

Nos. 21-13199 and 21-13367

In the
**United States Court of Appeals
For the Eleventh Circuit**

MARTIN COWEN et al.,

Plaintiffs – Appellees – Cross-Appellants

v.

GEORGIA SECRETARY OF STATE,

Defendant – Appellant – Cross-Appellee

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

APPELLEES' PETITION FOR REHEARING EN BANC

Bryan L. Sells
The Law Office of
Bryan L. Sells, LLC
Post Office Box 5493
Atlanta, Georgia 31107-0493
(404) 480-4212
bryan@bryansellslaw.com

Attorney for the Plaintiffs – Appellees – Cross-Appellants

**Cowen v. Georgia Secretary of State
21-13199 and 21-13367**

**Certificate of Interested Persons
and
Corporate Disclosure Statement**

I hereby certify under Eleventh Circuit Rules 26.1, 26.1-2,
and 26.1-3 that these persons and entities have or may have an
interest in the outcome:

Buckley, Allen

Carr, Christopher

Correia, Cristina

Cowen, Martin

Gilmer, Aaron

Heidt, Josiah B.

Libertarian Party of Georgia, Inc.

May, Leigh Martin

McGowan, Charlene S.

Monds, John

**Cowen v. Georgia Secretary of State
21-13199 and 21-13367**

**Certificate of Interested Persons
and
Corporate Disclosure Statement
(continued)**

Raffensperger, Brad

Sells, Bryan L.

The Law Office of Bryan L. Sells, LLC

Webb, Bryan K.

Willard, Russell D.

/s/ Bryan L. Sells

Georgia Bar No. 635562

The Law Office of

Bryan L. Sells, LLC

Post Office Box 5493

Atlanta, Georgia 31107-0493

(404) 480-4212 (voice/fax)

bryan@bryansellslaw.com

Attorney for the Plaintiffs – Appellees – Cross-Appellants

Statement of Counsel

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

Norman v. Reed, [502 U.S. 279](#) (1992); *Anderson v. Celebrezze*, [460 U.S. 780](#) (1983); *Illinois State Board of Elections v. Socialist Workers Party*, [440 U.S. 173](#) (1979); *Cowen v. Georgia Secretary of State*, [960 F.3d 1339](#) (11th Cir. 2020); *New Alliance Party of Alabama v. Hand*, [933 F.2d 1568](#) (11th Cir. 1991); and *Bergland v. Harris*, [767 F.2d 1551](#) (11th Cir. 1985).

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves two questions of exceptional importance because of their impact on millions of Georgia voters and because of the fundamental nature of the rights involved. The first is whether, on this record, Georgia's ballot-access restrictions on third-party candidates for U.S. Representative violate the First and Fourteenth Amendments.

The second is whether Georgia's ballot-access restrictions violate the Equal Protection Clause by requiring Libertarian candidates for U.S. Representative to gather more signatures for ballot access than Libertarian candidates for statewide offices.

/s/ Bryan L. Sells

Georgia Bar No. 635562
The Law Office of
Bryan L. Sells, LLC
Post Office Box 5493
Atlanta, Georgia 31107-0493
(404) 480-4212 (voice/fax)
bryan@bryansellslaw.com

Attorney for the Plaintiffs – Appellees – Cross-Appellants

Table of Contents

Certificate of Interested Persons and Corporate Disclosure Statement.....	2
Statement of Counsel.....	4
Table of Contents	6
Table of Citations.....	7
Statement of the Issues	9
Statement of the Case.....	10
Statement of the Facts.....	14
Argument	19
A. The panel’s reliance on the disputed success of a single independent candidate for district attorney to measure the burden of Georgia’s ballot-access restrictions on third-party candidates for U.S. Representative is contrary to decisions of this Court and the Supreme Court.....	19
B. The panel’s decision on the Libertarian Party’s Equal Protection claim is contrary to Supreme Court precedent.	23
Conclusion	30
Certificate of Compliance	32
Certificate of Service.....	33
Appendix A: Panel Opinion	34
Appendix B: District Court Opinion	44

Table of Citations

Cases

* <i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	4, 20, 29
* <i>Bergland v. Harris</i> , 767 F.2d 1551 (11th Cir. 1985)	4, 20, 22
* <i>Cowen v. Georgia Secretary of State</i> , 960 F.3d 1339 (11th Cir. 2020)	4, 11, 15, 20
<i>Cowen v. Secretary of State</i> , 22 F.4th 1227 (11th Cir. 2022)	<i>passim</i>
<i>Green Party of Georgia v. Kemp</i> , 171 F. Supp. 3d 1340 (N.D. Ga. 2016)	20
* <i>Illinois State Board of Elections v. Socialist Workers Party</i> , 440 U.S. 173 (1979)	4, 24, 25
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971)	11
<i>Lee v. Keith</i> , 463 F.3d 763 (7th Cir. 2006)	21
<i>Mandel v. Bradley</i> , 432 U.S. 173 (1977)	19, 22
* <i>New Alliance Party of Alabama v. Hand</i> , 933 F.2d 1568 (11th Cir. 1991)	4, 21
* <i>Norman v. Reed</i> , 502 U.S. 279 (1992)	<i>passim</i>

<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	19
---	----

Statute

O.C.G.A. § 21-2-180	15
---------------------------	----

Treatises

Bryan A. Garner et al., <i>The Law of Judicial Precedent</i> (2016).....	28
--	----

Statement of the Issues

This petition presents two issues that merit en banc consideration because of their impact on millions of Georgia voters; because of the fundamental nature of the rights involved; and because the panel's decision is contrary to binding precedent.

The first is whether, on this record, Georgia's ballot-access restrictions on third-party candidates for U.S. Representative violate the First and Fourteenth Amendments.

The second is whether Georgia's ballot-access restrictions violate the Equal Protection Clause by requiring Libertarian candidates for U.S. Representative to gather more signatures for ballot access than Libertarian candidates for statewide offices.

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.

The Libertarian Party of Georgia, prospective Libertarian candidates, and Libertarian voters—collectively, the “Libertarian Party” or just “Party”—bring this case against the Georgia Secretary of State. They allege that Georgia’s ballot-access restrictions unconstitutionally burden their associational rights under the First and Fourteenth Amendments to the U.S. Constitution. ([ECF 1 at 37.](#)) They also allege that Georgia’s ballot-access restrictions violate the Equal Protection Clause by requiring Libertarian candidates for U.S. Representative to gather more

signatures for ballot access than Libertarian candidates for statewide offices. (*Id.*)¹

After an extended period of discovery, the parties cross-moved for summary judgment, and the district court granted summary judgment for the Secretary. (ECF 113 at 15.) The court based its ruling on the Supreme Court's decision in *Jenness v. Fortson*, 403 U.S. 431 (1971), which upheld an earlier version of Georgia's ballot-access requirements as constitutional. Finding itself bound by *Jenness*, the district court summarily rejected both of the Party's claims. (ECF 113 at 15.)

The Party appealed. A three-judge panel of this Court vacated the judgment, holding that *Jenness* did not control either of the Party's claims, and it remanded the case to the district court to reconsider both claims under the proper legal standards. *Cowen v. Ga. Sec'y of State*, 960 F.3d 1339, 1347 (11th Cir. 2020) ("*Cowen I*").

On remand, the parties cross-moved for summary judgment again. In a lengthy opinion, the district court granted the

¹ The Party also raises a discriminatory-purpose claim that is not at issue in this appeal.

Libertarian Party's motion for summary judgment on its First and Fourteenth Amendment claim but granted the Secretary's motion for summary judgment on the Party's Equal Protection claim. (ECF 159 at 47.)²

Both sides appealed. After expedited briefing and argument, a second three-judge panel reversed the district's court's ruling on the Party's First and Fourteenth Amendment claim. *Cowen v. Sec'y of State*, 22 F.4th 1227, 1234 (11th Cir. 2022) ("*Cowen II*"). The panel concluded that, although *Jenness* did not automatically control the Party's claim here, the Party had identified no material distinction between this case and *Jenness* that would warrant a different result. *Id.* at 1232.

In reaching that conclusion, the panel acknowledged the undisputed fact that no third-party candidate for U.S. Representative has ever been able to satisfy Georgia's ballot-access requirements. *Id.* But it said that the district court's focus on the many unsuccessful petitioning efforts by candidates for U.S.

² A copy of the district court's opinion is attached as Appendix B.

Representative was too narrow because the Supreme Court in *Jenness* had relied on the past petitioning success of a presidential candidate and a gubernatorial candidate when the plaintiffs in that case included a gubernatorial candidate and two candidates for U.S. Representative. The panel then pointed to the fact that a single independent candidate for district attorney had “gathered enough signatures to exceed the 5% threshold” in 2020.³ *Id.* “This local candidate’s success,” the panel concluded, “shows that the 5% requirement still does not bar candidates from the ballot” as the Supreme Court had found in *Jenness*. *Id.* Seeing no material distinction with *Jenness*, the panel found as a matter of law that the burden of Georgia’s ballot-access restrictions on the Party’s associational rights is not severe and can be justified by the State’s asserted interests in preventing frivolous candidacies and avoiding crowded ballots. *Id.* at 1233-34.

The panel also affirmed the district court’s summary judgment for the Secretary on the Party’s Equal Protection claim.

³ The candidate needed 3,526 signatures. ([ECF 139-1 at 21.](#))

Id. at 1235-36. The panel found, based solely on its ruling on the Party's First and Fourteenth Amendment claim, that the burden of requiring Libertarian candidates for U.S. Representative to gather more signatures than Libertarian candidates for statewide offices is not severe, and it found that the State's interest in ensuring that candidates have a significant modicum of support among the electorate sufficiently justifies the disparity. *Id.* In accepting that justification, the panel attempted to distinguish the Supreme Court's decision in *Norman v. Reed*, 502 U.S. 279, 293-94 (1992), which had expressly rejected a similar justification for an Illinois law that required candidates in a district or political subdivision to gather more signatures for ballot access than statewide candidates. *Cowen II*, 22 F.4th at 1235 n.5.

Statement of the Facts

In 1943, the State of Georgia imposed a five-percent petition requirement for access to the general-election ballot. (ECF 159 at 2.) That provision allowed candidates of any political party that received at least five percent of the votes in the last general election for the office to appear on the general-election ballot without a

petition or fee, but it required all other candidates to file a petition signed by at least five percent of the registered voters in the territory covered by the office. (*Id.*) Over the next few decades, the State tightened its ballot-access requirements through several incremental changes to the petition deadline, an added qualifying fee, and various other restrictions. (*Id.*)

In 1986, the State substantially loosened its ballot-access requirements—but only for statewide candidates. *Cowen I*, 960 F.3d at 1340-41. That year, the State dropped the petition requirement to one percent for statewide offices and created a way for third parties to have their candidates for statewide offices appear on the ballot without the need to submit a petition. *Id.* Under the latter provision, referred to here as “Section 21-2-180,” a third party can become qualified to nominate statewide candidates without a petition if the party either (a) submits a petition signed by at least one percent of the registered voters at the last general election; or (b) had one of its statewide candidates in the last general election receive votes totaling at least one percent of the registered voters in the election. O.C.G.A. § 21-2-180. The State left

unchanged the five-percent petition requirement for independent and third-party candidates for non-statewide offices, including U.S. Representative.

The upshot of Georgia's current ballot-access regime is that the Libertarian Party, which has maintained its qualification under Section 21-2-180 since 1988, 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. ([ECF 159 at 4.](#)) All the Party must do is pay the qualifying fees. But to have a full slate of fourteen nominees for U.S. Representative appear on the general-election ballot in 2022, the Party would have to pay \$73,080 in qualifying fees and submit nominating petitions containing at least 360,572 valid signatures—an average of about 25,755 signatures from each of Georgia's 14 congressional districts. ([ECF 154 at 2](#); [ECF 155 at 1.](#))

To put those numbers in some context, Georgia’s qualifying fees are higher than any other state in the nation that also requires a nominating petition for independent or third-party candidates. (ECF 159 at 23.) Georgia also requires more signatures than any other state in the nation, both as a percentage of votes cast for President (which is a common denominator for comparison among the states) and as an absolute number of signatures. (*Id.* at 22.) Georgia’s signature requirement is also substantially higher, in absolute terms, than any signature requirement that an independent or third-party candidate for U.S. Representative has ever been able to overcome in the history of the United States. (*Id.* at 23.) 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. (*Id.* at 6.)

The record in this case, which the district court described as “robust,” contains evidence of approximately 20 unsuccessful attempts to satisfy Georgia’s ballot-access requirements for U.S. Representative in the last 20 years alone. (*Id.* at 15-21.) It also includes un rebutted evidence of the cost and practical difficulties of

gathering signatures in Georgia today as well as the near-impossibility of raising funds to pay for such efforts. (*Id.* at 23-27.)

The record also contains undisputed evidence of widespread support for the Libertarian Party at the ballot box in Georgia and across the nation. (*Id.* at 7-8.) Over the last 10 years, Libertarian candidates for statewide offices in Georgia have received more than five million votes (*id.* at 8), and the Secretary has repeatedly told this Court in other cases that the Libertarian Party has “significant support” in the state ([ECF 97 at 93-94](#)). Nationwide, the Libertarian Party runs hundreds of candidates in every election cycle, and it has had candidates for U.S. Representative on the ballot in every state in the nation except Georgia. ([ECF 159 at 7.](#))

Argument

- A. The panel’s reliance on the disputed success of a single independent candidate for district attorney to measure the burden of Georgia’s ballot-access restrictions on third-party candidates for U.S. Representative is contrary to decisions of this Court and the Supreme Court.**

The panel’s analysis of the burden imposed by Georgia’s ballot-access restrictions marks a substantial departure from existing precedent. Courts commonly look to history as a guide. *See Storer v. Brown*, [415 U.S. 724, 742](#) (1974) (“Past experience will be a helpful, if not always unerring guide: it will be one thing if independent candidates have qualified with regularity and quite a different matter if they have not.”); *Mandel v. Bradley*, [432 U.S. 173, 178](#) (1977) (criticizing the district court for failing to analyze what the “past experience” under the ballot restriction might reveal about the burdens it imposed). But they do not place such heavy reliance on the success of a single candidate for a different office—and particularly not when, as here, there is substantial contrary evidence in the record.

Numerous decisions of the Supreme Court and of this Court make clear that measuring the burden of a challenged ballot-access restriction on a plaintiff's associational rights is a fact-intensive endeavor. "Constitutional challenges to specific provisions of a State's election laws ... cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); accord *Bergland v. Harris*, 767 F.2d 1551, 1554-55 (11th Cir. 1985). Indeed, the prior panel here reversed the district court precisely because of its failure to sift through the evidence in the voluminous record. *Cowen I*, 960 F.3d at 1345-46.

This Court's precedents also show that a single success under a ballot-access regime is not enough to insulate it from challenge under the required review. In *Green Party of Georgia v. Kemp*, for instance, this Court affirmed the district court's summary judgment striking down Georgia's one-percent presidential petition requirement even though Pat Buchanan had satisfied it in 2000 and Ross Perot had satisfied it in 1992 and 1996. See *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1348 (N.D. Ga. 2016), *aff'd*,

674 F. App'x 974 (11th Cir. 2017) (per curiam). And in *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568, 1569 (11th Cir. 1991) (per curiam), this Court affirmed the district court's judgment after trial striking down Alabama's ballot-access regime for third parties. The district court there had found that the challenged laws imposed a "significant" burden even though more than 20 independent and third-party candidates had successfully gained ballot access in the three election cycles immediately preceding the decision. *Id.* at 1575-76. Until the panel's decision in this appeal, a single instance of success has never been enough in the Eleventh Circuit to prove that the burden imposed by a ballot-access law is not severe.⁴

Even in *Jenness*, the sole case on which the panel relied, the Supreme Court cited the recent success of *two* candidates—a gubernatorial candidate and a presidential candidate—both of whom, because of the larger territory involved, would have had to

⁴ The panel's ruling on this issue also conflicts with the decisions of at least one other circuit. *See, e.g., Lee v. Keith*, 463 F.3d 763, 769 (7th Cir. 2006) (finding a severe burden even though three candidates had qualified under the challenged restrictions).

gather more signatures than the two candidates for U.S.

