No. 21-13199

In the

United States Court of Appeals

for the Eleventh Circuit

Georgia Secretary of State,
Defendant-Appellant,

v.

Martin Cowen, et al.,
Plaintiffs-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.
No. 1:17-cv-04660-LMM — Leigh Martin May, *Judge*

BRIEF OF APPELLANT

Christopher M. Carr
Attorney General of Georgia
Bryan K. Webb
Deputy Attorney General
Russell D. Willard
Senior Assistant Attorney General
Charlene S. McGowan
Assistant Attorney General
Office of the Georgia Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3658
cmcgowan@law.ga.gov
Counsel for Appellant

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify that the following persons and entities may have an interest in the outcome of this case:

Buckley, Allen, Plaintiff/Appellee

Carr, Christopher M., Attorney General, Counsel for Defendant/Appellant

Cowen, Martin, Plaintiff/Appellee

Gilmer, Aaron, Plaintiff/Appellee

Law Office of Bryan L. Sells, LLC, Counsel for Plaintiffs/Appellees

Libertarian Party of Georgia, Plaintiff/Appellee

May, Hon. Leigh Martin, U.S. District Court Judge

McGowan, Charlene S., Assistant Attorney General, Counsel for Defendant/Appellant

Monds, John, Plaintiff/Appellee

Raffensperger, Brad, Georgia Secretary of State, Defendant/Appellant

Sells, Bryan L., Counsel for Plaintiffs/Appellees

Webb, Bryan K., Deputy Attorney General, Counsel for Defendant/Appellee

Willard, Russell D., Senior Assistant Attorney General, Counsel for Defendant/Appellant

The undersigned counsel certifies that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

/s/ *Charlene S. McGowan*

Charlene S. McGowan
Assistant Attorney General

STATEMENT REGARDING ORAL ARGUMENT

The Georgia Secretary of State respectfully requests oral argument. The district court permanently enjoined Georgia's ballot-access statute, which has been challenged many times and upheld each time. That departure from controlling precedent necessitates review. The district court's injunction was unnecessarily broad, as well. The Libertarian Party sued only on behalf of candidates for U.S. Representative, but the district court drastically reduced the signature requirements for *all* non-statewide races in Georgia. This case involves complex questions, and oral argument will aid the court's review of these important constitutional and equitable issues.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal of the final judgment of the district court pursuant to 28 U.S.C. § 1291. The final judgment was entered on September 15, 2021, and Appellant timely filed a notice of appeal on September 17, 2021. The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it presents a federal question.

STATEMENT OF ISSUES

1. Whether Georgia's requirement that political body candidates for U.S. Representative submit a petition signed by 5% of eligible voters to appear on the general election ballot violates the right to freedom of association under the First and Fourteenth Amendments, when the Supreme Court and this Court have repeatedly upheld the same petition requirement against identical constitutional challenges.

INTRODUCTION

This action involves a constitutional challenge to Georgia's ballot-access requirements for political body candidates for U.S. Representative. There have been multiple challenges to these same requirements over the past 50 years, and each has failed. *See generally Jenness v. Fortson*, 403 U.S. 431 (1971); *McCrary v. Poythress*, 638 F.2d 1308 (11th Cir. 1981); *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002); *Coffield v. Handel*, 599 F.3d 1276 (11th Cir. 2010). In this case, however, the district court ignored controlling decisions by the Supreme Court and this Court upholding the exact same statutory requirements, and arbitrarily reduced them by 80%.

Georgia 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." *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1982). Based on this important interest, courts have repeatedly upheld state ballot-access requirements like Georgia's that "protect the integrity and reliability of the electoral process itself." *Id.* And the Supreme Court and this Court consistently have held that Georgia's ballot-access requirements are reasonable, non-discriminatory restrictions that are justified by the state's important interest in requiring candidates to

demonstrate a "significant modicum of support" before placing them on the general election ballot. *Jenness*, 403 U.S. at 442.

Despite this clear precedent, the district court concluded that Georgia's ballot-access requirements impose a severe burden on candidates and do not withstand a heightened level of scrutiny under the *Anderson-Burdick* framework, and reduced the requirements by 80%. That was error. The factual record does not demonstrate that Georgia has imposed any new burdens on candidates than what has already been presented and considered in prior cases before this Court. Georgia's ballot-access requirements have not materially changed since *Jenness*, and this Court and other federal courts have continuously upheld Georgia's ballot-access requirements and similar requirements in other states. The Libertarian Party failed to prove that a different result is required in this case.

