at 1362.

By comparison, Georgia's signature requirement for independent and political-body candidates for U.S. Representative is higher in percentage terms. It has excluded political-body candidates for more than half a century longer. It is the highest such requirement in the nation, and it has excluded candidates of the Libertarian Party, which is the third-largest party in the United States and enjoys widespread support nationwide *and* in Georgia. Strict scrutiny should therefore apply in this case as well.

Another way to measure the magnitude of the injuries is by looking to past experience. If genuine candidates for U.S. Representative have been unable to meet the requirements, then the burden is probably severe. *See, e.g., Mandel v. Bradley,* 432 U.S. 177, 178 (1977) (criticizing the district court for failing to analyze what the "past experience" under the ballot restriction might indicate about the burdens it imposed); *Storer v. Brown,* 415 U.S. 724, 742 (1974) ("Past experience will be a helpful, if not always unerring, guide" when assessing the burdens imposed by ballot access requirements); *see also Coffield*, 599 F.3d at 1277 (suggesting that the number of unsuccessful candidates is highly

relevant); *Swanson*, 490 F.3d at 910 (same). Here, it is undisputed that no political-body candidate for U.S. Representative has ever satisfied the five-percent signature requirement since it was enacted in 1943. And that is despite more than 20 genuine attempts to qualify for the ballot since 2002 alone. It is also undisputed that Georgia's signature requirement is higher, in absolute terms, than any signature requirement that an independent or third-party candidate for U.S. Representative has ever met in the history of the United States. If past experience is any guide, then, strict scrutiny should clearly apply.

Yet another way to measure the burden is by comparison to other states. It is undisputed that Georgia requires more signatures for third-party candidates for U.S. Representative to appear on the general-election ballot than any other state in the nation, both as a percentage of votes cast and as an absolute number of signatures. It is also undisputed that Georgia's qualifying fees are higher than any other state in the nation with a mandatory petition requirement.

Other key factors that point to a severe burden here include: (1) the Secretary of State's petition-checking process, which leads to lower signature-validation rates than in other states; (2) the impact of federal campaign-finance law, which limits the amount that a party or other donor can contribute toward the cost of gathering signatures for a candidate; and (3) the other practical difficulties of gathering signatures today. These factors plainly add weight to the burden imposed by Georgia's restrictions.

This Court should therefore conclude that Georgia's ballot-access restrictions for independent and political-body candidates for U.S. Representative impose a severe constitutional burden and merit strict scrutiny.

The second and third steps of the *Anderson* test require the Court to evaluate the strength, legitimacy, and tailoring of the State's asserted interests. *Bergland*, 767 F.2d at 1553-54. In the district court, the defendant offered two such interests: (1) "ensuring that political-body candidates for U.S. Representative can demonstrate that they have significant support within the

congressional districts that they wish to represent" (V:73-2 at 23); and (2) "preventing run-off elections" (*id.* at 27).

The first asserted interest is indistinguishable from the interest that the Supreme Court found lacking in *Norman*. 502 U.S. at 293-94. As in that case, Georgia could have served any such interest by imposing a geographic distribution requirement on the Libertarian Party's 1988 statewide qualifying petition or the one-percent retention threshold under Section 21-2-180.[9] But the State has chosen not to do so, and the Libertarian party could therefore secure all the votes it needs to demonstrate "statewide" support from any one of the state's most-populous counties. That speaks volumes about the strength and tailoring of this asserted interest.

[9] Using statewide election data that his office already compiles, the Secretary of State could determine whether the Libertarian Party has support in a particular congressional district by examining the votes that Libertarian candidates for statewide office received in the district. The data would show, for example, that, in 2016, the Libertarian candidate for the Public Service Commission, Eric Hoskins, received approximately 159,260 votes, or 63.7 percent of votes cast, in Georgia's Fifth Congressional District. (VII:105 at 13-14.)