Representative who were among the plaintiffs. It simply does not follow from *Jenness* or any other cases of the Supreme Court or of this Circuit that the success of a single independent candidate for a low-level office, who had to gather far fewer signatures, establishes that the burden of Georgia's ballot-access regime for U.S.

Representative is not severe.

The panel's decision thus changes the standard that applies to ballot-access cases—at least those challenging the five-percent petition requirement in Georgia. No longer must a district court “sift through the conflicting evidence and make findings of fact as to the difficulty” of obtaining ballot access under the challenged statutes, as the district court did here. *Bergland*, 767 F.2d at 1555 (quoting *Mandel*, 432 U.S. at 178). Instead, the court need only identify a single successful candidate at any level to conclude—despite any conflicting evidence—that the burden is not severe. En banc review is therefore warranted to restore the importance of context that the prior panel emphasized just two years ago.

Not only was it contrary to longstanding precedent for the panel to rely on a single instance of success, but the one example of “success” it relied on is disputed. As the district court recognized, there is a factual dispute about whether the district-attorney candidate was reasonably diligent in his efforts or merely benefited from nationwide media attention after he happened to be the only challenger to the district attorney accused mid-campaign of prosecutorial misconduct in connection with the murder of Ahmaud Arbery. ([ECF 159 at 20](#).) This factual dispute alone should have precluded summary judgment for the Secretary here.⁵

B. The panel’s decision on the Libertarian Party’s Equal Protection claim is contrary to Supreme Court precedent.

The Libertarian Party’s Equal Protection claim is controlled by the Supreme Court’s decisions in *Illinois State Board of*

⁵ The panel also makes several mistaken assertions that certain other evidence is not in the record. *See Cowen II*, [22 F. 4th at 1233](#). For example, the panel claims that the Party “has made no showing that prospective candidates could not gain contributions from additional donors.” *Id.* But the Party offered un rebutted evidence of the near-impossibility of raising funds for petition drives. (*E.g.*, [ECF 69-14 at 3-4](#); [ECF 69-15 at 2-3](#); [ECF 69-24 at 1-2](#).)

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.

In *Socialist Workers*, the issue was a provision of Illinois law that required independent and third-party candidates for office in a 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 third-party candidate to appear on the ballot in a 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](#). At issue was a later 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 candidates for the Cook County Board of Commissioners, which consisted of two districts, and the Illinois Supreme Court construed the new law to require them to gather 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 defenders of the law advanced what they claimed to be a state interest, not addressed in the prior case, in ensuring that a third 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. The Supreme Court closed that portion of its opinion by again reaffirming the rule laid down by its earlier decision: “Thus, as in *Socialist Workers*, the State’s requirements for access to the statewide ballot become criteria in the first instance for judging whether rules of access to local ballots are narrow enough to pass constitutional muster.” *Id.* Finding “no justification for the disparity,” the Court struck down the law. *Id.*

The panel’s decision here acknowledges that the Party’s Equal Protection claim here is identical to the claims in *Socialist Workers* and *Norman. Cowen II*, 22 F.4th at 1235. Georgia law requires Libertarian candidates to gather more signatures to run for U.S. Representative than they would need to run for any one of Georgia’s statewide offices. But the panel’s decision fails to distinguish *Socialist Workers* at all, and it departs from the analysis in *Socialist Workers* and *Norman* in two significant ways.

First, the panel applied only low-level scrutiny. In both *Socialist Workers* and *Norman*, by contrast, the Supreme Court applied heightened scrutiny. The Court did so based on the existence of a disparity alone (rather than its size), but the disparity in *Norman*—25,000 signatures—was smaller than exists in Georgia. The panel therefore should have applied heightened scrutiny to the Party’s Equal Protection claim.

Second, the panel found the disparity to be justified by a state interest nearly identical to the interest that the Supreme Court found lacking in *Norman*. Defenders of the law in *Norman* asserted an interest in “in ensuring that the electoral support for new

parties in a multidistrict political subdivision extends to every district.” 502 U.S. at 293. The panel attempted to distinguish *Norman*, asserting in a footnote that *Norman*’s reasoning does not apply here “because prospective candidates at both the statewide and non-statewide levels must only show sufficient support among the electorate of the office they seek.” *Cowen II*, 22 F.4th at 1235 n.5. But the panel’s distinction misses its mark for four reasons.

First, the distinction does not address *Socialist Workers*, which did not involve a multidistrict political subdivision. That case is on all fours with this one, and the panel fails to explain why a different outcome is warranted here.

Second, the distinction that the panel drew here was not material to the outcome in *Norman*. See generally, Bryan A. Garner et al., *The Law of Judicial Precedent* § 8 at 97-102 (2016) (explaining that distinctions should be based on “material differences”). The Supreme Court gave no indication that the defect in Illinois’ law was that it required candidates to gather signatures among some other electorate. The defect, rather, was the disparity

itself, and the Court concluded that the State “has adduced no justification for the disparity here.” [502 U.S. at 294](#).

Third, the panel’s distinction does not square with the facts here. The Party has been clear from the beginning that it wants to run a full slate of candidates for U.S. Representative. ([ECF 1 at 4](#); [ECF 97 at 5](#).) To do so, Georgia’s law would require them to demonstrate support “in every district,” just as did the law in *Norman*. [502 U.S. at 293](#). That would require 360,572 valid signatures even though Libertarian candidates for statewide offices, which would cover the same territory, can appear on the ballot without gathering *any* signatures.

Fourth, the State here did not actually assert an interest “in requiring voter support in specific electoral districts,” as the panel says. *Cowen II*, [22 F.4th at 1235 n.5](#). That interest appears nowhere in the Secretary’s briefs, and the applicable law does not permit the panel to make up an interest on the state’s behalf. *See, e.g., Anderson*, [460 U.S. at 789](#) (the court “must identify *the precise interests put forward by the State*” (emphasis added)).

The panel's analysis of the Libertarian Party's Equal Protection claim is thus irreconcilable with *Socialist Workers* and *Norman*, and en banc review is warranted to maintain consistency with binding precedent.

Conclusion

Georgia's voters—more than five million of whom have voted for Libertarian candidates for statewide offices in recent years—should have an opportunity to vote for a Libertarian candidate for Congress. The voluminous record here shows that the actual operation of Georgia's ballot-access scheme makes it virtually impossible for Libertarian candidates for U.S. Representative to qualify for the ballot despite significant support for the Party among the voters. That result is incompatible with settled understandings of the First and Fourteenth Amendments and the Equal Protection Clause.

The panel sidestepped all of this by changing the standards, relying on the disputed success of a single low-level candidate and an illusory distinction from two binding precedents. This Court

should grant en banc review to restore those standards and to protect the fundamental rights of parties, candidates, and voters.

Dated: February 23, 2022

Respectfully submitted,

/s/ Bryan L. Sells

Georgia Bar No. 635562
The Law Office of
Bryan L. Sells, LLC
Post Office Box 5493
Atlanta, Georgia 31107-0493
(404) 480-4212 (voice/fax)
bryan@bryansellslaw.com

Attorney for the Plaintiffs – Appellees – Cross-Appellants

Certificate of Compliance

This brief complies with the type-volume limitation of Rule 35(b)(2)(A) of the Federal Rules of Appellate Procedure because, excluding parts of the brief exempted by Eleventh Circuit Rule 35-1, it contains 3,857 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 Microsoft Word for Mac.

/s/ Bryan L. Sells

*Attorney for the Plaintiffs –
Appellees – Cross-Appellants*

Certificate of Service

I hereby certify that on February 23, 2022, I electronically filed the foregoing **Appellees' Petition for Rehearing En Banc** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of this filing to these attorneys of record:

Bryan L. Sells: bryan@bryansellslaw.com
Charlene McGowan: cmcgowan@law.ga.gov

/s/ **Bryan L. Sells**

*Attorney for the Plaintiffs –
Appellees – Cross-Appellants*

Appendix A: Panel Opinion

Cowen v. Secretary of State of Georgia, 22 F.4th 1227 (2022)

29 Fla. L. Weekly Fed. C 703

22 F.4th 1227

United States Court of Appeals, Eleventh Circuit.

Martin **COWEN**, an individual, Allen Buckley,
 an individual, **Aaron Gilmer**, an individual,
 John Monds, an individual, Libertarian
 Party of Georgia, Inc., a Georgia nonprofit
 corporation, Plaintiffs-Appellees-Cross Appellants,
 v.

SECRETARY OF STATE of the State OF
 GEORGIA, Defendant-Appellant-Cross Appellee.

No. 21-13199

Filed: 01/05/2022

Synopsis

Background: Political party, its Congressional candidates, and voters brought action alleging that Georgia's ballot-access requirements for third-party and independent candidates violated their associational rights and voting rights under First and Fourteenth Amendments and their equal protection rights under Fourteenth Amendment. The district court granted summary judgment in state's favor. On appeal, the United States Court of Appeals for the Eleventh Circuit, [960 F.3d 1339](#), vacated and remanded. Plaintiffs and state filed motions for summary judgment. The United States District Court for the Northern District of Georgia, No. 1:17-cv-04660-LMM, Leigh Martin May, J., [537 F.Supp.3d 1327](#), granted summary judgment for political party in part, and entered injunction, [2021 WL 4533264](#). Secretary of State appealed.

Holdings: The Court of Appeals, **Grant**, Circuit Judge, held that:

[1] rights of free speech and association were not violated by Georgia statute on general-election ballot access for third-party and independent candidates seeking Congressional office to obtain and file nominating petition;

[2] rights of free speech and association were not violated by federal law capping amount that donors could contribute to petitioning efforts;

[3] submission of pauper's affidavit and satisfaction of one percent signature requirement was sufficient alternative means of ballot access;

[4] Georgia's ballot-access system that was rational way to meet Georgia's compelling regulatory interests; and

[5] ensuring that candidates had significant modicum of support among electorate before placing them on ballot was important regulatory interest.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (11)

[1] Federal Courts 🔑 Summary judgment

A district court's decision on cross-motions for summary judgment is reviewed de novo. [Fed. R. Civ. P. 56](#).

[2] Federal Civil Procedure 🔑 Presumptions

On cross-motions for summary judgment, the facts are viewed in the light most favorable to the non-moving party on each motion. [Fed. R. Civ. P. 56](#).

[3] Constitutional Law 🔑 Ballots and ballot access

Constitutional Law 🔑 Elections, voting, or ballot access in general




Election Law 🔑 Filing certificate or nomination papers

Rights of free speech and association were not violated by Georgia statute on general-

Cowen v. Secretary of State of Georgia, 22 F.4th 1227 (2022)

29 Fla. L. Weekly Fed. C 703

election ballot access requiring third-party and independent candidates seeking Congressional office to obtain and file nominating petition signed by not less than five percent of eligible voters within same 180-day deadline governing candidates in party primary to have name placed on general election ballot; even if collecting petition signatures was costly and difficult and petition-validation process was so “error-prone” that prospective candidates had to gather extra signatures to make up for those that were erroneously rejected, requirement did not bar candidates from ballot as practical matter and judicial-review mechanism was adequate to correct any erroneous petition denials.

U.S. Const. Amend. 1;  Ga. Code Ann. §§ 21-2-132(e),  21-2-133(a),  21-2-170, 21-2-171(c).

[4] **Constitutional Law**  Ballots and ballot access

On a claim that ballot-access laws unconstitutionally burden the rights 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, a court (1) considers the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate; (2) identifies and evaluates the precise interests put forward by the State as justifications for the burden imposed by its rule; and (3) weighs those factors and decides whether the challenged provision is unconstitutional. U.S. Const. Amends. 1, 14.

[5] **Constitutional Law**  Campaign finance, contributions, and expenditures

Constitutional Law  Limitations on amounts

Election Law  Limitations on amount of contributions



Rights of free speech and association were not violated by federal law capping amount that donors could contribute to ballot-access petitioning efforts, since those contribution limits were not connected to any materially heightened burden, such as prospective candidates not being able to gain contributions from additional donors or preventing party from donating more to its candidates. U.S. Const.

Amend. 1;  52 U.S.C.A. § 30116(a).

[6] **Constitutional Law**  Ballots and ballot access

Constitutional Law  Elections, voting, or ballot access in general

Election Law  Filing fee

Submission of pauper's affidavit and satisfaction of one percent signature requirement was sufficient alternative means of ballot access, and therefore Georgia's reasonable, nondiscriminatory requirement of paying fee of three percent of annual salary of office sought to qualify for ballot access did not violate rights of free speech and association, particularly where several candidates who did not successfully amass required petition signatures did pay qualifying fee. U.S. Const. Amend. 1;  Ga. Code Ann. §§ 21-2-132(g),  21-2-132(h).

[7] **Constitutional Law**  Ballots and ballot access



Election Law  Power to regulate

Regulatory interests of requiring some preliminary showing of significant modicum of support before printing name of political organization's candidate on ballot, of maintaining orderly administration of elections, and avoiding confusion, deception, and even frustration of democratic process at general election were compelling, and therefore Georgia's ballot-access system that was rational way to meet those interests did


Cowen v. Secretary of State of Georgia, 22 F.4th 1227 (2022)

29 Fla. L. Weekly Fed. C 703

not violate organization's First and Fourteenth Amendment rights; actual proof of voter confusion, ballot overcrowding, or presence of frivolous candidacies was not required. U.S.

Const. Amends. 1, 14;  Ga. Code Ann. §§ 21-2-132,  21-2-170.

[8] Constitutional Law  **Ballot access****Election Law**  **Power to regulate**


Requiring third-party and independent candidates for non-statewide office to petition for individual ballot access rather than benefiting from party's qualification to nominate slate of candidates at statewide level, as cognizable geographic classification, could be justified under Equal Protection Clause if Georgia put forward important regulatory interest, since magnitude of that inequality was at most only as substantial as severity of burden of meeting five percent signature requirement which was not severe. U.S. Const. Amend. 14;  Ga. Code Ann. §§ 21-2-170(b), 21-2-180.

[9] Constitutional Law  **Ballot access**

When considering an equal protection challenge to a ballot-access law, a court assesses the character and magnitude of the asserted denial of equal treatment, identifies the precise interests put forward by the State to justify its rule, and determines the legitimacy and strength of each interest. U.S. Const. Amend. 14.

[10] Constitutional Law  **Ballot access****Election Law**  **Power to regulate**

Ensuring that candidates had significant modicum of support among electorate before placing them on ballot was important regulatory interest, as required for Georgia's requirement for third-party and independent candidates for non-statewide office to petition for individual ballot access rather than benefiting from

party's qualification to nominate slate of candidates at statewide level, as cognizable geographic classification, to not violate Equal Protection Clause; although more narrowly tailored alternatives may have been available, perfect tailoring was not required when disparity was not severe. U.S. Const. Amend. 14;  Ga. Code Ann. §§ 21-2-170(b), 21-2-180.

[11] Constitutional Law  **Nomination of Candidates****Election Law**  **Requisites and sufficiency**

Candidates running for office within a county that comprises multiple electoral districts cannot be required to show support among citizens from an electoral district other than the one that would elect them, and therefore a requirement that results in county candidates having to gain more petition signatures than statewide candidates may violate the Equal Protection Clause. U.S. Const. Amend. 14.

West Codenotes**Negative Treatment Reconsidered**

 Ga. Code Ann. §§ 21-2-132(d),  21-2-170(a),  21-2-170(b)

*1229 Appeals from the United States District Court for the Northern District of Georgia, D.C. Docket No. 1:17-cv-04660-LMM

Attorneys and Law Firms

Bryan L. Sells, Law Office of Bryan L. Sells, LLC, Atlanta, GA, for Plaintiffs-Appellees-Cross Appellants.

