No. 22-

IN THE

Supreme Court of the United States

MARTIN COWEN, ALLEN BUCKLEY, AARON GILMER, JOHN MONDS AND THE LIBERTARIAN PARTY OF GEORGIA, INC.,

Petitioners,

v.

GEORGIA SECRETARY OF STATE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a State violate the First and Fourteenth Amendments when its ballot-access restrictions on third-party candidates for United States Representative are so onerous that—despite many attempts over more than three-quarters of a century—no such candidates have ever satisfied them and likely never will?

2. Does a State violate the Equal Protection Clause when it requires third-party candidates to gather more signatures to get on the ballot in a congressional district than they would need for a statewide office?

PARTIES TO THE PROCEEDING

The Petitioners (plaintiffs-appellees below) are Martin Cowen, Allen Buckley, Aaron Gilmer, John Monds, and the Libertarian Party of Georgia, Inc. The Respondent (defendant-appellant below) is the Georgia Secretary of State. When this case was filed, Brian Kemp was the Secretary of State. Brad Raffensperger was substituted as a party following the 2018 election.

RULE 29.6 STATEMENT

The Libertarian Party of Georgia, Inc. has no parent company, and no publicly held company has a 10 percent or greater ownership interest in it.

RELATED PROCEEDINGS

United States District Court for the Northern District of Georgia:

- *Cowen v. Raffensperger*, No. 1:17-CV-04660-LMM (Sept. 23, 2019) (ECF 113) (order on cross-motions for summary judgment)

- *Cowen v. Raffensperger*, No. 1:17-CV-04660-LMM (Mar. 29, 2021) (ECF 159) (order on cross-motions for summary judgment following remand from *Cowen I*)

United States Court of Appeals for the Eleventh Circuit:

- *Cowen v. Georgia Secretary of State*, No. 19-14065 (June 2, 2020) (*"Cowen I"*)

- *Cowen v. Secretary of State of the State of Georgia*, No. 21-13199 (January 5, 2022) (*"Cowen II"*)

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JURISDICTION

The judgment of the court of appeals was entered on January 5, 2022. A petition for rehearing was denied on March 31, 2022 (App., *infra*, 102a). On April 28, Justice Thomas granted the petitioners' application (21A647) to extend the time to petition for a writ of certiorari until July 29. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are those sections of the Georgia Election Code that regulate third-party access to the general-election ballot: O.C.G.A. §§ 21-2-131, -132, -170, and -180. The text of those provisions is reproduced in an appendix. App., *infra,* 103a-126a.

INTRODUCTION

This is a constitutional challenge to Georgia's ballot-access restrictions on third-party candidates for United States 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 restrictions include a signature requirement that is substantially higher than any third-party candidate for United States Representative has ever been able to overcome in the history of the United States. Unless this Court intervenes, the people of Georgia will never again have the chance to vote for House candidates nominated by parties other than the Democrats or Republicans.

That is reason enough to grant review. "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Anderson v. Celebrezze*, 460 U.S. 780, 802 (1983) (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). While States have great latitude in regulating access to the ballot, the Constitution does not permit them to hard-wire the existing parties. This case tests the extreme outer limits of state authority over the manner of electing members of Congress.

The Court should also grant review because the Eleventh Circuit's First Amendment analysis fundamentally misreads *Jenness v. Fortson*, 403 U.S. 431 (1971), which upheld an earlier version of Georgia's ballot-access scheme, and conflicts with *Storer v. Brown*, 415 U.S. 724 (1974), and with the decisions of at least three other circuits. The panel's opinion on the Equal Protection issue conflicts with this Court's decisions in *Norman v. Reed*, 502 U.S. 279 (1992), and *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). Review is necessary to resolve these conflicts.

These important issues are squarely presented. The record is robust. This Court should grant certiorari to review the Eleventh Circuit's judgment.