Accordingly, this Court should reverse the district court's order and enter summary judgment in favor of the Secretary.

STATEMENT OF THE CASE

This case involves a constitutional challenge to Georgia's ballot-access requirements by the Libertarian Party of Georgia and four of its members (collectively, the "Libertarian Party"), seeking to have the party's candidates placed on the general

election ballot for the U.S. House of Representatives. The Libertarian Party's complaint against the Secretary asserts that Georgia's ballot-access requirements for U.S. Representative are an unconstitutional burden on their rights to freedom of association and equal protection under the First and Fourteenth Amendments.

This is the second time the case has been before this Court. The district court previously entered judgment in favor of the Secretary, holding that the Libertarian Party's constitutional claims were foreclosed by *Jenness* and prior decisions of this Court. On appeal, this Court vacated the district court's grant of summary judgment, holding that although *Jenness* remained precedent, the district court was still required to analyze the Libertarian Party's constitutional claims under the *Anderson-Burdick* framework. *Cowen v. Ga. Sec'y of State*, 960 F.3d 1339, 1344 (11th Cir. 2020). The Court remanded the case with instructions to apply the *Anderson-Burdick* framework. *Id.* at 1347.

On remand, the parties filed second cross-motions for summary judgment. In a reversal of its prior summary judgment order, the district court granted summary judgment in favor of the Libertarian Party on their First and Fourteenth Amendment

claim, concluding that Georgia's ballot-access requirements were severely burdensome and not narrowly drawn to advance a compelling state interest. Doc. 159. The district court entered a permanent injunction enjoining the Secretary from enforcing the provisions of O.C.G.A. § 21-2-170(b) and reducing the petition-signature requirement from 5% to 1% for all non-statewide offices in Georgia. Doc. 168.

A. Statutory Framework

Georgia's elections code provides for ballot access based on a candidate's showing of support within the electorate. A "political party," for example, is defined under Georgia law as a political organization whose nominee received at least 20% of the vote in the last gubernatorial or presidential election. O.C.G.A. § 21-2-2(25). Based on that substantial showing of support, political parties obtain ballot access by nominating their candidates via primary election. O.C.G.A. § 21-2-130(1). Currently, only the Republican and Democratic parties meet the definition of a political party in Georgia. To maintain their status, political parties must continue to demonstrate support among the electorate by receiving at least 20% of the vote in each general election. O.C.G.A. § 21-2-2(25).

The Libertarian Party is a "political body" as defined by Georgia law, which includes any political organization that is not a political party. O.C.G.A. § 21-2-2(23). Political body candidates do not have to win a majority of votes in a primary election or expend resources running a primary campaign to be nominated for the general election ballot. Rather, political body candidates may be nominated at their organization's convention, and included on the general election ballot by demonstrating significant voter support in other ways.

For statewide offices, a political body can qualify to have its nominees appear automatically on the general election ballot by either (a) submitting a qualifying petition signed by at least 1% of the total number of registered voters at the last general election; or (b) nominating a candidate for statewide office who received votes totaling at least 1% of the total number of registered voters at the last general election. O.C.G.A. § 21-2-180.

For non-statewide offices, including U.S. Representative, political body candidates may appear on the general election ballot if they submit a nomination petition signed by 5% of the number of registered voters eligible to vote for that office in the last election. O.C.G.A. § 21-2-170(b). Political body candidates have six months to collect petition signatures. O.C.G.A. § 21-2-170(e). Any

registered voter may sign a petition; the only restriction is that no person may sign the same petition more than once. O.C.G.A. § 21-2-170(c).

If a political body candidate does not qualify by nomination or petition, they may alternatively run as a write-in candidate for state or local office by filing notice of their intention of candidacy. O.C.G.A. § 21-2-133.

B. Relevant Background

Although the Libertarian Party is organized in all fifty states, the Libertarian Party of Georgia has a very small membership. In 2016, the most recent year for which data is available, the Libertarian Party of Georgia had 5,861 Georgia residents as members, with 161 dues-paying members. Doc 135-3 ¶ 39. Although it takes only three members (who must volunteer to be officers) to start an affiliate branch of the Libertarian Party, the Libertarian Party of Georgia has only seven active affiliates in the state. *Id.* ¶ 41.