Charlene S. McGowan, Christopher Michael Carr, Attorney General's Office, Atlanta, GA, for Defendant-Appellant-Cross Appellee.

Cowen v. Secretary of State of Georgia, 22 F.4th 1227 (2022)

29 Fla. L. Weekly Fed. C 703

Cristina Correia, Josiah Benjamin Heidt, Attorney General's Office, Atlanta, GA, for Service.

Before William Pryor, Chief Judge, Grant, and Hull, Circuit Judges.

Opinion

Grant, Circuit Judge:

Georgia law places restrictions on which prospective candidates for elective office can appear on the general election ballot. Over the past 50 years, courts have repeatedly rejected constitutional challenges to these ballot-access laws: first the Supreme Court, then our predecessor circuit, and then this Circuit, twice. See *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971); *McCrary v. Poythress*, 638 F.2d 1308 (5th Cir. 1981); *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002); *Coffield v. Kemp*, 599 F.3d 1276 (11th Cir. 2010). The challengers here—the Libertarian Party of Georgia, prospective Libertarian candidates, and affiliated voters—ask us to change course and hold that Georgia's ballot-access laws unconstitutionally burden their First and Fourteenth Amendment rights and deny them equal protection. We decline to do so. Instead, we conclude that the district court incorrectly held that the laws violate their First and Fourteenth Amendment rights. And we agree with the district court's conclusion that Georgia's laws do not cause an equal protection violation. We therefore reverse in part, affirm in part, and vacate the district court's injunction.

I.

The Libertarian Party, joined by voters and prospective candidates, brought suit against the Georgia Secretary of State to *1230 challenge the ballot-access requirements that prospective Libertarian candidates for the United States House of Representatives must satisfy. This case is now before us for the second time. See *Cowen v. Georgia Sec'y of State*, 960 F.3d 1339 (11th Cir. 2020). Our prior opinion provided an overview of Georgia's ballot-access system, so

we elaborate only on those aspects that are necessary to our evaluation here. See *id.* at 1340–41.

To appear on the ballot for a non-statewide office, including the office of U.S. Representative, prospective candidates that do not belong to a “political party”—that is, third-party and independent candidates—must submit a nomination petition signed by a number of voters equal to 5% of the total number of registered voters eligible to vote in the last election for the office. *O.C.G.A. § 21-2-170(a)–(b)*.¹ The petitions also must satisfy certain technical requirements. Candidates have a 180-day period to collect signatures. *Id. § 21-2-170(e)*. Each signer must declare that she is a registered voter of the electoral district qualified to vote in the next election for that office, sign her name, and include her residential address; signers are also encouraged to add their dates of birth for verification purposes. *Id. § 21-2-170(c)*. Upon filing, the petition circulator must attach a notarized affidavit stating that, among other things, the signers were qualified to sign the petition, and then an official must verify the signatures. *Id. §§ 21-2-170(d), 21-2-171(a)*. If a nomination petition is denied, that decision can be reviewed by a court through an application for a writ of mandamus. *Id. § 21-2-171(c)*.

In addition to the petition requirement, prospective candidates for non-statewide office must file a notice of candidacy and submit a qualifying fee. *Id. § 21-2-132(d)*. For most offices, including U.S. Representative, the fee is 3% of the office's annual salary. *Id. § 21-2-131(a)(2)*. A candidate who cannot afford the fee may file a pauper's affidavit instead, which requires an affirmation under oath of an inability to pay, a financial statement, and a signed petition. *Id. § 21-2-132(g)–(h)*.

Ballot-access requirements differ for third-party candidates running for statewide office instead of non-statewide office. While candidates for statewide office must still file a notice of candidacy and pay the qualifying fee, they can avoid the petition requirement if they are nominated by a third-party “political body” that has met certain criteria. *Id. §§ 21-2-132(d), 21-2-180*. A political body can nominate statewide candidates to the ballot this way if it either (1)

Cowen v. Secretary of State of Georgia, 22 F.4th 1227 (2022)

29 Fla. L. Weekly Fed. C 703

files a qualifying petition signed by a number of voters equal to 1% of the total number of registered voters eligible to vote in the preceding general election, or (2) at the preceding general election nominated a candidate for statewide office who received a number of votes equal to 1% of the total number of registered voters eligible to vote in that election. *Id.* § 21-2-180. Otherwise, a candidate for statewide office can earn a place on the ballot by submitting a nomination petition signed by a number of voters equal to 1% of the total number of registered voters eligible to vote in the last election for the office. *Id.* § 21-2-170(b).

The Libertarian Party now challenges this ballot-access system with two constitutional claims. *First*, it argues that the requirements for prospective Libertarian candidates for U.S. Representative cumulatively impose an unconstitutional burden *1231 on associational and voting rights protected by the First and Fourteenth Amendments. *Second*, it contends that Georgia law draws an unjustified classification between prospective Libertarian candidates for statewide office and those for non-statewide office.² This case first came before us on the district court's grant of summary judgment to the Secretary on both claims. See *Cowen*, 960 F.3d at 1341. In our prior decision, we remanded for the district court to apply the correct legal test to the First and Fourteenth Amendment claim and to separately address the equal protection claim. *Id.* at 1347. On remand, the district court maintained its determination that the Libertarian Party showed no equal protection violation. But it shifted course and ruled for the Party on its First and Fourteenth Amendment claim.

To remedy that constitutional violation, the district court permanently enjoined the Secretary from enforcing the 5% signature requirement that applied to third-party and independent candidates for non-statewide office. In its place, the district court imposed a 1% requirement as an interim measure, which would persist until the state legislature enacted a permanent replacement. The Secretary and the Libertarian Party both appealed.

II.

[1] [2] We review a district court's decision on cross-motions for summary judgment de novo. *Chavez v. Mercantil*

Commercebank, N.A., 701 F.3d 896, 899 (11th Cir. 2012). We view the facts “in the light most favorable to the non-moving party on each motion.” *Id.*

III.






[3] [4] The Libertarian Party first claims that Georgia's ballot-access laws unconstitutionally burden two overlapping rights protected by the First and Fourteenth Amendments: “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.” *Anderson v. Celebrezze*, 460 U.S. 780, 787, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (quotation omitted). As we explained in our prior decision, reviewing courts must analyze this claim under the framework the Supreme Court established in *Anderson v. Celebrezze*. *Cowen*, 960 F.3d at 1342. The *Anderson* test requires the court to (1) “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”; (2) “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule”; and (3) weigh those factors and “decide whether the challenged provision is unconstitutional.” *Id.* (quotations omitted).




Anderson postdated the Supreme Court's 1971 decision in *Jenness v. Fortson*, which held that Georgia's 5% signature requirement did not violate voters' and prospective candidates' First and Fourteenth Amendment rights. *Jenness*, 403 U.S. at 439–40, 91 S.Ct. 1970. Because *Anderson* clarified that no “litmus-paper test” exists to “separate valid from invalid restrictions” and that the analysis must be context-specific, we concluded that the holding in *Jenness* could not automatically control the Libertarian Party's claim here. *Cowen*, 960 F.3d at 1342, 1345–46 (quotations omitted).




*1232 Still, *Jenness* could not be disregarded. We instructed that the Libertarian Party would have to “satisfactorily distinguish its claims from those rejected in



Cowen v. Secretary of State of Georgia, 22 F.4th 1227 (2022)



29 Fla. L. Weekly Fed. C 703


 *Jenness*” to prevail on remand.  *Id.* at 1346. Specifically, the Libertarian Party’s task was to “demonstrate why a different result from  *Jenness* is required in this case—either because of 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.”  *Id.*




On remand, the Libertarian Party persuaded the district court that changed circumstances warranted a different result. But we are unconvinced. True, some changes to Georgia’s ballot-access laws have occurred in the 50 years since  *Jenness*. And the evidentiary record detailing the practical difficulties of gathering petition signatures may be more robust here than it was in that case. But to satisfactorily distinguish the claims, not just any difference from  *Jenness* will do—the difference must be material enough to transform Georgia’s ballot-access system from one that “in no way freezes the status quo” to one that does.  *Jenness*, 403 U.S. at 439, 91 S.Ct. 1970. The Libertarian Party has not identified such a difference.








Both the Libertarian Party and the district court heavily relied on the undisputed fact that “no political-body candidate for U.S. Representative has ever satisfied the requirements to appear on Georgia’s general-election ballot” since the 5% signature requirement was first adopted, long before  *Jenness*. But that frame of reference is too narrow. Focusing only on the success of political-body candidates for one particular non-statewide office is unwarranted when other candidates—including independent candidates and those running for other non-statewide offices—must meet the same 5% threshold. See  O.C.G.A. § 21-2-170(a)— (b).

That limited focus is also inconsistent with the analysis applied by the Supreme Court. In  *Jenness*, the challengers to Georgia’s 5% signature requirement included one prospective candidate for governor and two for  U.S. Representative. 403 U.S. at 432 n.3, 91 S.Ct. 1970. When assessing the record of past petitioning efforts, however, the Supreme Court looked not only to a gubernatorial candidate who successfully petitioned onto the ballot, but also to a

presidential candidate.  *Id.* at 439, 91 S.Ct. 1970. Each of those candidates was subject to the 5% signature requirement under the law as it existed at that time.  *Id.* at 432, 438–39, 91 S.Ct. 1970.

We thus broaden our own analysis to include other prospective candidates for non-statewide office. The parties agree that in 2020, an independent candidate for district attorney gathered enough signatures to exceed the 5% threshold. Although the absolute number of signatures required for district attorney candidates and congressional candidates differs because of the varied sizes of the electoral districts, so did the absolute number of signatures required for the congressional and statewide candidates compared in  *Jenness*. This local candidate’s success shows that the 5% requirement still does not bar candidates from the ballot.


As the Supreme Court did in  *Jenness*, we recognize that the 5% requirement appears to be somewhat higher than that in other states. See  *id.* at 442, 91 S.Ct. 1970. But it remains just as true that Georgia imposes “no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes.”  *Id.*


In fact, Georgia’s ballot-access laws were and are quite open in numerous respects. The  *Jenness* Court explained that “no suffocating restrictions” existed—voters could sign petitions for multiple candidates; *1233 they could both sign a petition and vote in a party primary; they did not have to state that they intended to vote for a candidate in order to sign that candidate’s petition; the pool of voters eligible to sign included those not registered in the preceding election; and petition signatures did not need to be notarized.  *Id.* at 438–39, 91 S.Ct. 1970. None of that has changed; nomination petitions can circulate just as freely today. See  *Cartwright*, 304 F.3d at 1140–41. Candidates still have 180 days to collect signatures, and the filing deadline, which the Supreme Court stated was not “unreasonably early” in  *Jenness*, is later now.  *Jenness*, 403 U.S. at 433–34, 438, 91 S.Ct. 1970;  O.C.G.A. §§ 21-2-132(e),  21-2-170(e). The Georgia legislature has since added a requirement that write-in candidates file a notice of candidacy, but that change


Cowen v. Secretary of State of Georgia, 22 F.4th 1227 (2022)



29 Fla. L. Weekly Fed. C 703

has no effect on the burden of gaining ballot access by nomination petition. See  O.C.G.A. § 21-2-133(a).



The Libertarian Party offers evidence to show that collecting petition signatures is costly and difficult. It is no surprise that parties must “undergo expense” to accumulate required petition signatures.  *Am. Party of Texas v. White*, 415 U.S. 767, 793–94, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974). But the Libertarian Party has not shown that the endeavor is significantly more challenging than it was 50 years ago.











The Party asserts that the Secretary's petition-validation process is so “error-prone” that prospective candidates must gather extra signatures to make up for those that are erroneously rejected. But it does not account for the availability of prompt judicial review of the decision to deny a nomination petition. See O.C.G.A. § 21-2-171(c). Nor does it contend that this judicial-review mechanism is inadequate to correct any erroneous petition denials. And most importantly, it provides no information about how validation rates have changed since  *Jenness*.

[5] The Party's reliance on increased campaign-finance restrictions also falls short. While federal law now caps the amount that donors can contribute to petitioning efforts, the Party has not connected those contribution limits to any materially heightened burden. See  52 U.S.C. § 30116(a). For instance, it has made no showing that prospective candidates could not gain contributions from additional donors, or that the Party would donate more to its candidates if it were not barred from doing so. Asserting that some new limit exists is not enough to show that it has caused a constitutional violation.

[6] The main difference between this case and  *Jenness* has nothing to do with the petition requirements—it is the challenge to the qualifying fee, which was not at issue there. See  *Jenness*, 403 U.S. at 432, 91 S.Ct. 1970. But we have long recognized qualifying fees as “reasonable, nondiscriminatory means of regulating ballot access” as long as “an alternative means of ballot access” exists. *Green v. Mortham*, 155 F.3d 1332, 1337 (11th Cir. 1998). Such an alternative means exists here: candidates for non-statewide office may qualify without paying the fee if they submit a

pauper's affidavit and satisfy a 1% signature requirement.





 O.C.G.A. § 21-2-132(g)– (h). And this Circuit has upheld higher fees than Georgia's 3% fee. See *Green*, 155 F.3d at 1339 (7.5% and 6% fees); *Little v. Florida Dep't of State*, 19 F.3d 4, 5 (11th Cir. 1994) (4.5% fee). The Libertarian Party presents no evidence that the amount of the fee has precluded prospective candidates from accessing the ballot; to the contrary, it stipulated that several candidates who did not successfully amass the required petition signatures did pay the qualifying fee.

[7] In sum, Georgia's ballot-access laws do not severely burden the Libertarian Party's First and Fourteenth Amendment rights. Under the  *Anderson* framework, *1234 then, the laws need only be justified by “the State's important regulatory interests.”  *Anderson*, 460 U.S. at 788, 103 S.Ct. 1564; see  *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). That test is met here. It bears repeating that the interests the Secretary asserts—in “requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot,” in maintaining the orderly administration of elections, and in “avoiding confusion, deception, and even frustration of the democratic process at the general election”—are compelling.³  *Jenness*, 403 U.S. at 442, 91 S.Ct. 1970; see also  *Swanson v. Worley*, 490 F.3d 894, 903 (11th Cir. 2007);  *Munro v. Socialist Workers Party*, 479 U.S. 189, 193–94, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986);  *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 792–93 (11th Cir. 1983). Georgia's ballot-access system is a “rational way” to meet those interests.  *Swanson*, 490 F.3d at 903–04 (quotation omitted). No proof of “actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies” is required.  *Munro*, 479 U.S. at 195, 107 S.Ct. 533; see also  *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009). We conclude that Georgia's ballot-access laws again survive challenge under the First and Fourteenth Amendments.


Cowen v. Secretary of State of Georgia, 22 F.4th 1227 (2022)


29 Fla. L. Weekly Fed. C 703



IV.

[8] We now turn to the claim that the disparate routes to the ballot provided for Libertarian candidates seeking non-statewide versus statewide office violate the Equal Protection Clause. In our prior opinion, we explained the classification at issue.  *Cowen*, 960 F.3d at 1346–47. If in the preceding general election any Libertarian candidate for statewide office received a number of votes equal to 1% of the total number of registered and eligible voters, Libertarian candidates for statewide office are “automatically entitled to ballot access,” while Libertarian candidates for non-statewide office must petition.⁴  *Id.*; see  O.C.G.A. §§ 21-2-170(b), 21-2-180. We sent the case back to the district court with instructions to analyze whether this distinction between offices violates equal protection.  *Cowen*, 960 F.3d at 1347.