STATEMENT OF THE CASE

A. Factual Background

In 1943, the State of Georgia imposed a five-percent petition requirement for access to the general-election ballot. 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. 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. App., *infra,* 18a-19a.

In 1986, the State substantially loosened its ballot-access requirements—but only for statewide candidates. 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. 1986 Ga. Laws 894 (codified at 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 United States Representative. App., *infra,* 67a.

The upshot of Georgia's current ballot-access scheme is that the Libertarian Party, which has been qualified under Section 21-2-180 since 1988, can have its nominees for a full slate of *statewide* offices—which include President, United States 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. The Party need only pay the qualifying fees. App., *infra,* 19a-21a. But to have a full slate of fourteen nominees for United States 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 fourteen congressional districts. Appellees' Supp. App. 87-92.

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. App., *infra,* 40a. 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.

App., *infra,* 38a. Georgia's signature requirement is also substantially higher, in absolute terms, than any signature requirement that any independent or third-party candidate for United States Representative has ever overcome in the history of the United States. App., *infra,* 39a. And, despite many attempts, no third-party candidate for United States Representative has appeared on the general-election ballot since the restrictions were first enacted in 1943. App., *infra,* 32a.

The record here, which the district court described as "robust," contains evidence of about 20 unsuccessful attempts to satisfy Georgia's ballot-access requirements for United States Representative in the last 20 years alone. App., *infra,* 32a-37a (detailing unsuccessful attempts from across the political spectrum, including one by former Representative Cynthia McKinney). It also includes unrebutted evidence of various practical difficulties of gathering signatures in Georgia today, including: (1) the Secretary of State's low signature-validation rates; (2) the difficulty and pace of petitioning in recent campaigns; (3) the cost of petitioning, the impact of federal campaign-finance laws, and the difficulty of raising money to pay for petition drives; (4) petition-circulators' lack of access to voters given the diminishing public square; and (5) public concerns about identity theft from disclosing the confidential information required by the form of Georgia's petition. App., *infra,* 23a, 40a-44a.

The record also contains undisputed evidence of widespread support for the Libertarian Party at the ballot box in Georgia and across the nation. App., *infra,* 23a-24a. Over the last 10 years, Libertarian candidates for statewide offices in Georgia have received more than

five million votes, App., *infra,* 24a, and the State has repeatedly described the Libertarian Party in other cases as having "significant support" in Georgia. 3 Appellant's App. 166-67. Nationwide, the Libertarian Party runs hundreds of candidates in every election cycle, and it has had candidates for United States Representative on the ballot in every state in the nation except Georgia. App., *infra,* 24a.

B. Proceedings Below

The Libertarian Party of Georgia, prospective Libertarian candidates for United States Representative, 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 on third-party House candidates unconstitutionally burden their associational rights under the First and Fourteenth Amendments to the United States Constitution. They also allege that those restrictions violate the Equal Protection Clause by requiring Libertarian candidates for United States Representative to gather more signatures for ballot access than Libertarian candidates for statewide offices.[1]

After an extended period of discovery, the parties cross-moved for summary judgment, and the district court granted summary judgment for the Secretary. The court based its ruling on this Court's decision in *Jenness*

1. The Party also claims that the restrictions were enacted in 1943 with a discriminatory purpose, but that claim was not resolved on summary judgment and is not at issue here. App., *infra,* 5a n.2.

v. Fortson, 403 U.S. 431 (1971), which upheld an earlier version of Georgia's ballot-access scheme as constitutional. Finding itself bound by *Jenness*, the district court summarily rejected both of the Party's claims. App., *infra,* 100a.

The Party appealed. A three-judge panel of the Eleventh Circuit 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. App., *infra,* 82a-83a.

On remand, the parties cross-moved for summary judgment again. In a lengthy opinion, the district court granted the Libertarian Party's motion for summary judgment on its First and Fourteenth Amendment claim but granted the Secretary's motion on the Party's Equal Protection claim. App., *infra,* 63a-64a.