Despite its low membership in Georgia, the Libertarian Party has successfully obtained ballot access for state and local office. In 1988, the Libertarian Party qualified under O.C.G.A. § 21-2-180 to nominate candidates for statewide offices when it submitted a qualifying petition signed by more than 1% of the total number of

registered voters in the preceding general election. *Id.* ¶ 37. Since then, the party has retained that qualification in each election cycle by nominating at least one candidate for statewide public office who received votes totaling at least 1% of the total number of registered voters in that election. *Id.*

While Libertarian Party candidates have some support among voters at the state level, no Libertarian Party candidate has met the petition requirement to qualify for the general election ballot for U.S. Representatives in Georgia. *Id.* ¶ 38. In part, that is because very few individuals have made a reasonably diligent effort to qualify.

The Libertarian Party submitted affidavits from 11 individuals who unsuccessfully attempted to meet the 5% petition-signature requirement as third-party or independent candidates in a handful of congressional elections since 2002. Several of these candidates collected only a few hundred signatures while working for a period of 2 months or less out of the 6-month signature-gathering period. *Id.* ¶¶ 42-43; 51; 49. Two others expressed interest in running for U.S. Representative but did not even attempt a petition campaign when they learned of the requirements. *Id.* ¶¶ 54; 57. The record further shows that four candidates were able to collect a significant number of signatures

with some effort, but fell short. *Id.* ¶¶ 47-50. For example, one candidate gathered approximately 13,000 signatures when attempting to qualify as a candidate for Georgia's 9th Congressional District. *Id.* ¶ 48.

One candidate came very close to meeting the petition requirement. *Id.* ¶ 55. The Libertarian Party raised $40,000 for his campaign in 2002, and paid for 35 professional petition circulators. *Id.* While he gathered over 20,000 raw signatures, after they were validated by county officials, he was "just shy" of the requirement. *Id.* ¶ 56. According to the candidate, the 2002 election cycle was the Libertarian Party's "most substantial effort to obtain ballot-access for U.S. Representative," before or after. *Id.* ¶ 55. In fact, his campaign is the only congressional campaign in which the Libertarian Party has invested any meaningful resources.

C. Proceedings Below

The Libertarian Party filed their complaint against the Secretary asserting that Georgia's 5% petition-signature requirement for U.S. Representative under O.C.G.A. § 21-2-170(b) violated their rights to freedom of association (Count I) and equal protection (Count II) under the First and Fourteenth Amendments. Doc. 1 ¶¶ 148; 149.

Following discovery, the parties filed cross-motions for summary judgment. The district court denied the Libertarian Party's motion and granted the Secretary's motion, concluding that the Supreme Court's decision in *Jenness* "rejected a constitutional challenge to essentially the same ballot-access restrictions" challenged here. Doc. 113 at 10. The district court concluded that it was "bound by clear rulings of both the Eleventh Circuit and the Supreme Court," and held that *Jenness* foreclosed the Libertarian Party's constitutional claims. Doc. 113 at 15.

The Libertarian Party appealed the district court's summary judgment order to this Court. On appeal, this Court vacated the order, holding that although *Jenness* remained precedent, the district court was still required to analyze the Libertarian Party's constitutional claims under the *Anderson-Burdick* framework. *Cowen v. Ga. Sec'y of State*, 960 F.3d 1339, 1344 (11th Cir. 2020). The Court remanded the case with instructions to apply the *Anderson-Burdick* framework and separately consider the Libertarian Party's equal protection claim. *Id.* at 1347. This Court made clear that "the [Libertarian] Party will, on remand, have to satisfactorily distinguish its claims from those rejected in *Jenness*." *Id.* at 1346.

On remand, the parties filed second cross-motions for summary judgment. The district court granted in part the Libertarian Party's motion for summary judgment, concluding that Georgia's ballot-access requirements violated their associational rights under the First and Fourteenth Amendments. Doc. 159 at 47. The district court denied the Libertarian Party's motion for summary judgment on their equal protection claim. *Id.* The district court entered a permanent injunction enjoining the Secretary from enforcing the petition-signature requirement in O.C.G.A. § 21-2-170(b) and reducing the requirement from 5% to 1% for all non-statewide offices in Georgia. Doc. 168.

D. Standard of Review

The constitutionality of a statute is a question of law subject to *de novo* review. *Padgett v. Donald*, 401 F.3d 1273, 1277 (11th Cir. 2005). This Court also reviews a district court's disposition of cross-motions for summary judgment *de novo*, applying the same legal standards as the district court. *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1240 (11th Cir. 2013).

SUMMARY OF ARGUMENT

It has long been established that Georgia has the undoubted right to require candidates to make a preliminary showing of

substantial support among the electorate in order to qualify for a place on the general election ballot. Under the *Anderson-Burdick* framework, the district court was required to defer to this important state interest unless the Libertarian Party proved that the burdens imposed on them by Georgia's 5% petition-signature requirement are severe.