The district court responded on remand that the Libertarian Party had misconstrued Georgia’s ballot-access system. But in reaching this conclusion, the court itself seems to have misconstrued the Libertarian Party’s claim, despite our earlier explanation. The district court explained that Libertarian candidates for statewide office have not needed to submit nomination petitions because the Libertarian Party has consistently qualified to nominate its statewide candidates by convention alone, having passed the 1% vote threshold in statewide elections for decades. It went on to acknowledge that Georgia law provides “an alternative way to access the general-election ballot through votes obtained in the prior election.” It then summarily concluded that this extra qualification method was not “a distinction that violates Plaintiffs’ right to equal protection.”

*1235 That reasoning misses the point. The “alternative way” around qualifying by nomination petition is available to Libertarian candidates for statewide office, but not non-statewide office. Under Supreme Court precedent, that is a cognizable “geographic classification.”  *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183–87, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979). So as the Libertarian Party proposes, and because the start of the 180-day petitioning window is nearly upon us, we will conduct the necessary equal protection analysis ourselves based on the summary judgment record instead of remanding a second

time to the district court. See  *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007) (stating that we may “affirm the district court’s judgment on any ground that appears in the record”).

[9] This Circuit considers equal protection challenges to ballot-access laws under the  *Anderson* test. *Indep. Party of Florida v. Sec’y, Florida*, 967 F.3d 1277, 1283–84 (11th Cir. 2020);  *Fulani v. Krivanek*, 973 F.2d 1539, 1543–44 (11th Cir. 1992). We assess “the character and magnitude of the asserted denial of equal treatment,” “identify the precise interests put forward by the State to justify its rule,” and “determine the legitimacy and strength of each interest.” *Indep. Party*, 967 F.3d at 1284 (quotations omitted).

The asserted injury here is that Libertarian candidates for non-statewide office must petition for individual ballot access rather than benefitting from the Libertarian Party’s qualification to nominate a slate of candidates at the statewide level. The magnitude of this inequality, however, is (at most) only as substantial as the severity of the burden of meeting the 5% signature requirement—the hurdle non-statewide candidates must overcome. And as we have already concluded, that burden is not severe. The disparity between candidates can thus be justified if the State puts forward an important regulatory interest. See *id.* at 1281.

[10] [11] The Secretary has explained the importance of “ensuring that candidates have a significant modicum of support among the electorate before placing them on the ballot.” This is a compelling interest. See, e.g.,  *Swanson*, 490 F.3d at 903. The disparity between qualification methods serves that interest, the Secretary reasoned, because it keeps Libertarian candidates for non-statewide office from relying on the Party’s support at the state level. Even though the Libertarian Party has consistently garnered support at that level, prospective Libertarian candidates for U.S. Representative may well lack a significant modicum of support within the congressional district they seek to represent.⁵ Though we might be able to imagine *1236 more narrowly tailored alternatives to the disparity at issue, the  *Anderson* test does not require perfect tailoring when the disparity is not severe. We conclude that the Secretary’s stated interest sufficiently justifies this distinction.

Cowen v. Secretary of State of Georgia, 22 F.4th 1227 (2022)

29 Fla. L. Weekly Fed. C 703

V.







For these reasons, we **REVERSE** the district court's grant of summary judgment to the Libertarian Party on its First and Fourteenth Amendment claim and its denial of summary judgment to the Secretary on that claim. We **AFFIRM** the

district court's summary judgment ruling on the Libertarian Party's equal protection claim. We **VACATE** the district court's injunction and **REMAND** for further proceedings consistent with this opinion.

All Citations

22 F.4th 1227, 29 Fla. L. Weekly Fed. C 703

Footnotes

- 1 Under Georgia law, a “political party” is a political organization that at the preceding general election for governor or president nominated a candidate that received at least 20% of the total vote cast.  [O.C.G.A. § 21-2-2\(25\)](#). Other political organizations are called “political bodies.”  [Id. § 21-2-2\(23\)](#).
- 2 The Libertarian Party moved for summary judgment on its classification theory underlying its equal protection claim, not its discriminatory purpose theory. The district court later found the discriminatory purpose theory moot in light of its conclusion on the First and Fourteenth Amendment claim. That theory is not at issue here.
- 3 In an unpublished opinion, this Circuit summarily affirmed a district court decision holding Georgia's 1% signature requirement for presidential candidates unconstitutional under this framework. See  [Green Party of Georgia v. Kemp](#), 171 F. Supp. 3d 1340 (N.D. Ga. 2016), *aff'd*, 674 F. App'x 974 (11th Cir. 2017). That decision does not control this outcome. It is not binding, and because it involved presidential elections, the nature of both the asserted injury and the State's interests differs.
- 4 The Libertarian Party does not argue that the disparity in signature percentage required for statewide and non-statewide candidates seeking to qualify by nomination petition violates equal protection or that we should consider any difference in qualifying fees.
- 5 We agree with the Secretary that the Supreme Court's decision in  [Norman v. Reed](#), 502 U.S. 279, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992), does not undermine the State's interest in requiring voter support in specific electoral districts. That case held it unconstitutional for a State to require candidates running for office within a county that comprises multiple electoral districts to show support among citizens from an electoral district other than the one that would elect them, where that requirement resulted in county candidates having to gain more petition signatures than statewide candidates.  [Id. at 284, 292–93, 112 S.Ct. 698](#). The Court explained that because the State did not have a geographic distribution requirement for statewide candidates, it did not demonstrate a serious state interest in demanding that distribution for local candidates.  [Id. at 293–94, 112 S.Ct. 698](#). But that reasoning does not apply here, because prospective candidates at both the statewide and non-statewide levels must only show sufficient support among the electorate of the office they seek.

Appendix B: District Court Opinion

COWEN v. RAFFENSPERGER
Cite as 537 F.Supp.3d 1327 (N.D.Ga. 2021)**1327**

dants' Motion to Dismiss for Mootness [ECF No. 80] is **DENIED**.

DONE AND ORDERED in Miami, Florida, this 7th day of May, 2021.



Martin COWEN, et al., Plaintiffs,

v.

**Brad RAFFENSPERGER, in his
official capacity as Secretary of
State of Georgia, Defendant.**

**CIVIL ACTION NO. 1:17-
CV-04660-LMM**

United States District Court,
N.D. Georgia, Atlanta Division.

Signed 03/29/2021

Background: Political party, its Congressional candidates, and voters brought action alleging that Georgia's ballot-access requirements for third-party and independent candidates violated their associational rights and voting rights under First and Fourteenth Amendments and their equal protection rights under Fourteenth Amendment. The district court granted summary judgment in state's favor. On appeal, the United States Court of Appeals for the Eleventh Circuit, 960 F.3d 1339, vacated and remanded. Plaintiffs and state filed motions for summary judgment.

Holdings: The District Court, Leigh Martin May, J., held that:

- (1) ballot-access requirements imposed severe burden on plaintiffs' First and Fourteenth Amendment rights;
- (2) ballot-access requirements were not narrowly tailored to advance state's legitimate interest in screening out

frivolous candidates and avoiding ballot confusion;

- (3) requiring higher absolute number of voter signatures for non-statewide offices than non-statewide offices did not violate equal protection; and
- (4) plaintiffs were obligated to show cause why equal-protection claim regarding signature percentage requirement should not be dismissed as moot.

Motions granted in part and denied in part.

1. Constitutional Law **1467**

To evaluate the constitutionality of ballot-access requirements under the First and Fourteenth Amendments, a court must (1) consider the character and magnitude of the asserted injury to the constitutionally protected rights that the plaintiff seeks to vindicate, (2) identify and evaluate the precise interests put forward by the state as justification for the burden imposed by its rule, and (3) weigh all these factors and decide whether the challenged provision is unconstitutional. U.S. Const. Amends. 1, 14.

2. Constitutional Law **1467**

The level of scrutiny applied to a ballot-access law test depends on the severity of the burdens it imposes on rights protected by the First and Fourteenth Amendments. U.S. Const. Amends. 1, 14.

3. Constitutional Law **1467**

To comply with the First and Fourteenth Amendments, severe restrictions on ballot access must be narrowly tailored and advance a compelling state interest; lesser burdens trigger less exacting review, and a state's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. U.S. Const. Amends. 1, 14.

4. Constitutional Law ⇌1467

In determining whether a state's ballot-access requirement complies with the First and Fourteenth Amendments, a court must ensure that any burden imposed on constitutionally protected rights is warranted by relevant and legitimate state interests. U.S. Const. Amends. 1, 14.

5. Election Law ⇌233(2)

The right to vote is heavily burdened by state regulation if that vote may be cast only for major-party candidates at a time when other parties or other candidates are clamoring for a place on the ballot.

6. Constitutional Law ⇌1467

The exclusion of political candidates by state regulation burdens voters' freedom of association, for purposes of a claim that ballot-access laws unconstitutionally burden First and Fourteenth Amendment rights, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens. U.S. Const. Amends. 1, 14.

7. Constitutional Law ⇌1467**Election Law** ⇌233(2)

Georgia statute on general-election ballot access for third-party and independent candidates seeking Congressional office imposed severe burden on First and Fourteenth Amendment associational rights and voting rights of minor political party, its candidates, and voters; no third-party candidates had gained such ballot access since statute's enactment over 75 years prior, requirement that candidates gather signatures of five percent of district's registered voters had caused many candidates to abandon ballot efforts, signature and qualifying-fee requirements were more restrictive than those in other states, and hiring of petition circulators to gather

required signatures could cost a minimum of \$75,000, although limit for party's contribution to Congressional candidates was \$10,000. U.S. Const. Amends. 1, 14; Ga. Code Ann. §§ 21-2-132(d), 21-2-170(b).

8. Constitutional Law ⇌1467**Election Law** ⇌233(2)

State had a legitimate interest in ensuring a significant modicum of voter support for candidates in order to screen out frivolous candidates and avoid ballot confusion, for purposes of determining whether Georgia's ballot-access requirements for third-party and independent candidates seeking non-statewide offices violated First and Fourteenth Amendment associational rights and voting rights. U.S. Const. Amends. 1, 14; Ga. Code Ann. §§ 21-2-132(d), 21-2-170(b).

9. Constitutional Law ⇌1467**Election Law** ⇌266

Georgia statute on general-election ballot access for third-party and independent candidates seeking Congressional office was not narrowly tailored to advance state's legitimate interest in screening out frivolous candidates and avoiding ballot confusion, and thus statute, which severely restricted candidates' and voters' First and Fourteenth Amendment associational rights and voting rights, was unconstitutional under strict scrutiny; requirement that candidates gather signatures of five percent of district's registered voters screened out legitimate candidates as well as frivolous ones, and state did not articulate a justification for five-percent requirement in light of state legislature's determination that one-percent threshold was adequate to screen candidates for statewide offices. U.S. Const. Amends. 1, 14; Ga. Code Ann. §§ 21-2-132(d), 21-2-170(b), 21-2-180.

COWEN v. RAFFENSPERGER
Cite as 537 F.Supp.3d 1327 (N.D.Ga. 2021)**1329****10. Constitutional Law ⇌1050**

A state's means of achieving even legitimate goals may be struck down where the state has failed to justify the burden that its regulations impose on constitutionally protected rights.

11. Constitutional Law ⇌3653**Election Law ⇌266**

Georgia statute requiring that third-party and independent candidates for Congressional and other non-statewide offices obtain higher absolute number of registered voter signatures than candidates for statewide offices did not violate equal protection rights of minor political party, its candidates, and voters; statute provided alternative means to access general-election ballot for statewide offices if party had obtained votes of one percent of registered voters in prior election. U.S. Const. Amend. 14; Ga. Code Ann. §§ 21-2-132(d), 21-2-170(b), 21-2-180.

12. Constitutional Law ⇌977

Political party, its Congressional candidates, and voters were obligated to show cause why their equal-protection claim regarding state election statute's requirement for certain percentage of registered voter signatures in order to get on general-election ballot for Congressional office should not be dismissed as moot, after district court granted plaintiffs' motion for summary judgment on claims that statute violated First and Fourteenth Amendment associational rights and voting rights; plaintiffs did not seek summary judgment on equal protection theory and state did not address claim in its summary judgment brief. U.S. Const. Amend. 14.

West Codenotes

Held Unconstitutional

Ga. Code Ann. §§ 21-2-132(d), 21-2-170(b)

Bryan Ludington Sells, The Law Office of Bryan L. Sells, LLC, Atlanta, GA, for Plaintiffs.

Charlene S. McGowan, Office of the Georgia Attorney General, Cristina Correia, Georgia Department of Law Department of Law, Atlanta, GA, for Defendant.

ORDER

LEIGH MARTIN MAY, United States District Judge

This case comes before the Court on Plaintiffs' Second Motion for Summary Judgment [134], Defendant's Second Motion for Summary Judgment [135], and Defendant's Motion to Exclude Expert Witness [137]. The Court previously granted Defendant's first motion for summary judgment. *See* Dkt. No. [113]. On appeal, the Eleventh Circuit vacated that decision and remanded to this Court. *See Cowen v. Ga. Sec'y of State*, 960 F.3d 1339, 1340 (11th Cir. 2020). The parties then filed the present Motions. After considering the Eleventh Circuit's decision, the parties' briefs, and the evidence in the record, the Court enters the following Order:

I. FACTUAL BACKGROUND

This case is a constitutional challenge to Georgia's ballot-access restrictions for third-party and independent candidates seeking election to the United States House of Representatives. Plaintiffs are the Libertarian Party of Georgia, prospective Libertarian candidates, and Libertarian voters. Plaintiffs seek injunctive relief and a declaration that Georgia's ballot-access restrictions (1) unconstitutionally burden Plaintiffs' rights under the First and Fourteenth Amendments and (2) violate the Equal Protection Clause of the

Fourteenth Amendment. See Dkt. No. [1] ¶¶ 148–52.

A. History of Georgia’s Ballot-Access Restrictions

Georgia enacted its first ballot-access law in 1922, which provided that an independent candidate, or the nominee of any party, could appear on the general-election ballot as a candidate for any office with no petition and no fee. Dkt. No. [97] ¶ 13. In 1943, Georgia adopted a 5% petition requirement for access to the general-election ballot. Id. ¶ 15. That law allowed candidates of any political party that received at least 5% of the votes in the last general election for the office to appear on the general-election ballot without a petition or fee. Id. All other candidates were required to file a petition signed by at least 5% of the registered voters in the territory covered by the office. Id. The deadline for the petition was thirty days before the general election. Id. ¶ 16. Between 1943 and 1999, the Georgia General Assembly adopted a series of incremental changes to the petition deadline and imposed various other restrictions. Id. ¶¶ 17–26.

B. Georgia’s Current Ballot-Access Laws

Georgia’s current ballot-access laws distinguish between (1) candidates nominated by a political party; (2) candidates nominated by a political body; and, (3) independent candidates. Under Georgia law, a “political party” is any political organization whose nominee received at least twenty percent of the vote in the last gubernatorial or presidential election. O.C.G.A. § 21-2-2(25). Political parties choose nominees in partisan primaries, and the candidate nominated by the party automatically appears on the general election ballot for any statewide or district office. O.C.G.A. § 21-2-130(1). Presently, the only entities that

meet the definition of “political party” under Georgia law are the Democratic Party of Georgia and the Georgia Republican Party. Dkt. No. [97] ¶ 38.

A “political body” is any political organization other than a political party. O.C.G.A. § 21-2-2(23). The Libertarian Party is a political body under Georgia law. Dkt. No. [97] at 9. 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 may depend on whether the nominee seeks a statewide office, a non-statewide office, or the office of the President of the United States.

Under Georgia law, a political body may become “qualified to nominate candidates for statewide public office by convention.” O.C.G.A. § 21-2-180. A political body becomes qualified to nominate candidates for *statewide* public office by convention if: (1) it submits a qualifying petition signed by at least one percent of the total number of registered voters at the last general election; or (2) it nominated a candidate for statewide public 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 has been qualified for statewide offices under § 21-2-180 since 1988. Dkt. No. [97] ¶ 204. Candidates for statewide offices nominated by a political body that are qualified under § 21-2-180 appear automatically on the general election ballot without a nomination petition. O.C.G.A. § 21-2-132(e)(5).