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. App., *infra,* 16a. 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. App., *infra,* 7a-8a.

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

efforts by candidates for United States 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 United States Representative. The panel then pointed to the fact that a single independent candidate for district attorney had gathered enough signatures to qualify for the ballot in 2020.[2] App., *infra,* 8a-9a. "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 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. App., *infra,* 11a-12a.

The panel also affirmed the district court's summary judgment for the Secretary on the Party's Equal Protection claim. App., *infra,* 16a. 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 United States 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.

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2. The candidate needed only 3,526 signatures. 4 Appellant's App. 241.

In accepting that justification, the panel distinguished this Court's decision in *Norman v. Reed*, 502 U.S. 279 (1992), which had 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. App., *infra,* 15a n.5. The panel reasoned that *Norman* did not apply "because prospective candidates at both the statewide and non-statewide levels must only show sufficient support among the electorate of the office they seek." *Id.*

The panel did not distinguish this Court's decision in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), which struck down an earlier Illinois law that also required candidates in a district or political subdivision to gather more signatures for ballot access than statewide candidates.

REASONS FOR GRANTING THE PETITION

The Court should hear this case for two reasons.

First, Georgia is violating core First Amendment freedoms by shutting the Libertarian Party (and other third parties) out of elections for the House of Representatives. Its ballot-access restrictions are so onerous that no third-party House candidate has ever satisfied them and likely never will. The Eleventh Circuit's opinion upholding those restrictions misreads this Court's decision in *Jenness v. Fortson*, 403 U.S. 431 (1971), and it conflicts with this Court's decision in *Storer v. Brown*, 415 U.S. 724 (1974), and with the decisions of at least three other circuits. This case therefore presents an important federal question that has been decided in a way that

conflicts with the decisions of this Court and other courts of appeals. Sup. Ct. R. 10(a), (c). Review is necessary to secure consistency in the application of the First and Fourteenth Amendments.

Second, Georgia's ballot-access scheme does not comply with this Court's Equal Protection precedents. Twice the Court has held that a state may not require third-party candidates to gather more signatures to get on the ballot in a district or political subdivision than they would need for a statewide office. *See Norman v. Reed*, 502 U.S. 279 (1992); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). But Georgia's ballot-access scheme does exactly that. While Libertarian candidates can get on the ballot for statewide offices without submitting any petition signatures, Libertarian candidates for any one of Georgia's fourteen congressional districts must submit more than 25,000 signatures each. In blessing Georgia's scheme anyway, the Eleventh Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

I. The Court should grant certiorari to ensure consistency in the application of core First Amendment freedoms.

The Eleventh Circuit's First Amendment jurisprudence is grossly out of step with other circuits. Even though Georgia's restrictions on third-party candidates for United States Representative are so onerous that no such candidate has ever satisfied them and likely never will, the Eleventh Circuit concluded as a matter of law that the restrictions "do not severely burden the Libertarian

Party's First and Fourteenth Amendment rights." App., *infra,* 11a. In arriving at that conclusion, the court relied heavily on this Court's decision in *Jenness* and the petitioning success of a single independent candidate for a low-level office.[3] App., *infra,* 8a-9a. That reliance misreads *Jenness,* conflicts with *Storer,* and conflicts with the decisions of at least three other circuits. This Court should grant review to resolve those conflicts.

In *Jenness*, this Court upheld an earlier version of Georgia's ballot-access scheme against a First Amendment challenge involving third-party candidates for Governor and United States Representative. The Court cited the recent petitioning success of a gubernatorial candidate in 1966 and a presidential candidate in 1968 as support for its conclusion that Georgia's ballot-access scheme does not "freeze[] the status quo." 403 U.S. at 439. The Eleventh Circuit took that as license to broaden its analysis here to include candidates for any other non-statewide office and as support for its conclusion that even one local candidate's success shows that Georgia's ballot-access scheme "still does not bar candidates from the ballot." App., *infra,* 9a.