The second asserted interest, preventing runoffs, has been described by the Supreme Court as "important," but not compelling. *Clements v. Fashing*, 457 U.S. 957, 965 (1982). It therefore cannot justify a heavy constitutional burden as there is in this case. The circumstances here indicate, moreover, that Georgia isn't really serious about preventing runoffs:

- Most runoffs occur in party primaries, and primary runoffs are more expensive than general runoffs. Yet the State does nothing to curtail primary runoffs.
- Runoffs in statewide elections are more expensive than runoffs for district offices. Yet the State does nothing to curtail statewide runoffs.
- It is rare nationwide for a winning congressional candidate to receive less than 50 percent of the vote.
- Many elections for U.S. Representative in Georgia are unopposed, so adding a Libertarian candidate would not increase the chance of having a runoff.
- Georgia could avoid the downsides of runoffs altogether by eliminating them or by implementing ranked-choice voting, as five other states have done.

(I:69-1 at 38-39; V:96 at 16-18.) Moreover, it requires "elusive logic," *Norman*, 502 U.S. at 294, to demonstrate a serious state interest in avoiding runoffs in general-elections for U.S.

Representative when Georgia law allows the Libertarian Party's candidates for any and all statewide offices to appear on the ballot without further petitioning.

For these reasons, the Secretary of State cannot show that Georgia's ballot-access restrictions are necessary to advance either of the asserted state interests. This Court should therefore conclude that those restrictions violate the First and Fourteenth Amendments.

C. Georgia's ballot-access laws violate the Equal Protection Clause.

To determine whether a ballot-access restriction violates the Equal Protection Clause of the Fourteenth Amendment, this Court "must examine the character of the classification in question, the importance of the individual interests at stake, and the state interests asserted in support of the classification." *Socialist Workers*, 440 U.S. at 183. This test is functionally almost identical to the *Anderson* test, and the Supreme Court has noted that the analysis is interchangeable. *Norman,* 502 U.S. at 288 n.8;

Anderson, 460 U.S. at 786-87 n.7; *see also Fulani*, 973 F.2d at 1542-43.

It is undisputed that Georgia law creates a classification by treating Libertarian Party candidates for U.S. Representative differently from Libertarian Party candidates for statewide offices including U.S. Senator. The latter have automatic ballot access. The former must petition.

The individual interests impacted by this classification are the same fundamental rights involved in the plaintiffs' First Amendment claim: "'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.'" *Socialist Workers*, 440 U.S. at 184 (quoting *Williams*, 393 U.S. at 30). And the burden on those rights is the same as well.

In the district court, the defendant asserted only one state interest to justify this unequal treatment: "making sure that the Libertarian Party has support within the political subdivision or district that its candidates seek election." (VII:98 at 10.) But as already discussed in the preceding section, this interest is

indistinguishable from the interest that the Supreme Court found lacking in *Norman*. 502 U.S. at 293-94. The State could have imposed a distribution requirement on the Libertarian Party's qualifying petition under Section 21-2-180, or it could have imposed a distribution requirement on the vote-threshold for retaining that qualification. But because the Libertarian Party has repeatedly demonstrated that it has at least as much actual voter support as the Sate of Georgia believes is necessary for the party's statewide candidates to appear on the general-election ballot, this asserted state interest cannot justify the heavy burdens that result from treating Libertarian candidates for U.S. Representative differently from candidates for U.S. Senator, Governor, or other statewide offices.

There are no facts in dispute on this claim. Georgia law creates an absurd classification that impinges upon fundamental rights, and the State's only justification is one that the Supreme Court has already rejected. This Court should therefore grant summary judgment in the plaintiffs' favor.

Conclusion

The district court plainly erred when—despite this Court's repeated rulings to the contrary—it relied on *Jenness* to foreclose all of the plaintiffs' claims. The district court should have instead considered the plaintiffs' First and Fourteenth Amendment claim under the *Anderson* test, and it should have separately considered the plaintiffs' Equal Protection claim and their argument that this case is controlled by the Supreme Court's decisions in *Socialist Workers* and *Norman*. It would therefore be appropriate for this Court to vacate the district court's judgment and remand for further proceedings.

It would also be within the Court's authority to rule on the merits of the summary judgment motions, and the undisputed facts in this case are overwhelming. They permit the trier of fact to reach only one conclusion, and—if it chooses to reach the issue—this Court should therefore grant summary judgment in the plaintiffs' favor.

Dated: November 13, 2019 Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure because, excluding parts of the brief exempted by Rule 32(f), it contains 8,948 words. This brief also complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook font using version 16.31 of Microsoft Word for Mac.

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Certificate of Service

I hereby certify that on November 13, 2019, I electronically filed the foregoing **Appellants' Brief** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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