However, candidates for *non-statewide* offices (including the office of U.S. Representative) nominated by a § 21-2-180-qualified political body do not appear automatically on the general-election ballot. Instead, such candidates must submit (1)

COWEN v. RAFFENSPERGER
Cite as 537 F.Supp.3d 1327 (N.D.Ga. 2021)

1331

a notice of candidacy and qualifying fee,¹ see O.C.G.A. § 21-2-132(d), and (2) a nomination petition signed by 5% of the number of registered voters eligible to vote for that office in the last election, see O.C.G.A. § 21-2-170(b). Thus, in order for the Libertarian Party to have run a full slate of candidates for U.S. Representative in 2020, it would have had to pay the necessary qualifying fees pursuant to § 21-2-132(d) and submit the necessary 5% nomination petitions pursuant to O.C.G.A. § 21-2-170(b). This ballot-access scheme for *non-statewide* political-body and independent candidates is the target of Plaintiffs' constitutional challenge.

The qualifying fee for most partisan public offices, including U.S. Representative, is 3% of the annual salary of the office. O.C.G.A. § 21-2-131(a)(1)(A). The current annual salary for U.S. Representatives is \$174,000. Dkt. No. [97] ¶ 64. As such, the qualifying fee for each candidate for U.S. Representative is \$5,220. Because Georgia currently has fourteen members of the U.S. House of Representatives, each of whom is elected from a single-member district, the Libertarian Party would have needed to pay \$73,080 in qualifying fees in order to run a full slate of U.S. Representative candidates in 2020. *Id.* ¶¶ 60, 64. The Secretary of State estimates that the Libertarian Party would also have also needed 321,713 signatures to run a full slate of U.S. Representative candidates in 2020. *Id.* ¶ 63; see also Dkt. No. [69-34] at 8.

Qualifying fees for political-party candidates for U.S. Representative are paid directly to the state political party, which retains 75% and sends 25% to the Secretary of State. O.C.G.A. § 21-2-131(b)–(c). Qualifying fees for independent and politi-

cal-body candidates for U.S. Representative are paid to the Secretary of State. O.C.G.A. § 21-2-131(b)(2). For political body candidates, the Secretary retains twenty-five percent and sends seventy-five 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 its share of the qualifying fees for the 2018 election until after the election was over, in mid-April 2019. O.C.G.A. § 21-2-131(c)(4); Dkt. No. [69-12] ¶¶ 15–16.

The deadline for political-body candidates to file their notice of candidacy and qualifying fee is noon on the Friday following the Monday of the thirty-fifth week before the general election—a date that falls in early March of an election year. O.C.G.A. § 21-2-132(d)(2). The nomination petition is due no later than noon on the second Tuesday in July. O.C.G.A. § 21-2-132(e). The form of the petition is set out by statute. O.C.G.A. § 21-2-183. A nomination petition must be on sheets of uniform size and different sheets must be used by signers residing in different counties or municipalities. O.C.G.A. § 21-2-170(d). Each sheet must also contain a sworn and notarized affidavit of the circulator attesting, among other things, that each signature on the sheet was gathered within 180 days of the filing deadline. *Id.*

No political-body candidate for U.S. Representative has *ever* satisfied the requirements to appear on Georgia's general-election ballot since the 5% petition requirement was adopted in 1943. Dkt. No. [97] ¶ 76. Plaintiffs have submitted evidence that since 2002, at least twenty independent and political body candidates have

1. Pursuant to O.C.G.A. § 21-2-132(g), a candidate may file a pauper's affidavit in lieu of paying the qualifying fee. A pauper's affidavit requires the candidate to swear under oath

that the candidate has neither the assets nor income to pay the filing fee, and it requires the candidate to submit a personal financial statement. *Id.*

unsuccessfully attempted to access the ballot. *Id.* ¶¶ 92-131. Plaintiffs also provide evidence of the various practical barriers to gathering enough signatures to satisfy the 5% petition requirement, including: (1) the Secretary of State's signature-checking process, which according to Plaintiffs is error prone; (2) the difficulty and pace of petitioning; (3) the cost of petitioning and the impact of federal campaign finance law; (4) petition-circulators' lack of access to voters; and; (5) public concern about disclosing the confidential information required by the form of a nomination petition. *Id.* ¶¶ 144, 149-154, 171, 173-74, 181-84. The Court discusses this evidence in further detail in its analysis of the burden imposed on Plaintiffs' rights.

C. Support for the Libertarian Party

The Libertarian Party was founded in 1971 and is organized in all fifty states, plus the District of Columbia. *Id.* ¶ 189. Nationwide, the Libertarian Party is currently the third-largest political party in the United States by voter registration. *Id.* ¶ 190. In 2018, the National Libertarian Party counted as members, including persons that paid no annual dues, 5,851 persons residing in Georgia. Dkt. No. [96-1] ¶ 24. The most recent data from the parties shows that in 2016, the Libertarian Party of Georgia had 161 dues-paying members. *Id.* ¶ 25.

The Libertarian Party runs hundreds of candidates in every election cycle who seek positions ranging from city council to President. Dkt. No. [97] ¶ 194. The Libertarian 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.* ¶ 197. There are currently 180 elected officials affiliated with the Libertarian Party nationwide. *Id.* ¶ 198.

In 1988, the Libertarian Party of Georgia qualified to nominate candidates for

statewide public office by convention when it submitted a qualifying petition signed by at least one percent of the number of total registered voters at the preceding general election. *Id.* ¶ 204. 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. *Id.* In the last ten years, Libertarian candidates for statewide offices in Georgia have received more than five million votes. *Id.* ¶ 205.

II. PROCEDURAL BACKGROUND

Plaintiffs first sued in this Court on November 21, 2017, alleging that Georgia's ballot-access laws violate their First and Fourteenth Amendment associational and voting rights and their Fourteenth Amendment equal-protection rights. Dkt. No. [1] ¶¶ 148-149. On September 23, 2019, the Court held that Defendant was entitled to summary judgment. Dkt. No. [113]. The Court reached this conclusion based on the Supreme Court's decision in *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971), which upheld as constitutional Georgia's law requiring a third-party or independent candidate for any race to file a nominating petition signed by at least 5% of the number of registered voters in the last general election for the office in question. Plaintiffs then appealed to the Eleventh Circuit. Dkt. No. [115]. The Eleventh Circuit reversed and remanded, holding that this Court erred in its conclusion that Plaintiffs' challenge was foreclosed by Supreme Court and Eleventh Circuit precedent without conducting the balancing test articulated in *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). *See Cowen*, 960 F.3d at 1343. On remand, the Eleventh

COWEN v. RAFFENSPERGER
Cite as 537 F.Supp.3d 1327 (N.D.Ga. 2021)

1333

Circuit has instructed the Court to apply the Anderson test and to consider Plaintiffs' Equal Protection challenge. See id. at 1347.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 56 provides “[t]he 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 factual dispute 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, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). 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).

The moving party bears the initial burden of showing the Court, by reference to materials in the record, that there is no genuine dispute as to any material fact that should be decided at trial. Hickson Corp. v. N. Crossarm Co., 357 F.3d 1256, 1260 (11th Cir. 2004) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The moving party's burden is discharged merely by “‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support [an essential element of] the nonmoving party's case.” Celotex Corp., 477 U.S. at 325, 106 S.Ct. 2548. In determining whether the moving party has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. Johnson v. Clifton, 74 F.3d 1087, 1090 (11th Cir. 1996).

Once the moving party has adequately supported its motion, the non-movant then has the burden of showing that summary

judgment is improper by coming forward with specific facts showing a genuine dispute. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). There is no “genuine [dispute] for trial” when the record as a whole could not lead a rational trier of fact to find for the nonmoving party. Id. (citations omitted). All reasonable doubts, however, are resolved in the favor of the non-movant. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993).

The same standard of review applies to cross-motions for summary judgment, but the Court must determine whether either of the parties deserves judgment as a matter of law on the undisputed facts. S. Pilot Ins. Co. v. CECS, Inc., 52 F. Supp. 3d 1240, 1242-43 (N.D. Ga. 2014) (citing Am. Bankers Ins. Grp. v. United States, 408 F.3d 1328, 1331 (11th Cir. 2005)). Each motion must be considered “on its own merits, [with] all reasonable inferences [resolved] against the party whose motion is under consideration.” Id. at 1243.

IV. DISCUSSION

Plaintiffs argue that they are entitled to summary judgment because Georgia's ballot-access restrictions for political body candidates for U.S. Representative unconstitutionally burden their First and Fourteenth Amendment rights. Dkt. Nos. [1] ¶ 148; [134-1] at 7–8. Plaintiffs challenge Georgia's 5% petition-signature requirement, see O.C.G.A. § 21-1-170(b), as well as the qualifying fee requirement for the office of U.S. Representative, see O.C.G.A. § 21-2-132(d). Plaintiffs argue that “[t]his case is about the ‘cumulative burdens’ of Georgia's ballot-access, which include not only a burdensome petition requirement but also the highest candidate qualifying fee in the nation.” Dkt. No. [134-1] at 45 (emphasis in original). Plaintiffs also chal-

lenge Georgia’s ballot-access laws under the Equal Protection Clause, arguing that the ballot-access restrictions create a classification that treats Libertarian Party candidates for U.S. Representative differently from Libertarian Party candidates for statewide offices.² Dkt. No. [1] ¶ 149; [134-1] at 8, 54–56. Defendant moves for summary judgment on both of Plaintiffs’ claims. *See* Dkt. No. [135]. In accordance with the Eleventh Circuit’s instructions, the Court considers Plaintiffs’ claims and the parties’ respective arguments in turn.

**A. Plaintiffs’ First and Fourteenth
Amendment Claim and the
Anderson Test**

[1] Plaintiffs contend that Georgia’s ballot-access laws unconstitutionally burden their First and Fourteenth Amendment rights to vote and to associate with their preferred political party. Dkt. No. [134-1] at 8, 35–36. In remanding the case to this Court, the Eleventh Circuit instructed the Court to apply the balancing test set forth in *Anderson* to determine whether the challenged ballot-access laws violate these First and Fourteenth Amendment rights. *See Cowen*, 960 F.3d at 1346. Under the balancing test established in *Anderson*, the Court must (1) “consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment that the plaintiff seeks to vindicate[]”; (2) “identify and evaluate the precise interests put forward by the State as justification for the burden imposed by its rule”; and (3) “weigh all these factors and decide whether the challenged provision is unconstitutional.” *Id.* at 1342 (alterations and quotation marks omitted) (quoting *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564).

2. Plaintiffs have not moved for summary judgment on their Equal-Protection Claim

[2–4] “Under this framework, the level of scrutiny . . . appl[ie]d to a ballot-access law depends on the severity of the burdens it imposes.” *Indep. Party of Fla. v. Sec’y, State of Fla.*, 967 F.3d 1277, 1281 (11th Cir. 2020); *see also Stein v. Ala. Sec’y of State*, 774 F.3d 689, 694 (11th Cir. 2014) (“[T]he level of scrutiny to which election laws are subject varies with the burden they impose on constitutionally protected rights.”). “Regulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997). “Lesser burdens . . . trigger less exacting review, and a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.” *Id.* (quotation marks and citation omitted). Still, “[h]owever severe the burden, [a court] must ensure it is warranted ‘by relevant and legitimate state interests sufficiently weighty to justify the limitation.’” *Indep. Party of Fla.*, 967 F.3d at 1281 (quoting *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009)).

The Eleventh Circuit has also explained that contextual, circumstance-specific analysis is central to the test articulated in *Anderson*, noting that the Supreme Court has rejected the use of a “litmus-paper test” to differentiate between valid and invalid restrictions. *See Cowen*, 960 F.3d at 1342 (quoting *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564); *see also Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) (“The rule is not self-executing and is no substitute for the hard judgments that must be made.”). To this end, “the *Anderson* analysis must be undertaken even if the very same requirement had been previously upheld as consti-

that the laws were adopted with a discriminatory purpose.

COWEN v. RAFFENSPERGER
Cite as 537 F.Supp.3d 1327 (N.D.Ga. 2021)

1335

tutional, if there are at least some non-frivolous arguments that, since the decision upholding the requirement, circumstances have changed the context of the analysis.” Cowen, 960 F.3d at 1342 n.1. With this in mind, the Court turns to the parties’ arguments regarding the severity of the burden that Georgia’s ballot-access laws impose on Plaintiffs’ First and Fourteenth Amendment rights.

**1. The Character and Magnitude
of the Injury**

[5,6] The Court must first “consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment that the plaintiff seeks to vindicate[]”. Anderson, 460 U.S. at 789, 103 S.Ct. 1564. As to the character of the injury, Plaintiffs assert two related rights: “the right of individuals to associate for the advancement of political beliefs[] and the right of qualified voters, regardless of political persuasion, to cast their votes effectively.” Dkt. No. [134-1] at 35–36 (quoting Williams v. Rhodes, 393 U.S. 23, 30, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968)). These rights “rank among our most precious freedoms.” Williams, 393 U.S. at 30, 89 S.Ct. 5. “The right to vote is ‘heavily burdened’ if that vote may be cast only for major-party candidates at a time when other parties or other candidates are ‘clamoring for a place on the ballot.’” Anderson, 460 U.S. at 787, 103 S.Ct. 1564 (quoting Lubin v. Panish, 415 U.S. 709, 716, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974)). And “[t]he exclusion of candidates also burdens voters’ freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens.” Id.; Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 186, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) (“[A]n election campaign is a means of dissemin-

ating ideas as well as attaining political office.... Overbroad restrictions on ballot access jeopardize this form of political expression.”).

As to the magnitude of the injury, Plaintiffs argue that their right to vote and right to associate have been severely burdened. Dkt. No. [134-1] at 37. Defendant disagrees. He cites a series of cases in which the Supreme Court and Eleventh Circuit have upheld Georgia’s 5% signature requirement in part because the requirement did not severely burden plaintiffs in those cases. Dkt. No. [140] at 5–8. Defendant has moved for summary judgment on this basis. Dkt. No. [135]. The Court first addresses the magnitude of the injury to Plaintiffs’ rights based on the facts in the current record, and then the Court addresses the relevant precedents that Defendant cites.

i. Severity of Burden

The Court agrees with Plaintiffs that Georgia law imposes a severe burden on their First and Fourteenth Amendment rights. The cumulative effect of Georgia’s requirements on independent and political-body candidates has frozen the political status quo in Georgia as to congressional races. Libertarian Party of Fla. v. Florida, 710 F.2d 790, 793 (11th Cir. 1983) (“[A] court must determine whether the challenged laws ‘freeze’ the status quo by effectively barring all candidates other than those of major parties”). Georgia’s laws “ha[ve] effectively foreclosed [Georgia’s] [federal congressional] ballot to all but Republicans and Democrats.” Williams, 393 U.S. at 35, 89 S.Ct. 5 (Douglas, J., concurring).

[7] The robust record in this case supports this conclusion, and the Court highlights several key facts from it. First, the historical record shows that third-party and independent candidates have largely been excluded from Georgia’s congression-

al ballots. Since 1943, the year the 5% requirement was adopted, no political-body candidate for U.S. Representative has appeared on a general election ballot in Georgia. Dkt. No. [97] ¶ 76. In fact, Plaintiffs note 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 overcome in the history of the United States.” Dkt. No. [134-1] at 38.