But that reads too much into *Jenness*. The Court did not say that a local candidate's success sheds light on the requirements for gubernatorial and congressional candidates. Nor would it make any sense to do so. The number of signatures required for statewide and local

3. The successful independent candidate received 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. App., *infra,* 37a. He needed only 3,526 signatures. 4 Appellant's App. 241.

candidates are of different orders of magnitude. Rather, the Court pointed to the success of *statewide* candidates to measure the burden on statewide and congressional candidates. Because of the larger territory involved in a statewide race and given the limited information in the stipulated record, *see Jenness*, 403 U.S. at 432, it was rational for the Court to infer from the recent success of two statewide candidates that the ballot-access requirements for congressional candidates were not unduly burdensome.

Not so here. There are no recent statewide successes. No third-party House candidate has ever satisfied the requirements since Georgia first adopted them almost 80 years ago. The voluminous record reveals about 20 unsuccessful attempts to satisfy the requirements for United States Representative—the only office at issue here—in the last 20 years alone. The record also shows that Georgia's signature requirement is substantially higher than any signature requirement that any independent or third-party candidate has ever overcome in the history of the United States. The status quo is in a deep freeze. And the Eleventh Circuit's reliance on a single local race to conclude otherwise turns *Jenness* on its head.

The Eleventh Circuit's reliance on a single race also conflicts with this Court's decision in *Storer*. At issue there was a California statute requiring independent candidates to submit a petition signed by at least five percent of the total votes cast in the area for which the candidate sought to run. The Court vacated the district court's judgment for the State and remanded for further proceedings, but it noted one instance when an independent candidate had succeeded in qualifying for the ballot. *See id.* at 742-43.

Storer thus makes clear that one success is not enough. A pattern of success or the lack thereof is what matters: "it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." *Id.* at 742. And there is no pattern of success here. The district court relied on *Storer* in finding a severe burden, *see* App., *infra,* 33a, but the Eleventh Circuit did not discuss it.

The Eleventh Circuit's reliance on a single success also conflicts with decisions of the Sixth, Seventh, and Eighth Circuits.

The Sixth Circuit faced the issue in *Graveline v. Benson*, 992 F.3d 524 (6th Cir. 2021). The lead plaintiff there was an independent candidate for attorney general, and he challenged Michigan's requirement that he submit a petition containing at least 30,000 valid signatures by a mid-July deadline with a certain number collected from at least half of Michigan's congressional districts. *Id.* at 529. Reviewing the district court's summary judgment for the plaintiffs, the Sixth Circuit found that Michigan's ballot-access scheme for statewide candidates imposed a severe burden on the plaintiffs' First Amendment rights. *Id.* at 539. In reaching that conclusion, the court observed that "Since [the scheme's] implementation in 1988, no independent candidate for statewide office has managed to complete a qualifying petition." *Id.* But, as the district court's opinion points out, two recent *presidential* candidates—Ralph Nader and Ross Perot—had been able to satisfy the same requirements. *See Graveline v. Benson*, 430 F. Supp. 3d 297, 302 (E.D. Mich. 2019); *see also id.* at 318. Under the Eleventh Circuit's reading of *Jenness*, those successes would likely have precluded the

Sixth Circuit's finding that Michigan's scheme imposed a severe burden.

In *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006), the Seventh Circuit considered ballot-access requirements for independent state legislative candidates in Illinois. Those included a petition requirement of about 7,000 signatures, a mid-December deadline, and a restriction that disqualified anyone who signed an independent petition from voting in a party primary. *See id.* at 765-67. Reviewing the district court's summary judgment for the State, a unanimous panel of the Seventh Circuit reversed. The court relied heavily on the fact that "since 1980, not a single independent legislative candidate has qualified" when it concluded that the statutory scheme imposed a severe burden. *Id.* at 769. The court did not identify any unsuccessful attempts to qualify during that period, however, and it noted that three independent legislative candidates had qualified in 1979, during the first year that the statutory scheme was in effect. *See id.* The court nonetheless found that twenty-five years with no independent candidates outweighed those three successes.