The Libertarian Party failed to meet this burden. Long-standing Supreme Court and Eleventh Circuit precedent holds that Georgia's 5% petition-signature requirement does *not* impose a severe burden on candidates' First and Fourteenth Amendment rights and is justified by the state's important regulatory interests. This precedent is not materially distinguishable and is controlling here.

For a state ballot-access law to be severely burdensome, it must be virtually impossible for a reasonably diligent candidate to meet. The evidence adduced by the Libertarian Party falls far short of proving that Georgia's 5% petition-signature requirement is impossible to meet. The burdens identified by the Libertarian Party include the investment of time and financial resources, campaign fund-raising, and garnering voter support. But these are simply the ordinary burdens faced by all candidates when running a congressional campaign, so that cannot be enough to

establish a severe burden. Although the Libertarian Party emphasized the fact that none of its candidates have successfully obtained ballot access for U.S. Representative, this is more a reflection of their candidates' failure to exercise the reasonable diligence required of a congressional campaign than the objective severity of the burdens imposed by the petition requirement.

Georgia has not imposed any new burdens on candidates than what has already been presented and considered in prior cases, and Georgia's petition requirement has not materially changed since *Jenness*. Accordingly, the Court should reverse the district court and hold that Georgia's 5% petition-signature requirement is a reasonable, non-discriminatory restriction that is justified by the state's regulatory interests.

Even if the Libertarian Party could establish a constitutional violation, the district court's injunction is far broader than the scope of relief they requested in this action. The district court enjoined the Secretary from enforcing Georgia's petition-signature requirement for *all* non-statewide offices in Georgia, even though the Libertarian Party's claims were limited to the requirements for U.S. Representative. At a minimum, the district court's injunction should be reversed because it is not narrowly tailored to fit the nature of the alleged constitutional violation.

ARGUMENT

I. The district court's summary judgment order is contrary to precedent upholding Georgia's 5% petition-signature requirement.

On remand, the district court was instructed to apply the *Anderson-Burdick* framework for evaluating the constitutionality of ballot-access requirements under the First and Fourteenth Amendment. *Cowen*, 960 F.3d at 1344.

In *Anderson*, which first set forth this framework, the Supreme Court acknowledged that states "have the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot." *Id.* at 788 n.9 (citations omitted). Accordingly, state "regulatory interests are generally sufficient to justify reasonable, nondiscriminatory" ballot-access restrictions. *Id.* at 788.

Under the *Anderson-Burdick* framework, courts are to "weigh the character and magnitude of the burden the State's rule imposes on those rights against the interest the State contends justify that burden, and consider the extent to which the State's concerns make that burden necessary." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). The rigorousness of the Court's inquiry "depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."

Burdick v. Takushi, 504 U.S. 428, 434 (1992). When "those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (citations omitted). "Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Timmons*, 520 U.S. at 358 (citations omitted).

The Secretary maintains his position in the prior appeal that *Jenness* squarely controls and forecloses the Libertarian Party's claims in this action. But even applying the *Anderson-Burdick* framework to the Libertarian Party's claims, there is still no legal or factual basis for the district court's holding that Georgia's 5% petition-signature requirement imposes a severe burden on candidates and should be subjected to heightened scrutiny.

A. The district court erred in holding that Georgia's 5% petition-signature requirement imposes a severe burden on candidates.

Long-standing Supreme Court and Eleventh Circuit precedent has consistently held that Georgia's 5% petition-signature requirement does *not* impose a severe burden on candidates' First and Fourteenth Amendment rights. And

application of the *Anderson-Burdick* framework to the facts of this case only confirms that nothing about Georgia's 5% petition-signature requirement imposes a severe burden.

Starting with *Jenness*, the Supreme Court held that Georgia's 5% petition-signature requirement was not severely burdensome, holding that "Georgia imposes no suffocating restrictions whatever upon the free circulation of nominating petitions." 403 U.S. at 438. The Supreme Court reasoned that, although the 5% requirement is "somewhat higher" than other states, Georgia imposes few restrictions on the signature collection process. *Id.* at 442. Specifically, voters may sign a petition for more than one candidate; voters are not required to state that they intend to vote for that candidate in the election; and voters who previously voted in a party primary are still eligible to sign a petition. *Id.* at 438-39. Additionally, Georgia "does not fix an unreasonably early filing deadline for candidates" and allows them 6 months to conduct a signature-gathering campaign. *Id.* at 438. Georgia also "freely provides for write-in votes." *Id.* 438. In sum, the Supreme Court concluded that Georgia freely allows political body candidates to access the ballot. *Id.* at 438-39.