As a result, no Georgia voter hoping to support a third-party candidate for U.S. Representative has been able to vote their preference. No such Georgia voter has been able to associate with others who share their views—to express their beliefs by supporting an alternative candidate to those chosen by the Republican and Democratic parties. Only two independent candidates have ever appeared on Georgia’s general election ballot for non-statewide office, though neither accessed the ballot under the restrictions as they exist today. Dkt. No. [97] ¶¶ 77–81. In 1964, Milton Lent qualified as an independent candidate in Georgia’s First Congressional District. *Id.* ¶ 77. At that time, voter registration rates were lower; the congressional districts did not split county boundaries; there was no qualifying fee; there was no time limit for gathering signatures; and the petition deadline was October. *Id.* ¶¶ 78–80. In 1982, Billy McKinney qualified as an independent candidate for U.S. Representative in Georgia’s Fifth Congressional District after a federal court tempo-

rarily lowered the requirement to 4,037 signatures. *Id.* ¶ 81.

This long absence of political-body candidates from Georgia’s congressional ballots is not for lack of effort on their part. Plaintiffs have produced evidence in this case from 20 third-party and independent candidates who have tried and failed to appear on the ballot since 2002. This evidence strongly supports the conclusion that Georgia’s ballot-access laws impose a severe burden based upon the Supreme Court’s formulation in *Storer*: “[C]ould a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?” *Storer*, 415 U.S. at 742, 94 S.Ct. 1274; *see also* *Libertarian Party of Fla.*, 710 F.2d at 793 (citing *Storer*). The record indicates that it is exceedingly difficult for even reasonably diligent candidates to access Georgia’s ballots.

Plaintiffs have submitted evidence that, since 2002, several independent and political-body candidates for U.S. Representative have unsuccessfully attempted to access the ballot.³ The Court details a few examples here. In 2002, the Libertarian party sought to qualify Wayne Parker for U.S. Representative in Georgia’s Eleventh Congressional District. Dkt. No. [69-19] ¶ 5. Because the 2002 redistricting process had reduced the time available for petitioning, a federal judge reduced the signature requirement to 9,462 signatures. *Id.* ¶ 8. The Party raised approximately \$40,000 and used thirty-five professional, paid petition circulators (after beginning with vol-

3. The parties dispute how many aspiring candidates are properly before the Court. Plaintiffs claim 20 candidates, but Defendant argues that nine of these candidates should not be considered. Dkt. No. [140] at 11 n.5 Defendant argues that these nine candidates appear only in unauthenticated documents or hearsay statements from other witnesses. *Id.*

Plaintiffs do not directly counter this argument in their summary-judgment briefing, and so the Court will not consider the additional nine candidates. In any event, the Court finds that the difference between 11 and 20 candidates does not change its finding regarding the burden faced by Plaintiffs.

COWEN v. RAFFENSPERGER
 Cite as 537 F.Supp.3d 1327 (N.D.Ga. 2021)

1337

unteers) to focus on Parker’s petition campaign. *Id.* ¶¶ 9–11. Parker submitted more than 20,000 raw signatures. *Id.* ¶ 13. The Secretary of State’s office rejected more than half of the signatures, leaving Parker with 8,346. *Id.* ¶ 14.

In 2008, Faye Coffield attempted to qualify for the general-election ballot as an independent candidate in Georgia’s Fourth Congressional District. Dkt. No. [97] ¶ 104. She needed approximately 15,000 signatures to qualify for the ballot. Dkt. Nos. [97] ¶ 104; [69-7] ¶ 7. With a team of volunteers, and over the course of approximately two months during which she estimates they spent hundreds of hours gathering signatures, she gathered roughly 2,000 signatures. Dkt. Nos. [97] ¶ 104; [69-7] ¶¶ 6, 8. The Secretary of State did not accept her petitions “because they did not contain the required number of signatures on their face,” and she did not qualify for the ballot. Dkt. No. [69-7] ¶ 8; *see also* Dkt. No. [97] ¶ 104.

In 2010, Jeff Anderson sought to qualify for the general-election ballot as an independent candidate in Georgia’s Eleventh Congressional District. *Id.* ¶ 101. He had a team of approximately twenty-four volunteer petition circulators who ultimately gathered between 11,000 and 12,000 signatures. *Id.* Anderson did not file the signatures with the Secretary of State because this number was far short of what he needed. *Id.* Likewise in 2010, Eugene Moon attempted to qualify for the general-election ballot as an independent candidate

in Georgia’s Ninth Congressional District. Dkt. No. [97] ¶ 102. His team of volunteers gathered roughly 13,000 signatures, but he also did not file any of these signatures with the Secretary of State because this number was below what was needed to qualify for the ballot. *See id.*; *see also* Dkt. No. [69-17] ¶ 6.

In 2016, Hien Dai Nguyen attempted to qualify for the general-election ballot as an independent candidate in Georgia’s Fourth Congressional District. Dkt. No. [97] ¶ 97. His team of volunteer petition circulators gathered approximately 25,000 signatures across Dekalb, Gwinnett, and Rockdale counties, but only 528 of these signatures were accepted as valid by the Secretary of State’s office. Dkt. No. [69-18] ¶¶ 8–9.⁴ As a result, Nguyen did not qualify for the general-election ballot. Dkt. Nos. [97] ¶ 97; [69-18] ¶ 9.

Defendant attacks Plaintiffs’ evidence of failed candidacies. He argues that some of Plaintiffs’ “would-be candidates gathered only a few hundred signatures, or did not even try.” Dkt. No. [140] at 11. But this fact may help Plaintiffs as much as it harms them. Defendant highlights these candidates to argue that not all of Plaintiffs’ candidates who tried to access the ballot made genuine efforts. But the Court notes that several of these candidates gave up for the simple reason that Georgia’s ballot access requirements were too high to be worth their effort. *See, e.g.*, Dkt. No. [69-2] ¶ 100 (“McKinney soon determined

4. Defendant objects to paragraph 9 of Nguyen’s declaration, in which he testifies that he received a letter from the Secretary of State’s office “informing [him] that only 528 of [his] signatures were valid.” Dkt. No. [69-18] ¶ 9. Defendant argues that this paragraph makes reference to the letter without including a copy of it and that it is therefore inadmissible hearsay. Dkt. No. [99] at 17–18. Plaintiffs state that they produced the letter to Defendant during discovery and that it could be

introduced at trial and would be plainly admissible in that form. Dkt. No. [105-2] at 39. Plaintiffs also argue that this paragraph refers to statements by the Secretary of State’s office, which, as opposing party statements, are not hearsay. Fed. R. Evid. 801(d)(2)(A); *see* Dkt. No. [105-2] at 39. The Court agrees that this is admissible as an opposing party statement and therefore overrules Defendant’s objection to this paragraph of Nguyen’s declaration. *See* Fed. R. Evid. 801(d)(2)(A).

that she would not be able to raise the resources necessary to mount a successful ballot-access campaign *and* a competitive campaign in the general election once ballot access had been secured, and she therefore withdrew from the race.”); *id.* ¶ 102 (“His teams gathered approximately 13,000 raw signatures, but he did not turn them in because he knew that he would not qualify for the ballot.”); *id.* ¶ 106 (“After a while, he realized that he would not be able to qualify for the ballot with volunteer petitions, and the option of using paid petitioners was too expensive. He therefore abandoned his effort to qualify for the ballot and did not submit any signatures.”). Undoubtedly some of these candidates were genuine candidates who hoped to appear on the Georgia’s general election ballot. Plaintiffs have shown that Georgia’s ballot-access scheme disserved each of these candidates and their would-be voters.

Defendant also argues that several independent candidates met the 5% petition requirement—two candidates for State House and one for Brunswick District Attorney. Dkt. No. [140] at 12 (citing Dkt. No. [135-3] at 60–61). Plaintiffs contest that these facts diminish their claim. Dkt. No. [139] at 4–5. They argue that only the Brunswick District Attorney candidate gathered enough signatures to meet the 5% threshold and that he did so under the unusually high-profile circumstances of the Ahmaud Arbery murder and its political fallout. Of the other two candidates, one failed to meet the threshold because the Secretary verified too few of his submitted signatures, Dkt. No. [139-8], and the other only met the threshold after it was lowered by a judge in this District due to the

coronavirus pandemic. See *Cooper v. Rafensperger*, 472 F. Supp. 3d 1282 (N.D. Ga. 2020). The Court agrees with Plaintiffs on this issue. The success of one local official does not significantly undermine the otherwise categorical exclusion of political-body candidates from congressional ballots in Georgia.

Apart from the history of ballot exclusion in Georgia, the record also indicates that Georgia holds third-party and independent candidates to a higher bar than does any other state. While the Eleventh Circuit has emphasized that states are free “to adopt differing means of regulating ballot access,” *Libertarian Party of Fla.*, 710 F.2d at 793, the comparison to other states underscores the severity of the burden in Georgia. *Williams*, 393 U.S. at 33 n.9, 89 S.Ct. 5 (comparing Ohio’s restriction to those of forty-two other states and noting that “no significant problem has arisen in these States which have relatively lenient requirements for obtaining ballot position”); *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1363 (N.D. Ga. 2016) (“Plaintiffs have put forth evidence showing that Georgia’s ballot access signature requirements are substantially higher than those in most other states.”).

In support of their motion for summary judgment, Plaintiffs submit an affidavit by Richard Winger, a political scientist and ballot-access scholar.⁵ Mr. Winger discusses Georgia’s ballot-access requirements for third-party candidates in the context of other states’ restrictions. Dkt. No. [69-25]. He also submits an appendix of data regarding other states’ signature requirements and qualifying fees in support of his assertions. See *id.* at 16–25. According to Mr. Winger, Georgia requires more signa-

5. Another judge in the Northern District of Georgia recently relied on Mr. Winger’s testimony, finding that “[c]ourts have considered Mr. Winger’s expert testimony in many other

cases and . . . that he is a reliable witness.” *Green Party of Ga.*, 171 F. Supp. 3d at 1348 n.8. This Court agrees.

COWEN v. RAFFENSPERGER
 Cite as 537 F.Supp.3d 1327 (N.D.Ga. 2021)

1339

tures 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. *Id.* ¶ 2a. In 2018, Georgia law required more than 272,00 valid signatures for a third party to run a full slate of candidates for U.S. Representative. *Id.* ¶ 10. This number represents more than 6.3 percent of all votes cast in Georgia for president in 2016. *Id.*

Illinois required the next highest number of signatures for a third party to run a full slate of candidates for U.S. Representative; requiring approximately 178,400 valid signatures in 2016 and 262,000 valid signatures in 2018. *Id.* ¶ 12. These numbers represent approximately 3.2 percent and 4.7 percent of all votes cast in Illinois for president in 2016. *Id.* New York required the third highest number of signatures for a third party to run a full slate of candidates in 2016 and 2018, requiring approximately 94,500 valid signatures. *Id.* ¶ 13. This number represents approximately 1.2 percent of all votes cast in New York for president in 2016. *Id.* Twenty-nine states required 10,000 or fewer signatures for an unqualified third party to run a full slate of candidates for U.S. Representative in 2018. *Id.* ¶ 14. In some states, third parties may qualify to nominate candidates without submitting any signatures. *Id.* ¶ 15.

Mr. Winger further testifies that, in the entire history of the United States, only six independent or third-party candidates for U.S. Representative have ever overcome a signature requirement as high as 10,000 signatures, and only one such candidate has overcome a petition requirement higher than 15,000 signatures. *Id.* ¶¶ 29–37. This leaves political-body candidates in Georgia in an especially difficult position. In 2020, they needed between 19,777 and

26,539 valid signatures, depending on their district, to appear on the general-election ballot for a congressional race. Dkt. No. [134-1] at 31.

Mr. Winger also provides information regarding Georgia’s qualifying fees. He states that most states do not require third-party candidates for U.S. Representative who qualify for the general election ballot by petition to pay any qualifying fee. Dkt. No. [69-25] ¶ 17. Among states with a mandatory petition, Georgia’s qualifying fees are higher than any other state in the nation. *Id.* Georgia’s qualifying fee for U.S. Representative is \$5,220, which amounts to \$73,080 for a full slate of candidates. The state that requires the second highest qualifying fee for third-party candidates is North Carolina, which has a qualifying fee of \$1,740 (one percent of the annual salary of a U.S. Representative) for a single candidate and \$22,620 for a third party to run a full slate of thirteen candidates for U.S. Representative. *Id.* ¶ 19.

In addition to demonstrating candidates’ historical exclusion from ballots and Georgia’s restrictiveness compared to other states, Plaintiffs have introduced evidence showing the practical difficulties of obtaining petition signatures to appear on a ballot. This evidence is key in the context of the *Anderson* analysis because, “[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.” *Anderson*, 460 U.S. at 786, 103 S.Ct. 1564 (quoting *Bullock v. Carter*, 405 U.S. 134, 143, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972)); see also *Green Party of Ga.*, 171 F. Supp. 3d at 1350 (addressing the practical difficulties of gathering petition signatures in reaching the conclusion that presidential candidates faced a severe burden).

First, Plaintiffs offer evidence that the Secretary of State’s petition-checking process yields validation rates of between two

percent and forty percent.⁶ *Id.* ¶¶ 145, 147, 148. As a practical matter, then, independent and political body candidates for U.S. Representative must gather signatures in excess of the required figures. Derrick Lee, a member of a professional petition-circulating firm and an experienced petition circulator, estimates based on his experience in Georgia that Libertarian Party candidates would need to gather “somewhere between 600,000 and 1,000,000 signatures” to run a full slate of fourteen candidates for U.S. Representative—and that collecting that number of signatures is not “realistically achievable without an army of paid petition circulators.” Dkt. No. [69-13] ¶¶ 21, 22.⁷

Second, Plaintiffs submit evidence regarding the difficulty, pace, and cost of petitioning. Don Webb, a paid petition circulator, testified that he gathers 30 to 40 raw signatures in an eight- or nine-hour day on a Saturday, and 15 to 25 raw signatures on other days—an average of five signatures per hour over the course of a week. Dkt. No. [69-23] ¶ 7. Volunteer signature-gatherers tend to be less effective and rarely are willing or able to work for more than a few hours. *Id.* ¶ 9; see also

Dkt. No. [69-9] ¶ 9. As noted briefly above, Plaintiffs also offer testimony from a number of former independent and Libertarian candidates and experienced petition circulators who opine that it would be impossible for the Libertarian Party to qualify a full slate of candidates for the office of U.S. Representative without making extensive use of paid, professional petition circulators. See Dkt. Nos. [69-9] ¶¶ 9–10; [69-10] ¶ 10; [69-13] ¶ 21; [69-16] ¶ 8;⁸ [69-23] ¶ 12.

Third, Plaintiffs provide evidence of the potential overall cost of collecting signatures via paid petitioners. Hugh Esco, Georgia Green Party secretary and former Georgia Green Party candidate, estimates that a single independent or political-body candidate would need more than \$75,000 to collect the requisite number of signatures. Dkt. No. [69-9] ¶ 10. Wayne Parker, former Libertarian Party candidate, estimates that one third-party candidate would need more than \$100,000 for petition circulators. Dkt. No. [69-19] ¶ 17. Plaintiffs note that raising such sums is difficult in part because federal campaign finance laws limit the amount that donors, including a state or national party, can contrib-

6. Plaintiffs assert that the Secretary of State’s signature-validation process is error-prone, and, as evidence, Plaintiffs offer uncontested testimony that 2016 candidate Rocky De La Fuente’s petition contained numerous signatures that were improperly rejected. Dkt. No. [97] ¶ 146. Defendant admits that “some signatures from De La Fuente’s petition were improperly rejected.” *Id.*

7. Defendant objects to several declarations Plaintiffs have submitted in support of their claims as containing inadmissible opinion testimony from a lay witness. Defendant argues that this testimony is inadmissible under Federal Rule of Evidence 701. The Court has reviewed these objections and overrules them. “Rule 701 does not prohibit lay witnesses from testifying based on particularized knowledge gained from their own personal experi-

ences.” *U.S. v. Toll*, 804 F.3d 1344, 1355 (11th Cir. 2015) (citations omitted). The Court finds that the testimony at issue is fact testimony based on the witness’s own personal experiences. See *Toll*, 804 F.3d at 1355 (quotation marks and citation omitted). Defendant’s objections on this basis are overruled.