Finally, in *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980), the Eighth Circuit struck down North Dakota's statute that required new political parties to submit 15,000 signatures by a June 1 deadline. *See id.* at 1162. The district court had reviewed the statute under a rational-basis standard and upheld it as constitutional. *See id.* at 1161. Reversing, the Eighth Circuit observed that "the record shows that third parties have not qualified for ballot position in North Dakota with regularity, or even occasionally." *Id.* at 1165. But it also noted that the American Party had successfully completed a new-party

petition drive just four years earlier. *See id.* The court nonetheless applied heightened scrutiny and held the law unconstitutional.

In all three of these cases, the courts of appeals correctly followed *Storer*'s example and looked for a pattern of success, or the lack thereof, over time. They did not, as the Eleventh Circuit did here, seize upon a single success at any level to conclude that the challenged statutes pass constitutional muster.

Given the Eleventh Circuit's misreading of *Jenness*, it is hardly surprising that the court is out of step with *Storer* and its sister circuits. But the Libertarian Party's First Amendment right to associate for the advancement of political beliefs should not mean less in Alabama, Georgia, and Florida than it does elsewhere. This Court should therefore grant certiorari to ensure consistency in the application of this most fundamental right.

II. The Court should grant certiorari to consider whether Georgia's ballot-access scheme complies with this Court's Equal Protection precedents.

This Court should also review whether Georgia's ballot-access scheme complies with *Socialist Workers* and *Norman*, both of which forbid a state from requiring third-party candidates to gather more signatures to get on the ballot in a district or political subdivision than they would need for a statewide office.

In *Socialist Workers*, the issue was an Illinois law that required independent and third-party candidates for office in a district or political subdivision 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 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.

This 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 an 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 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 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 Eleventh Circuit's decision acknowledged that the Party's Equal Protection claim here is identical to the claims in *Socialist Workers* and *Norman*. App., *infra,* 14a. The court nonetheless concluded that *Norman* "does not undermine the State's interest in requiring voter support in specific electoral districts." App., *infra,* 15a-16a n.5. The court 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." App., *infra,* 16a n.5. But that distinction misses its mark for two reasons.

First, the distinction does not address *Socialist Workers* at all. That case is on all fours with this one, and the Eleventh Circuit failed to explain why a different outcome is warranted here.

Second, the distinction that the Eleventh Circuit drew here was immaterial to the outcome in *Norman*. The defect in Illinois' law was not, as the Eleventh Circuit suggested, that it required candidates to "show support among citizens from an electoral district other than the one that would elect them." App., *infra,* 16a n.5. It did not. *Norman,* 502 U.S. at 293. The petitioners there chose to run candidates for both of Cook County's districts and needed 50,000 signatures to do so. *Id.* Rather, the defect was the disparity between the state and county signature requirements, and the Court concluded that the State "has adduced no justification for the disparity here." *Id.* at 294. The same defect is present here: Georgia law requires Libertarian candidates for United States Representative to gather more signatures than they would need to run for any one of Georgia's statewide offices.

The Libertarian Party needs no signatures to run candidates for statewide offices because the Party has repeatedly demonstrated at the ballot box that it has at least as much actual voter support as Georgia believes is necessary for its statewide candidates to appear on the general-election ballot without a petition. *See* O.C.G.A. § 21-2-180. Its candidates have won the support of millions of Georgia voters over the last ten years. But Georgia's scheme produces the "incongruous result," *Socialist*

Workers, 440 U.S. at 176, that the Party must still gather tens of thousands of signatures for each congressional district where it seeks to run a candidate. That result conflicts with *Socialist Workers* and *Norman* and warrants this Court's review.

CONCLUSION

This Court should grant certiorari.