Since *Jenness*, the Eleventh Circuit has upheld Georgia's 5% petition-signature requirement three additional times, each time

rejecting the argument that the requirement imposes a severe burden on candidates and noting that "the pertinent laws of Georgia have not changed materially since *Jenness*." *Coffield*, 599 F.3d at 1277 ("Our Court and the Supreme Court have upheld Georgia's 5% rule before."); *see also McCrary*, 638 F.2d at 1311-13 (relying on *Jenness* to uphold the 5% petition requirement); *Cartwright*, 304 F.3d at 1141 (recognizing that the analysis in *Jenness* "still equally pertains today" and that Georgia's 5% petition requirement is not severely burdensome). These cases are controlling and should foreclose the Libertarian Party's claims. But at the very least, the district court failed to give proper deference to this Court's prior holdings that the burdens associated with meeting the 5% petition-signature requirement are not severe.

The district court's decision is an extreme outlier compared to similar ballot-access cases previously decided by this Court and other circuit courts. "Neither the Supreme Court nor any circuit court has struck down a statewide ballot-access regime on the grounds that a signature requirement of 5% (or less) is too much, or that 6 months (or more) is too little time within which to gather the signatures from a pool of substantially all voters." *Libertarian Party of N.H. v. Gardner*, 843 F.3d 20, 26 (1st Cir. 2016).

Indeed, the overwhelming weight of authority holds that state petition-signature requirements such as Georgia's are reasonable, non-discriminatory restrictions that do not impose a severe burden on candidates and do not warrant a heightened level of scrutiny. *See Ariz. Libertarian Party v. Hobbs*, 925 F.3d 1085, 1093 (9th Cir. 2019) ("there is no dispute that a state may require a candidate to demonstrate support from slightly, but not 'substantially,' more than 5% of voters without imposing a severe burden triggering heightened scrutiny"); *see also Libertarian Party of Fla. v. Fla.*, 710 F.2d 790, 793 (11th Cir. 1983); *Swanson v Worley*, 490 F.3d 894, 903-04 (11th Cir. 2007); *Rainbow Coalition of Okla. v. Okla. State Election Bd.*, 844 F.2d 740, 743 (10th Cir. 1988).

In contrast, the district court did not cite *any* authority to support its unprecedented holding that Georgia's 5% petition-signature requirement is severely burdensome. And the district court's stated reasons for departing so significantly from precedent do not withstand scrutiny. The district court first pointed to the fact that "the historical record shows that third-party and independent candidates have largely been excluded from Georgia's congressional ballots," and that Georgia "has frozen the political

status quo in Georgia as to congressional races."[1] Doc. 159 at 15. But past candidates' lack of success in meeting state ballot-access requirements is not the test for whether the requirements are severely burdensome. Rather, the relevant inquiry is whether it is "virtually impossible" for a reasonably diligent candidate to access the ballot. *Jenness*, 403 U.S. at 435; *see also Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016) ("The hallmark of a severe burden is exclusion or virtual exclusion from the ballot.").

The factual record here falls far short of proving that it is "virtually impossible" for a candidate to meet the 5% petition-signature requirement for U.S. Representative in Georgia, even though some aspiring candidates have tried and failed. The appropriate standard is whether "a reasonably diligent [ ]

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[1] The district court mischaracterizes the phrase "freeze the political status quo" from *Jenness*, 403 U.S. at 438. Doc. 159 at 15, 31. The Supreme Court in *Jenness* compared Georgia's petition requirements to the ballot access laws of Ohio struck down in *Williams v. Rhodes*, 393 U.S. 23 (1968). Ohio's requirements were much more restrictive, and made it "virtually impossible" for new political parties to access the ballot. *Jenness*, 403 U.S. at 435 (citing *Williams*, 393 U.S. at 24). In comparison, the *Jenness* court concluded that "Georgia's election laws, unlike Ohio's, do *not* operate to freeze the political status quo." *Id.* at 438 (emphasis added).

candidate [can] be expected to satisfy the signature requirements." *Libertarian Party of Fla.*, 710 F.2d at 793 (quoting *Storer v. Brown*, 415 U.S. 724, 742 (1974)). This is an objective standard of the "general assessment of the burden" not tied to the subjective experiences of a particular candidate. *Crawford v. Marion Cnty. Election Bd.*, 533 U.S. 181, 207 (2008) (Scalia, J., concurring).