8. Defendant objects to this paragraph of John Monds’s declaration. Dkt. No. [99] at 16. Defendant argues that Monds “does not claim any personal knowledge of signature-gathering campaigns, and he is not competent to testify about the feasibility of signature gathering campaigns under Georgia law.” Dkt. No. [99] at 16–17. As Plaintiff notes, however, there is evidence in the record that Monds does possess personal knowledge of signature-gathering efforts in Georgia. Defendant’s objection is overruled.

COWEN v. RAFFENSPERGER
Cite as 537 F.Supp.3d 1327 (N.D.Ga. 2021)

1341

ute to a candidate. Dkt. No. [97] ¶¶ 162, 171. The maximum amount that a state or national party may contribute to one candidate for U.S. Representative is \$10,000 per election. Dkt. No. [134-1] at 19.

Finally, regarding the difficulty of collecting petition signatures, Plaintiffs cite a lack of access to voters and public concern about disclosing confidential information as barriers to circulating petitions. Dkt. No. [97] ¶¶ 173, 187. Petition circulators in Georgia may not lawfully solicit signatures on private property (i.e., places of public accommodation) without the permission of the property owner. *Id.* ¶ 173. Georgia law prohibits petition-circulators from canvassing for signatures within 150 feet of a polling place. *Id.* ¶ 180. Plaintiffs also noted that the nomination petition form requires a signer's birth year. Dkt. No. [134-1] at 21 n.7. Although a voter's date of birth and residential address are not required, providing that information increases the chance that county election officials will be able to identify the signature. Dkt. No. [97] ¶ 186. Plaintiffs have submitted testimony from former candidates indicating that potential signers frequently cited a reluctance to share such information as a reason for not signing a petition. *See, e.g.*, Dkt. Nos. [69-7] ¶ 11; [69-11] ¶ 13; [69-12] ¶ 13.⁹

In sum, the record before the Court indicates that Georgia's ballot access laws, including the 5% petition signature requirement and the qualifying fee, place a severe burden on Plaintiffs' associational rights and right to vote. Even reasonably diligent political-body candidates who have

expended considerable time and resources have failed to access Georgia's ballots. Plaintiffs have shown that Georgia's laws relating to these congressional races have functionally frozen the status quo.

***ii. Prior Decisions on Georgia's
Ballot-Access Scheme***

Prior decisions have addressed and upheld Georgia's 5% signature petition requirement. This Court previously awarded summary judgment to Defendant by applying these decisions, particularly the Supreme Court's decision in *Jenness v. Fortson*. However, the Eleventh Circuit held that this judgment was in error. The Supreme Court's intervening decision in *Anderson* changed the test for a First and Fourteenth Amendment challenge in this context. For this reason, the Eleventh Circuit remanded so that the Court could apply the *Anderson* test. *Cowen*, 960 F.3d at 1347. Even so, the Eleventh Circuit observed that *Jenness* remains good law and emphasized that, on remand, Plaintiffs would have to distinguish *Jenness* "either because of 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." *Id.* at 1346.

As is clear from the Court's holding that Georgia's ballot-access laws impose a severe burden on Plaintiffs' constitutional rights, the Court finds that Plaintiffs have satisfactorily distinguished *Jenness*. To make these distinctions clear, the Court briefly reviews *Jenness* and other relevant precedents to illustrate why this case de-

9. Defendant objects to paragraph 11 of Faye Coffield's Declaration, Dkt. No. [69-7] ¶ 11, and paragraph 13 of Aaron Gilmer's Declaration, Dkt. No. [69-11] ¶ 13. Dkt. No. [99] at 8, 12. Defendant argues that these paragraphs contain inadmissible hearsay. Dkt. No. [99] at 8, 12. However, as Plaintiffs argue, these assertions need not be admitted for the truth of

the matter asserted—that is, it does not matter whether potential signers were telling the truth and actually were fearful of sharing this information or not. Dkt. No. [105-2] at 25. What is relevant is that some individuals provided this reason or excuse—true or not—for refusing to sign a petition.

mands a different outcome regarding the severity of the burden imposed upon Plaintiffs' rights.

In Jenness, a 1971 case, the Supreme Court addressed Georgia's 5% petition requirement. 403 U.S. at 432, 91 S.Ct. 1970. The plaintiffs there challenged provisions of the Georgia Election Code requiring political body candidates to submit (1) a nominating petition signed by at least 5% of the number of registered voters in the last general election for the office in question; and (2) a filing fee equal to 5% of the annual salary of the office sought. Id. The filing fee was not challenged on appeal because the district court had granted the plaintiffs an injunction as to it. Id. The appeal was instead taken from the Court's denial of an injunction related to the signature requirement.

The Supreme Court upheld Georgia's 5% petition signature requirement based on several factors tied to Georgia's election law scheme. The Court remarked upon the "open quality of the Georgia system." Id. at 439, 91 S.Ct. 1970. At that time, there was "no limitation whatever . . . on the right of a voter to write in on the ballot the name of the candidate of his choice and to have that write-in vote counted." Id. at 434, 91 S.Ct. 1970. Further, Georgia did "not require every candidate to be the nominee of a political party, but fully recognize[d] independent candidacies"; did not have an unreasonably early filing deadline; did not require small or new parties to establish "elaborate primary election machinery"; and did not impose "suffocating restrictions" on the circulation of nominating petitions. Id. at 438–39, 91 S.Ct. 1970. The Supreme Court also observed that the "open quality of the Georgia system [wa]s far from merely theoretical" giv-

en that a candidate for Governor and a candidate for President had gained ballot designation by nominating petitions in 1966 and 1968, respectively. Id. at 439, 91 S.Ct. 1970. The Supreme Court thus concluded that Georgia's election laws "d[id] not operate to freeze the political status quo." Id. at 438, 91 S.Ct. 1970.¹⁰

The Supreme Court's reliance on context-dependent factors makes Jenness distinguishable from the present case in several ways. First, the qualifying fee was not at issue in Jenness, but it is an important part of Plaintiffs' challenge here. Dkt. No. [134-1] at 44 (referring to O.C.G.A. § 21-2-132(d)). The Court must examine the "cumulative burdens" of the laws preventing Plaintiffs from accessing Georgia's ballot. Clingman v. Beaver, 544 U.S. 581, 607, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005) (O'Connor, J., concurring); accord Williams, 393 U.S. at 34, 89 S.Ct. 5 (measuring the burden of Ohio's ballot-access laws "taken as a whole"). The qualifying fee increases the burden on Plaintiffs' constitutional rights, and so it is essential to the Court's analysis. See Cowen, 960 F.3d at 1348 (Jordan, J., concurring) ("So, whatever effect Jenness may have had on the plaintiffs' First and Fourteenth Amendment claims, it did not foreclose or control the plaintiffs' challenge to the qualifying fee.").

Second, Georgia law regarding write-in candidates has changed since Jenness with new restrictions adopted in 1978. Such candidates must now file and publish a notice of candidacy in advance of the election, O.C.G.A. § 21-2-133(a), and votes cast for someone who has not followed this process are not counted, Ga. Comp. R. & Regs. 183-1-15-.02(5).

¹⁰ The former Fifth Circuit followed Jenness by upholding Georgia's entire electoral statutory scheme before the Supreme Court

changed the test in Anderson. McCrary v. Poythress, 638 F.2d 1308 (5th Cir. 1981)

COWEN v. RAFFENSPERGER
Cite as 537 F.Supp.3d 1327 (N.D.Ga. 2021)

1343

Third, the record of historical ballot exclusion is stronger here than it was in Jenness. There, the Supreme Court held that Georgia's election system was "open" in part because the stipulated record contained evidence that two candidates—one for President and one for Governor—had gained ballot designation by petition. Jenness, 403 U.S. at 439, 91 S.Ct. 1970. This finding influenced the Court's holding that "Georgia in no way freezes the status quo[.]" Id. In this case, by contrast, the record indicates that no political-body candidate for U.S. Representative has overcome Georgia's statutory petition threshold since it was established in 1943, though many candidates have tried. See Dkt. No. [97] ¶ 76. At least with respect to non-statewide office, the status quo is frozen.

And fourth, as previously discussed, the record in this case contains much evidence regarding the practical burdens of gathering petitions. Along with evidence of candidates attempting and failing to qualify despite collecting thousands of signatures, there is also evidence in the record illustrating the difficulty and cost of simply gathering the statutorily required number of signatures. See, e.g., Dkt. Nos. [69-9] ¶¶ 9–10; [69-10] ¶ 10; [69-13] ¶ 21; [69-16] ¶ 8; [69-23] ¶ 12. Moreover, Plaintiffs have produced evidence indicating that the Secretary of State's petition checking process yields signature-validation rates that, as a practical matter, require potential third-party and independent candidates to gather signatures in excess of those required by O.C.G.A. § 21-2-170. Dkt. No. [97] ¶¶ 145–148.

In addition to "different facts in the instant record, as compared to the record in Jenness[] [and] changes in the relevant Georgia legal framework," Cowen, 960 F.3d at 1346, the Court notes a critical "evolution of the relevant federal law," id. Since Jenness was decided, federal cam-

paign finance laws have become more stringent, so it has become more difficult for candidates to raise funding to gather petition signatures. More importantly, 12 years after Jenness was decided, the Supreme Court issued its decision in Anderson v. Celebrezze, which changed the rubric for analyzing ballot-access challenges like the one in this case.

This change was not simply academic. The Anderson court rejected what it described as a "litmus-paper test" in favor of "an analytical process that parallels [a court's] work in ordinary litigation." Anderson, 460 U.S. at 789, 103 S.Ct. 1564 (citing Storer, 415 U.S. at 730, 94 S.Ct. 1274). By this, the Court meant that the extent of the infringement must be considered based upon the facts of a case, and the magnitude of infringement must be balanced against the state's interest. The Court put it this way in Storer, an earlier case upon which Anderson relied:

[T]he rule fashioned by the Court to pass on the constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a "matter of degree," . . . very much a matter of "consider[ing] the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." What the result of this process will be in any specific case may be very difficult to predict with great assurance. Storer, 415 U.S. at 730, 94 S.Ct. 1274 (quoting Williams, 393 U.S. at 34, 89 S.Ct. 5; Dunn v. Blumstein, 405 U.S. 330, 335, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972)).

This shift to a factual, context-based balancing approach reinforces the Court’s decision to depart from Jenness for two reasons. First, the robust factual record showing the burden faced by aspiring candidates for office is key to the Court’s analysis here. The Eleventh Circuit has explicitly held regarding Jenness and McCrary that “the two cases . . . do not foreclose the parties’ right to present the evidence necessary to undertake the balancing approach outlined in Anderson” Bergland v. Harris, 767 F.2d 1551, 1554 (11th Cir. 1985); accord Cowen, 960 F.3d at 1345. And second, the rubric of Anderson requires the Court to take a closer look at the State’s stated interest—specifically, “the legitimacy and strength of each of those interests [and] the extent to which those interests make it necessary to burden the plaintiff’s rights.” Anderson, 460 U.S. at 789, 103 S.Ct. 1564. This second distinction is discussed in more detail below.

Since Anderson, the Eleventh Circuit has issued decisions approving Georgia’s 5% signature requirement. See Coffield v. Kemp, 599 F.3d 1276 (11th Cir. 2010); Cartwright v. Barnes, 304 F.3d 1138 (11th Cir. 2002). But each of those cases is distinguishable on grounds central to the Circuit’s holdings.

Cartwright concerned primarily a challenge to the 5% requirement under the Qualifications Clause. 304 F.3d at 1139 (“The main issue in this case is whether this 5% signature requirement creates a new qualification for holding federal office in violation of the Qualifications Clause”). The court’s discussion of the constitutional provisions at issue here was cursory. Id. (“We also conclude that this 5% signature requirement does not violate any other constitutional provision.”). Further, the Cartwright plaintiffs “pointed to only two differences in the relevant context to

distinguish their case from Jenness, both of which the panel rejected summarily as wholly without merit.” Cowen, 960 F.3d at 1345 (citing Cartwright, 304 F.3d at 1141–42). And in fact, the court in Cartwright did not even quote Anderson directly, much less apply its three-part test to weigh the interests at stake.

Coffield is similarly distinguishable. In that case, the aspiring independent candidate failed to show that Georgia’s 5% requirement severely burdened her. Coffield, 599 F.3d at 1277. The Eleventh Circuit rejected the candidate’s challenge because, while she alleged that no independent candidate for the House of Representatives met Georgia’s petition requirement since 1964, “she [did] not allege how many candidates have tried.” Id. Thus, the Coffield plaintiff simply failed to carry her burden. See Cowen, 960 F.3d at 1345 (“[O]ur decision in Coffield appears to have rejected an attempt to distinguish Jenness . . . because the plaintiff’s allegations were wholly insufficient to plausibly distinguish Jenness.”). And as in Cartwright, the Eleventh Circuit in Coffield did not balance the interests under the Anderson rubric.

A cursory reading of these Eleventh Circuit decisions suggests that the Circuit has approved Georgia’s ballot-access scheme. A closer reading reveals that the plaintiffs in those cases simply failed to prove a constitutional infringement under the fact-and context-dependent rubric of Anderson. These failures decisively distinguish the prior cases from this one. The distinction is decisive because Anderson instructs courts to consider the cumulative burden upon plaintiffs’ rights based on the context of each case. Anderson, 460 U.S. at 789, 103 S.Ct. 1564 (“[A] court must resolve such a challenge by an analytical process that parallels its work in ordinary

COWEN v. RAFFENSPERGER
Cite as 537 F.Supp.3d 1327 (N.D.Ga. 2021)

1345

litigation The results of this evaluation will not be automatic; as we have recognized, there is ‘no substitute for the hard judgments that must be made.’” (quoting Storer, 415 U.S. at 730, 94 S.Ct. 1274)); see also Bowe v. Bd. of Election Comm’rs, 614 F.2d 1147, 1152–53 (7th Cir. 1980) (“[T]he Supreme Court has consistently taken an intensely practical and fact-oriented approach to deciding these election cases.”); Green Party of Ga., 171 F. Supp. 3d at 1363 (holding that Georgia’s 1% petition-signature requirement for presidential candidates imposed a severe burden after the plaintiffs had a chance to fully develop an evidentiary record).

In this case, Plaintiffs have done what the plaintiffs in Cartwright and Coffield failed to do: they have developed a fulsome evidentiary record proving that Georgia’s laws have excluded political-body candidates from ballots in races for U.S. Representative. They have shown that Georgia’s ballot-access laws “‘freeze the status quo’ by effectively barring all candidates other than those of the major parties” Libertarian Party of Fla., 710 F.2d at 793 (quoting Jenness, 403 U.S. at 439, 91 S.Ct. 1970). For that reason, the Court finds that the laws impose a severe burden upon Plaintiffs’ First and Fourteenth Amendment rights.

2. Identifying and Evaluating the State’s Interests

The next step of the Anderson test requires the Court to “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.” 460 U.S. at 789, 103 S.Ct. 1564. The State has advanced two interests: (1) ensuring that a candidate has substantial support before putting the candidate’s name on ballots to screen out frivolous candidacies and avoid overcrowded ballots and (2) “a generalized interest in the orderly administration of elections.”

Dkt. No. [135-1] at 16–18; Dkt. No. [140] at 21–22.

The first of these interests has become well established in Supreme Court decisions since Jenness. See Jenness, 403 U.S. at 442, 91 S.Ct. 1970 (acknowledging the “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”); Am. Party of Tex.v. White, 415 U.S. 767, 782, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974) (“[W]e think that the State’s admittedly vital interests are sufficiently implicated to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support.”); Anderson, 460 U.S. at 788 n.9, 103 S.Ct. 1564 (discussing the “undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot”); Munro v. Socialist Workers Party, 479 U.S. 189, 193–94, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986) (same).