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JANUARY 5, 2022

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-13199

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,

versus

SECRETARY OF STATE OF THE STATE OF GEORGIA,

Defendant-Appellant-Cross-Appellee.

January 5, 2022, Filed

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

Before WILLIAM PRYOR, *Chief Judge*, GRANT, and HULL, *Circuit Judges.*

Appendix A

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 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).

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).

Appendix A

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) 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 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

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.

state legislature enacted a permanent replacement. The Secretary and the Libertarian Party both appealed.

II.

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.

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. 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).

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

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. 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; 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. 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; 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 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*.

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.

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. 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.

In sum, Georgia's ballot-access laws do not severely burden the Libertarian Party's First and Fourteenth Amendment rights. Under the *Anderson* framework, then, the laws need only be justified by "the State's important regulatory interests." *Anderson*, 460 U.S. at 788; *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; *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; *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.

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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.

IV.

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,

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.

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."

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").

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.

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

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

to imagine 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.

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.

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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. 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. 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 — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED MARCH 29, 2021

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

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

MARTIN COWEN, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF GEORGIA,

Defendant.

March 29, 2021, Decided
March 29, 2021, Filed

Leigh Martin May, United States District Judge.

ORDER

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) a notice of candidacy and qualifying fee,[1] *see* O.C.G.A. § 21-2-132(d), and

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

(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 a 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

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

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 political-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 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. Forston, 403 U.S. 431 (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 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. 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. § 21-2-170(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 challenge 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]

2. Plaintiffs have not moved for summary judgment on their Equal-Protection Claim that the laws were adopted with a discriminatory purpose.

¶ 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

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).

"Under this framework, the level of scrutiny . . . appl[ied] 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); *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 constitutional, 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

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. 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. "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 (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 disseminating 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 (Douglas, J., concurring).

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 congressional 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 temporarily 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; *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.

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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

Appendix B

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 volunteers) 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

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between 11 and 20 candidates does not change its finding regarding the burden faced by Plaintiffs.

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

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

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 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

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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).

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. Raffensperger*, 472 F. Supp. 3d 1282, 2020 WL 3892454 (N.D. Ga. July 9, 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 (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 signatures for third-party candidates for U.S. Representative to appear on the general-election ballot than any other state in the nation, both as a percentage of votes cast and as an absolute number of signatures. *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.

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.

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 (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]

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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 experiences." *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.

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

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.

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 contribute 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]

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

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

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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.

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 demands 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. 430 U.S. at 432. 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. 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. 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. The Supreme Court also observed that the "open quality of the Georgia system [wa]s far from merely theoretical" given 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. The Supreme Court thus concluded that Georgia's election laws "d[id] not operate to freeze the political status quo." *Id.* at 438.[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

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)

(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).

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. 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 campaign 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 (citing *Storer*, 415 U.S. at 730). 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 (quoting *Williams*, 415 U.S. at 730; *Dunn v. Blumstein*, 405 U.S. at 335).

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*, 767 F.2d at 1554; *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. 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 ("[A] court must resolve such a challenge by an analytical

process that parallels its work in ordinary 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)); *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). 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. 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 (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 (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).

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 ("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 ("[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 ("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. "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 legitimacy 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]. 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.2d 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).

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 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. 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. 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. 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.

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 (quoting *Williams v. Rhodes*, 393 U.S. at 30). 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). While Illinois, like Georgia, had "a legitimate interest in regulating the number of candidates on the ballot[,]" *id.* at 184-85, such that Illinois could "require a preliminary showing of a 'significant modicum of support,'" *id.* at 185 (quoting *Jenness*, 403 U.S. at 442), 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. 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 classification 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.

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.3d 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. 2d 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 candidates 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

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 signatures, 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.[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 remining 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.

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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.

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 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

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 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.

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.

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.