Nearly all of the candidates that the Libertarian Party identified as having made an effort to meet the petition-signature requirement made little to no effort during the 6-month period they were allowed to gather signatures. Doc. 135-3 ¶¶ 42-57. While some would-be candidates only worked for several weeks and gathered a few hundred signatures, others did not even try once they learned what the requirements were. *Id.* Candidates cannot be said to have exercised reasonable diligence if they fail to invest any significant amount of time or resources towards a petition drive.

However, the one candidate who did invest the kind of time and financial resources that would be expected for a congressional campaign actually came very close to satisfying the requirement. *Id.* ¶¶ 55-56. Thus, the factual record demonstrates that it is possible for a serious candidate to access the ballot, so long as the candidate exercises reasonable diligence.

The district court also pointed to the fact that Georgia's petition-signature requirements are higher than those in other states. Doc. 159 at 21. But this Court has rejected that kind of state-by-state comparison as a means of determining whether a ballot-access restriction is severely burdensome. *See Swanson*, 490 F.3d at 910 ("the Supreme Court has upheld a broad array of election schemes, and we confine our inquiry to whether Alabama's scheme is constitutional, not whether Alabama's scheme is the best relative to other states"). The district 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." *Libertarian Party of Fla.*, 710 F.2d at 794.

Finally, the district court pointed to the "practical difficulties of obtaining petition signatures" as evidence that Georgia's petition requirement is severely burdensome, including the time and financial resources required to conduct a petition drive. Doc. 159 at 23-26. But those are the ordinary burdens candidates face when running for office. Every candidate must invest substantial time and financial resources, raise campaign funds, organize volunteers, and garner voter support. *See Libertarian Party of Fla.*, 710 F.2d at 794-795 ("candidates must incur some expenses in accumulating the necessary signatures to qualify for the

ballot"); *see also American Party of Texas v. White*, 415 U.S. 767, 794 (1974) (recognizing that minor parties "must undergo expense, to be sure, in holding their conventions and accumulating the necessary signatures to qualify for the ballot").

Ballot-access laws will invariably impose some burden upon candidates, and a state is "not burdened with a constitutional imperative to reduce voter apathy or to 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot." *Munro v. Socialist Workers Party*, 479 U.S. 189, 198 (1986); *see also Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 75 (3d Cir. 1999) ("Although minor parties face many hurdles in entering the political arena, the [Supreme] Court explained that states are under no duty to alleviate those difficulties.").

In sum, there is no legal or factual support for the district court's holding that Georgia's 5% petition-signature requirement imposes a severe burden on candidates and is subject to heightened scrutiny. The fact that Georgia's "system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny." *Burdick*, 504 U.S. at 433. Such a result "would tie the hands of

States seeking to assure that elections are operated equitably and efficiently." *Id.*

B. The district court erred in holding that *Jenness* and its progeny are materially distinguishable.

The conclusion that the district court should have reached—that Georgia's 5% petition-signature requirement is not severely burdensome and is justified by the state's regulatory interests—is required by *Jenness* and subsequent Eleventh Circuit decisions, which are not materially distinguishable. As this Court stated in the prior appeal, to come to the conclusion that "a different result from *Jenness* is required in this case," there must be "different facts in the instant record, as compared to the record in *Jenness*; changes in the relevant Georgia legal framework; or the evolution of the relevant federal law." *Cowen*, 960 F.3d at 1346. The Libertarian Party has shown none of those things. And although the district court attempted to distinguish *Jenness* in several ways, none of them are persuasive.

First, the Libertarian Party's claims are no different than those raised in prior constitutional challenges to the same 5% petition-signature requirement. The district court found that the Libertarian Party sufficiently distinguished its claims from *Jenness* because they also challenged the qualifying fee, which

adds to the "cumulative burdens" imposed on political body candidates. Doc. 159 at 30. However, all candidates regardless of party affiliation must pay a qualifying fee in Georgia based upon a percentage of the annual salary of the office the candidate is seeking. O.C.G.A. § 21-2-131. This is not a burden imposed solely on political body candidates, and is separate and apart from the petition requirement.[2] The district court even recognized this when it refused to enjoin the qualifying fee as the Libertarian Party requested. Doc. 165 at 5, 6 ("as the [Secretary] points out, all candidates for office are ordinarily required to pay the qualifying fee").