[8] As Plaintiffs point out, Defendant has invoked this interest in its briefing but has not offered substantial support for that interest. Dkt. No. [148] at 2 (citing Fulani v. Krivanek, 973 F.2d 1539, 1544 (11th Cir. 1992); Bergland, 767 F. 2d at 1554). Of course, it goes without saying that a 5% petition signature requirement and registration fee screen out frivolous candidates because it is Plaintiffs’ argument that even legitimate candidates are being screened out. But Defendant has offered little support for the reasonableness of those restrictions besides citation to precedent. Cf. Fulani, 973 at 1544 (“The state identifies interests that courts have found compelling in other cases, but fails to explain the relationship between these interests and the classification in question.”). Even so, the Court finds that the State does have a legitimate interest in ensuring a significant

modicum of support to screen out frivolous candidates and avoid ballot confusion.

The second of the State's claimed interests lacks the same grounding in prior precedent. Defendant cites several cases to support a generalized interest in election administration: Jenness, Storer v. Brown, and Timmons. Dkt. No. [140] at 22. The language Defendant cites from Jenness is a rephrasing of the State's first asserted interest. See Jenness, 403 U.S. at 442, 91 S.Ct. 1970 ("There is surely 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—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.") (emphasis added to highlight Defendant's cited language). The citations from Storer and Timmons are truisms that do not outline specific interests, but rather elaborate on State's authority to regulate elections. Storer, 415 U.S. at 730, 94 S.Ct. 1274 ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process."); Timmons, 520 U.S. at 366, 117 S.Ct. 1364 ("States also have a strong interest in the stability of their political systems."). These interests are now weighed.

3. Weighing the Factors

The third and final step of the Anderson test requires the Court to "determine the legitimacy and strength of [the State's] interests [and] consider the extent to which those interests make it necessary to burden the plaintiff's rights." 460 U.S. at 789, 103 S.Ct. 1564. "Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." Id. The Eleventh Circuit has held that the legiti-

macy of ballot restrictions depends on the severity of the constitutional burdens imposed:

[I]f the state election scheme imposes "severe burdens" on the plaintiffs' constitutional rights, it may survive only if it is "narrowly tailored and advance[s] a compelling state interest." [Timmons, 520 U.S. at 358, 117 S.Ct. 1364]. But when a state's election law imposes only "reasonable, nondiscriminatory restrictions" upon a plaintiff's First and Fourteenth Amendment rights, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." Id. (quotations omitted). In short, the level of scrutiny to which election laws are subject varies with the burden they impose on constitutionally protected rights—"lesser burdens trigger less exacting review." Id. Stein v. Ala. Sec'y of State, 774 F.3d 689, 694 (11th Cir. 2014). Because the Court holds that Georgia's laws impose a severe burden on Plaintiffs' constitutional rights, the Court must determine whether Georgia law is "narrowly tailored and advances a compelling state interest." Id. (citing Timmons, 520 U.S. at 358, 117 S.Ct. 1364).

[9] The Court agrees with Plaintiffs on this issue and holds that Defendant has not shown that Georgia's ballot-access requirements for non-statewide office are narrowly tailored to advance a compelling state interest. See Dkt. No. [134-1] at 48. While Georgia has an undeniable interest in regulating elections by bringing order to its ballots and screening out frivolous candidates, its chosen method of accomplishing that goal is overbroad. Georgia's 5% petition signature requirement for non-statewide candidates screens out legitimate candidates in addition to frivolous ones, and it does so without a reasonable justification. Georgia's own election scheme includes a more narrowly tailored

COWEN v. RAFFENSPERGER
Cite as 537 F.Supp.3d 1327 (N.D.Ga. 2021)**1347**

means of screening out frivolous candidates—namely, the 1% petition signature requirement of O.C.G.A. § 21-2-180, which the State established in 1986. However, this 1% threshold only applies to statewide candidates, while candidates for non-statewide office must still clear the 5% hurdle established in 1943. Simply put, the State offers no justification for the higher threshold imposed on candidates for non-statewide office.

An unjustified distinction like this one was addressed and deemed unconstitutional by the Supreme Court in Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983. In that case, the Socialist Workers Party challenged a provision of Illinois law which required candidates for mayoral office in Chicago to obtain more signatures to access the ballot in their race than candidates for statewide office needed to access the ballot in statewide races. Id. at 177–78, 99 S.Ct. 983. This disparity arose from an Illinois law that required candidates for statewide office to obtain 25,000 signatures, while candidates for non-statewide office needed signatures from 5% of the number of persons who voted at the previous election in the relevant political subdivision. Id. at 176–77, 99 S.Ct. 983. This meant that statewide candidates needed 25,000 signatures, while candidates of “new political parties” running for mayor in Chicago needed 63,373 signatures. Id. at 177, 99 S.Ct. 983.

The Supreme Court held this scheme unconstitutional. It first described the rights at stake, which were the same as those at stake here: “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.” Id. at 184, 99 S.Ct. 983 (quoting Williams v. Rhodes, 393 U.S. at 30, 89 S.Ct. 5). The Court held that when “such vital individual

rights are at stake, a State must establish that its classification is necessary to serve a compelling interest.” Id. (citing Am. Party of Tex., 415 U.S. at 780–81, 94 S.Ct. 1296). While Illinois, like Georgia, had “a legitimate interest in regulating the number of candidates on the ballot[.]” id. at 184–85, 99 S.Ct. 983, such that Illinois could “require a preliminary showing of a ‘significant modicum of support,’” id. at 185, 99 S.Ct. 983 (quoting Jenness, 403 U.S. at 442, 91 S.Ct. 1970), the State failed to justify the disparity between signature requirements for statewide and non-statewide offices.

The Court held that the 5% rule, as applied in Chicago, was “not the least restrictive means of protecting the State’s objectives.” Id. at 186, 99 S.Ct. 983. The Court noted that Illinois’s legislature “ha[d] determined that its interest in avoiding overloaded ballots in statewide elections [wa]s served by the 25,000-signature requirement.” Id. But the State had advanced “no reason, much less a compelling one,” why ballot access should be more burdensome for a Chicago mayoral candidate than for a candidate for statewide election. Id.

The State of Georgia has a similarly incongruous ballot-access scheme to the one struck down in Socialist Workers Party. The General Assembly has deemed a 1% petition signature requirement adequate to guard against ballot crowding and frivolous candidacies on a statewide basis. O.C.G.A. § 21-2-180. It is not immediately clear why candidates for non-statewide office must clear a proportionally higher hurdle, the 5% petition signature requirement. Defendant has not offered any explanation for this disparity. See Fulani, 973 F.2d at 1546 (“The problem is that the state has plucked these interests from other cases without attempting to explain how they justify the discriminatory classifica-

tion here at issue.”). Accordingly, the Court finds that Georgia’s 5% petition signature requirement, combined with the qualifying fee, are not narrowly drawn to advanced the State’s interests. Georgia’s ballot-access scheme overburdens Plaintiffs’ rights to vote and to associate with their preferred political party, and so it violates the First and Fourteenth Amendments.

[10] The Court would reach the same decision even under a more deferential standard of review. The Eleventh Circuit has held that, even when the burden on plaintiffs’ rights is “significant,” rather than “severe,” a state defendant must still articulate its interests and “explain the relationship between these interests and the classification in question.” Fulani, 973 F.2d at 1544. A state’s means of achieving even legitimate goals may be struck down where “the state has failed to justify” the burden in question. Id. at 1547; see also New Alliance Party of Ala. v. Hand, 933 F.2d 1568, 1576 (11th Cir. 1991) (striking down a law that made it “moderately difficult” to access the ballot when the State failed to show that the less-than-severe burdens were necessary to advance Alabama’s legitimate interests); Green Party of Ga., 171 F. Supp. 3d at 1367 (holding that, even under a deferential standard, “the State’s regulatory interest [wa]s not sufficiently important to justify the restrictions on the First and Fourteenth Amendment rights of Plaintiffs”). Here, Defendant has failed to justify the requirement that congressional candidates must clear the 5% threshold when the General Assembly has determined that a 1% threshold is adequate on a statewide basis.

In reaching this decision, the Court agrees with the reasoning of another judge in this District in a similar case. See Green Party of Ga., 171 F. Supp. 3d at 1365. In Green Party of Georgia, the court found

that Georgia’s statewide 1% petition requirement violated plaintiffs’ First and Fourteenth Amendment rights with respect to a national presidential election. Id. at 1365–66. The plaintiffs’ interests were similar to those in this case, as was the State’s interest. Id. at 1365. The court found that the 1% requirement was “not narrowly tailored to advance the State’s interests.” Id. This requirement translated to more than 50,000 signatures to access the general election ballot. Id. “But requiring a lower number would ease the burden on voters’ and political bodies’ rights while still serving the State’s interest in avoiding voter confusion and a crowded ballot.” Id. The Eleventh Circuit succinctly affirmed this holding in an unpublished decision. Green Party of Ga. v. Kemp, 674 F. App’x 974, 975 (11th Cir. 2017) (per curiam) (unpublished) (“The judgment of the district court is affirmed based on the district court’s well-reasoned opinion.”).

In fact, the case now before the Court is a stronger case for Plaintiffs under the Anderson framework. While the court in Green Party of Ga. looked at the burden of the 1% requirement and the State’s justification in isolation, the Court here has the 1% requirement as a benchmark against which to consider the challenged 5% requirement and qualifying fee. The Green Party of Ga. court held that, even under a deferential standard of review, the State could not justify a 1% threshold that required presidential candidates to gather 50,000 signatures. Green Party of Ga., 171 F. Supp. 3d at 1366. Here, Defendant must justify a higher proportional burden for non-statewide elections—a 5% signature requirement that forces aspiring congressional candidates in Georgia’s 14 congressional districts to gather between 19,000 and 25,000 signatures. The candidates face this burden despite the State’s decision that a 1% threshold is adequate for candi-

COWEN v. RAFFENSPERGER
Cite as 537 F.Supp.3d 1327 (N.D.Ga. 2021)

1349

dates running on a statewide basis. Defendant has failed to justify this burden.

Accordingly, Plaintiffs' Second Motion for Summary Judgment, Dkt. No. [134], is **GRANTED** as to their First and Fourteenth Amendment claim. Defendant's Motion for Summary Judgment on that claim, Dkt. No. [135], is **DENIED**.

B. Equal Protection Clause Challenge

[11] Plaintiffs have also moved for summary judgment on a separate, narrow equal-protection challenge. They argue, under Socialist Workers Party and Norman v. Reed, 502 U.S. 279, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992), that Georgia's election scheme unconstitutionally requires candidates for non-statewide office to obtain more petition signatures than candidates for statewide office. Dkt. No. [134-1] at 53–54. They point out that statewide Libertarian candidates do not need any petition signatures because they have already qualified under O.C.G.A. § 21-2-180, while non-statewide candidates must meet the 5% threshold and thus obtain between 19,777 and 26,539 signatures (for 2020).

Defendant argues that this claim fails as a matter of law, Dkt. No. [135-1] at 22–23, and the Court agrees. Plaintiffs misconstrue Georgia's ballot-access scheme. While it is true that Libertarian candidates for statewide office did not need to collect petition signatures, that is only so because the Libertarian Party has qualified to run statewide candidates under O.C.G.A. § 21-2-180 since 1988. But that statute requires the political bodies to show the required modicum of support by obtaining votes from 1% of registered voters in the prior election. If a statewide candidate in 2020 sought ballot access through petition sig-

natures, that candidate would need 51,686 signatures, a sum far above that required for any individual congressional district. That Georgia provides an alternative way to access the general-election ballot through votes obtained in the prior election does not mean that they have created a distinction that violates Plaintiffs' right to equal protection. See Jenness, 403 U.S. at 441–42, 91 S.Ct. 1970.¹¹

Accordingly, Plaintiffs' Motion for Summary Judgment, Dkt. No. [134], is **DENIED** as to their classification theory for their equal-protection claim. Defendant's Motion for Summary Judgment, Dkt. No. [135], is **GRANTED** as to that theory.

C. Remedies and Remaining Claims

Although the Court is granting Plaintiffs' Motion for Summary Judgment as to its Fourteenth Amendment claims, the issue of what remedies are appropriate and whether there are other remaining claims remains unclear.

As to the issues of remedies, Plaintiffs should submit a brief within 21 days of the date of this Order as to the remedies it is proposing. Defendant shall then have an opportunity to respond, and Plaintiffs can then reply. The Court will then provide further guidance to the parties.

[12] In addition, a claim relating to Plaintiffs' theory that Georgia's 5% requirement violates the Equal Protection Clause still remains. Plaintiffs have not moved for summary judgment on that theory. Dkt. No. [134] at 2 n.1. Defendant does not address the claim in his summary-judgment brief. Dkt. No. [135-1]. Since the Court is granting Plaintiffs' Motion for Summary Judgment as to their

11. To be clear, Plaintiffs argue that they are entitled to summary judgment because the state may not require a higher absolute number of signatures on a statewide basis than on a non-statewide or district-level basis. Dkt.

No. [134-1] at 54. Plaintiffs do not argue in their summary judgment motion that Georgia has violated their equal-protection rights by establishing disparate percentage requirements.

1350

537 FEDERAL SUPPLEMENT, 3d SERIES

First and Fourteenth Amendment claims, the Court is unclear as to whether Plaintiffs want to move forward with a trial as to this remaining claim when the summary judgment order may resolve any ongoing controversy in the case. To that end, Plaintiffs are **DIRECTED** to show cause why their remaining equal-protection claim should not be dismissed as moot in the same brief they are submitting as to remedies. Even if Plaintiffs do not agree that the claim is moot, they should address whether they are still requesting a trial as to that claim. Defendant can also respond to this issue in his response brief. Plaintiffs shall be entitled to reply.¹²

V. CONCLUSION

Based upon the foregoing, Plaintiffs' Second Motion for Summary Judgment [134] is **GRANTED in part** and **DENIED in part**. Defendant's Second Motion for Summary Judgment [135] is likewise **GRANTED in part** and **DENIED in part**.

Plaintiffs' Second Motion for Summary Judgment [134] is **GRANTED** as to their First and Fourteenth Amendment claim. Defendant's Motion for Summary Judgment [135] is **DENIED** as to that claim.

The Court **DIRECTS** Plaintiffs to submit within **21** days of the entry of this Order briefing proposing an appropriate remedy related to the First and Fourteenth Amendment claim and addressing their claim that Georgia's 5% requirement violates the Equal Protection Clause because it was adopted with a discriminatory purpose. Defendant and Plaintiffs shall then have the ordinary response and reply times.

12. Defendant has filed a motion to exclude the testimony of Plaintiffs' expert Darcy Richardson. Dkt. No. [137]. This testimony only pertains to Plaintiffs' theory that Georgia's 5% requirement violates the Equal Protection

Plaintiffs' Second Motion for Summary Judgment [134] is **DENIED** as to their equal-protection claim. Defendant's Second Motion for Summary Judgment [135] is **GRANTED** as to Plaintiffs' classification theory for that claim. Plaintiffs did not move for summary judgment on their discrimination theory for their equal-protection claim, and Defendant did not specifically address that claim in his briefing.

IT IS SO ORDERED this 29th day of March, 2021.



**MCC HOLDINGS doing business as
Crane Resistoflex, Plaintiff,**

v.

**UNITED STATES, Defendant,
and**

**Anvil International, LLC, Defendant-
Intervenor.**

**Slip Op. No. 21-109
Court No. 18-00248**

United States Court of International
Trade.

August 26, 2021

Background: Importer filed suit challenging decision by International Trade Commission (ITC), Department of Commerce, in first remand redetermination following voluntary remand, that importer's ductile iron lap joint flanges were within scope of antidumping duty order covering non-

Clause because it was adopted with a discriminatory purpose. The Court will wait to rule on this motion until after it becomes clear whether this claim survives.