/s/ Leigh Martin May
Leigh Martin May
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JUNE 3, 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14065

D.C. Docket No. 1:17-cv-04660-LMM

MARTIN COWEN, ALLEN BUCKLEY, *et al.*,

Plaintiffs-Appellants,

versus

GEORGIA SECRETARY OF STATE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia.

June 3, 2020, Decided

Before JORDAN, TJOFLAT, and ANDERSON, Circuit Judges. JORDAN, Circuit Judge, concurring.

ANDERSON, Circuit Judge:

The Libertarian Party of Georgia, several prospective Libertarian candidates for Congress, and several

Libertarian voters—collectively, "the Libertarian Party" or "the Party"—brought the instant case against the Secretary of State of Georgia. They alleged that Georgia's ballot-access requirements for third-party and independent candidates violated their associational rights under the First and Fourteenth Amendments and their Equal Protection rights under the Fourteenth Amendment. The district court granted the Secretary of State summary judgment, concluding that it did not need to apply the Supreme Court's test for the constitutionality of ballot-access requirements, as articulated in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983), and the Party appeals from that determination.

After careful review, and with the benefit of oral argument, we vacate the district court's grant of summary judgment. We conclude that the district court's failure to conduct the *Anderson* test constitutes reversible error; accordingly, we remand the case to the district court with instructions to conduct in the first instance the *Anderson* test and to consider the Party's Equal Protection claim.

I. BACKGROUND

We note at the outset that the facts are not seriously disputed, but nonetheless set them out to better contextualize the parties' arguments. The State of Georgia first established formal ballot access requirements in 1922, which required that an independent candidate, or the nominee of any party not conducting a primary election, could attain ballot access by simply "fil[ing] notice of their candidacy, giving their names and the offices for

which they are candidates, with the Secretary of State" for national and statewide elections, and with county officials for district and county elections, with no petition or filing fee requirements. 1922 Ga. Laws 100. Over the next few decades, the State subsequently tightened its ballot-access requirements. In 1943, the State enacted the predecessor of its current ballot-access requirement, which allowed third-party candidates to gain access to the ballot in one of two ways: (1) if the political party received 5 percent of the votes in the last general election for the office in question, which guaranteed ballot access; or (2) by gathering petitions signed by 5 percent of all of the registered voters in the state or district. 1943 Ga. Laws 292.

In 1986, the State substantially loosened its ballot-access requirements—but only with respect to statewide candidates. That year, the State amended its statutes to allow ballot access for third-party candidates nominated for statewide office if the third-party either: (1) submitted petitions "signed by voters equal in number to 1 percent of the registered voters who were registered and eligible to vote in the preceding general election; or (2) "[a]t the preceding general election, the political body nominated a candidate for state-wide office and such candidate received a number of votes equal to 1 percent of the total number of registered voters who were registered and eligible to vote in such general election." 1986 Ga. Laws 894. However, the legislature left unchanged the 5 percent petition requirement for third-party and independent candidates for non-statewide offices. Since 1986, Georgia's ballot-access requirements have remained largely unchanged.

Appendix C

In contrast to the 1986 requirement for statewide offices, Georgia has a two-tiered system through which non-statewide candidates, like those for the U.S. House of Representatives, can qualify for the ballot. For candidates of "political parties"—defined by state law as political organization whose nominees won at least twenty percent of the vote at the last gubernatorial or presidential election, O.C.G.A. § 21-2-2(25)—they are guaranteed ballot access so long as they win their party's primary and pay the requisite filing fee. But for candidates of "political bodies"—political organizations other than formally recognized political parties, O.C.G.A. § 21-2-2(23), which, as a practical matter, encompasses all third parties—the candidates are guaranteed ballot access only if they are nominated by their party at a convention, *id.* § 21-2-170(g), and if they submit nomination petitions signed by 5 percent of the registered voters eligible to vote for that office in the most recent general election, *id.* § 21-2-170(b).