Moreover, the Libertarian Party's additional challenge to the qualifying fee does not materially distinguish this case from *Jenness*, which still squarely controls their challenge to Georgia's 5% petition-signature requirement. If a litigant could avoid

[2] The qualifying fee requirement was challenged by the plaintiffs in *Jenness*, along with the 5% petition-signature requirement, and the qualifying fee was enjoined by the district court but the injunction was not appealed. *See generally Georgia Socialist Workers Party v Fortson*, 315 F. Supp. 1035 (N.D. Ga. 1970). Georgia then amended the law to allow candidates to submit a pauper's affidavit if they cannot meet the fee requirement. O.C.G.A. § 21-2-132(g). Therefore, the qualifying fee has actually become *less* restrictive since *Jenness*.

controlling precedent by slightly repackaging their claims, this Court's decisions would be meaningless.

Second, the district court is simply wrong that Georgia law has materially changed since *Jenness*. Doc. 159 at 30. As this Court correctly noted in *Coffield*, "the pertinent laws of Georgia have not changed materially since *Jenness*." 599 F.3d at 1277. The statutory requirements of O.C.G.A. § 21-2-170(b) remain the same, and Georgia still imposes few restrictions on the signature-collection process. *Id.*

The only change in Georgia law since *Jenness* that the district court identified is the requirement that write-in candidates must now file a notice of candidacy to have their votes counted. Doc. 159 at 30-31. However, this is a *de minimis* filing requirement, not an additional burden on the collection of signatures. *See* O.C.G.A. § 21-2-133. An aspiring candidate is still free to run as a write-in candidate, and voters can write in the name of that candidate and have those votes counted. In fact, Martin Cowen, the named plaintiff, qualified to run as a write-in candidate for U.S. Representative in 2018 and received votes in that election. Doc. 69-8 ¶ 10. The slight modification to the requirements for write-in candidates does not in any way materially distinguish this case from *Jenness*.

Third, federal law has not evolved in a way that departs from *Jenness*, even though, as the district court noted in its summary judgment order, *Anderson-Burdick* has since emerged as the current framework for courts to apply in ballot-access cases. Doc. 159 at 32-33. *Jenness* remains controlling Supreme Court precedent and has been cited with approval by the Supreme Court itself—including in both *Anderson* and *Burdick*. *See Anderson*, 460 U.S. at 788 n. 9; *Burdick*, 504 U.S. at 436 n. 4; *see also Timmons*, 520 U.S. at 364-65. And this Court and other federal courts frequently rely on *Jenness* in upholding similar ballot access requirements in other states. *See, e.g., Libertarian Party of Fla.*, 710 F.2d at 793; *Swanson*, 490 F.3d at 903-904. If anything, federal courts treat *Jenness* as a guidepost in deciding whether a state ballot-access law should be upheld as a reasonable, nondiscriminatory restriction.

C. The district court erred in holding that Georgia's 5% petition-signature requirement is not justified by the state's regulatory interests.

Because the burdens associated with Georgia's 5% petition-signature requirement are not severe, the district court should have upheld the requirement as a "reasonable, non-discriminatory restriction" justified by the state's important regulatory interests,

consistent with controlling precedent. *Timmons*, 520 U.S. 358. It is well established that Georgia has "an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot." *Jenness*, 403 U.S. at 442; *see also Anderson*, 460 U.S. at 788 n. 9; *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000).

Georgia also has an interest in the orderly administration of elections, and ballot-access laws advance the state's interest in "avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness*, 403 U.S. at 442; *see also Storer v. Brown*, 415 U.S. 724, 730 (1974); *Timmons*, 520 U.S. at 366 ("States also have a strong interest in the stability of their political systems."). While this interest "does not permit a [s]tate to completely insulate the two-party system from minor parties' or independent candidates' competition and influence," a state "need not remove all of the many hurdles third parties face in the American political arena today." *Timmons*, 520 U.S. at 367.

Because Georgia's "reasonable, nondiscriminatory" petition requirements are justified by the State's "important regulatory interests" in regulating ballot access, *Anderson*, 460 U.S. at 788, it was error for the district court to apply heightened scrutiny and

enjoin the requirements. Accordingly, the Court should reverse the district court's summary judgment order in favor of the Libertarian Party on its First and Fourteenth Amendment claim and enter judgment in favor of the Secretary.

II. The district court's permanent injunction is overly broad and fails to account for the state's regulatory interests.

Because the Secretary is entitled to summary judgment, no injunctive relief is warranted. But at a minimum, the permanent injunction order should be vacated because "there are serious and substantial problems that inhere in the remed[y]" imposed by the district court. *Hand*, 888 F.3d 1206. The district court held that Georgia's 5% petition-signature requirement was unconstitutionally burdensome for U.S. Representative candidates, but then unilaterally enjoined the requirement for *all* non-statewide offices.

In the case of a constitutional violation, "injunctive relief must be tailored to fit the nature and extent of the established violation." *Gibson v. Firestone*, 741 F.2d 1268, 1273 (11th Cir. 1984). *See also Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). An injunction "must be no broader than necessary to remedy the constitutional violation." *Newman v. State of Ala.*, 683 F.2d 1312, 1319 (11th Cir. 1982). When a district court fails to follow this

principle and drafts an unnecessarily broad injunction, the district court abuses its discretion. *Alley v. United States HHS*, 590 F.3d 1195, 1205 (11th Cir. 2009); *see also Belitskus v. Pizzingrilli*, 343 F.3d 632, 650 (3d Cir. 2003) (vacating injunction ordered in state election law challenge because the scope of the injunction was overly broad); *OCA-Greater Houston v. Texas*, 867 F.3d 604, 615-16 (5th Cir. 2017) (same).

The injunction exceeds the scope of the district court's summary judgment order and the relief requested by the Libertarian Party in their complaint. This case is "a constitutional challenge to Georgia's ballot-access laws for third-party candidates for U.S. Representative." Doc. 1 at ¶ 1. And the district court's holding on summary judgment was that Georgia's 5% petition-signature requirement for U. S. Representative candidates are unconstitutionally burdensome. Doc. 159 at 44. At no point in this action did the Libertarian Party challenge Georgia's ballot-access laws for any office other than U.S. Representative.

The factual record presented at summary judgment, *see generally* Doc. 73-1, as well as the factual findings made by the district court in its summary judgment order, *see generally* Doc. 159, are limited to the burdens imposed on candidates running for U.S. Representative in Georgia—not other offices. Indeed, the

primary fact relied upon by the district court in concluding that the petition-signature requirements impose a severe burden is the fact that no political body candidate has succeeded in meeting the requirements for *U.S. Representative*. *See* Doc. 159 at 27-28. The district court made no similar findings with respect to other offices.

Additionally, the district court imposed a drastic 80% reduction of the current petition-signature requirement without explaining why that reduction was necessary to alleviate the alleged constitutional violation.[3] Certainly the district court failed to grapple with the State's "undoubted right" to require candidates demonstrate "a preliminary showing of substantial support" before placing them on the ballot. *Anderson*, 460 U.S. at 788 n.9. The Georgia General Assembly reasonably determined that a petition-

[3] The injunction brings Georgia's requirements far below those found to be constitutionally permissible in other states, including by this Court. *See, e.g.*, *Libertarian Party of N.H.*, 843 F.3d at 27 (New Hampshire's 3% signature requirement); *Swanson*, 490 F.3d at 912 (Alabama's 3% signature requirement); *Rainbow Coalition of Okla.*, 844 F.2d at 744 (Oklahoma's 5% signature requirement); *Populist Party v. Herschler*, 746 F.2d 656, 660 (10th Cir. 1984) (Wyoming's 5% signature requirement); *Libertarian Party of Fla.*, 710 F.2d at 795 (Florida's 3% signature requirement); *Dart v. Brown*, 717 F.2d 1491, 1510 (5th Cir. 1983) (Louisiana's 5% signature requirement to be recognized as a political party).

signature requirement of 5% was necessary to keep frivolous candidates off of the ballot and avoid ballot overcrowding. The injunction reduces the petition-signature requirement by such a substantial amount that it is likely to undermine the state's interests, especially because the injunction reduces the requirement for *all* non-statewide offices in Georgia. Accordingly, at a minimum, the district court's injunction should be vacated because it is overly broad and fails to account for the state's important regulatory interests.

CONCLUSION

For the foregoing reasons, the Secretary requests that the Court reverse the district court's summary judgment order in favor of the Libertarian Party on its First and Fourteenth Amendment claim and enter judgment in favor of the Secretary.

Respectfully submitted, this 27th day of October, 2021.

/s/ *Charlene S. McGowan*
Christopher M. Carr
Attorney General of Georgia
Bryan K. Webb
Deputy Attorney General
Russell D. Willard
Senior Assistant Attorney General
Charlene S. McGowan
Assistant Attorney General
Office of the Georgia Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3658
cmcgowan@law.ga.gov
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6051 words as counted by the word-processing system used to prepare the document. 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.

/s/ *Charlene S. McGowan*
Charlene S. McGowan
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2021 I served this brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

/s/ *Charlene S. McGowan*
Charlene S. McGowan
Assistant Attorney General