The Libertarian Party of Georgia, along with several of its prospective congressional candidates and voters, brought the instant suit, challenging the constitutionality of these ballot-access requirements for congressional candidates. The Party noted that, if it wanted to run a full slate of congressional candidates in Georgia, it would be required to gather a grand total of 321,713 valid signatures. It also introduced evidence that no third-party congressional candidate has *ever* managed to petition its way onto the ballot—despite the fact that, since 2002, at least twenty candidates had attempted to do so. It also introduced evidence surrounding the practical difficulties of gathering petitions, which include

the allegedly error-prone signature-checking process, the undue cost of petitioning (and the inability, under federal campaign finance law, of the national party to help defray these costs), the onerousness of the pace and schedule of petition gathering, the lack of access to voters, and alleged concerns from voters about disclosing confidential information on the nominating petition.

The district court characterized this evidence as part of a "robust record" and noted that the Party raised "some compelling arguments," but nonetheless concluded that the Secretary of State was entitled to summary judgment. The court declined to apply the Supreme Court's test for the constitutionality of ballot-access requirements—as articulated in *Anderson*, 460 U.S. at 789—instead concluding that, in light of *Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 29 L. Ed. 2d 554 (1971), which upheld Georgia's ballot-access requirements, it was not necessary to apply the *Anderson* test to ballot-access requirements outside of the presidential election context. It also summarily rejected the Party's Equal Protection challenge. The Party timely appealed to us. We vacate and remand with instructions.

II. ANALYSIS

We review *de novo* a grant of summary judgment. *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1363 (11th Cir. 2007). Summary judgment is appropriate where "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. Pro. 56(a). In reviewing the propriety of

summary judgment, "we view the evidence in the light most favorable to the non-moving party." *Thomas*, 506 F.3d at 1363.

This case involves a challenge to Georgia's ballot-access requirements for third-party (or "political body") congressional candidates. The Libertarian Party in this case raises two different constitutional challenges to Georgia's ballot-access requirements—one based on its associational rights under the First and Fourteenth Amendments, and one based on its rights under the Equal Protection Clause. We address each in turn.

A. Associational Rights

The Supreme Court has recognized the unique "impact of candidate eligibility requirements on voters," which implicates the "basic constitutional rights" of both voters and candidates under the First and Fourteenth Amendments. *Anderson*, 460 U.S. at 786. Specifically, ballot-access requirements implicate "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 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968)).

In *Anderson*, the Supreme Court laid out a multistep test for evaluating the constitutionality of ballot-access requirements under the First and Fourteenth Amendment. First, the court must "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." 460 U.S. at 789. Second, "[i]t then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* Third, the court must "weigh[] all these factors" and "decide whether the challenged provision is unconstitutional." *Id.*

In laying out these steps, the Court emphasized the importance of context. "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." *Id.* at 789. In other words, the determination that a 1 percent petition requirement by one state's election law in one context is constitutional, *vel non*, does not guarantee the same determination of a similar law in a different context.[1]

> [T]he rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test

1. We note below that our decision in *Bergland v. Harris*, 767 F.2d 1551, 1554 (11th Cir. 1985), held that, in a challenge to the constitutionality of a ballot-access requirement, the *Anderson* analysis must be undertaken even if the very same requirement had been previously upheld as constitutional, if there are at least some non-frivolous arguments that, since the decision upholding the requirement, circumstances have changed the context of the analysis.

> 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 "considering the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.

Storer v. Brown, 415 U.S. 724, 730, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974) (internal cites and punctuation omitted).

Georgia's ballot-access requirements have been repeatedly challenged, both before and after the Supreme Court's decision in *Anderson*, and have been upheld each time. While we ultimately conclude that the district court erred in prematurely concluding—without applying the *Anderson* analysis—that the Party's challenge was foreclosed by Supreme Court and Eleventh Circuit precedent, we nonetheless find it prudent to lay out the underlying legal landscape.

First, in *Jenness v. Fortson*—a decision predating *Anderson* by more than a decade—the Supreme Court upheld Georgia's ballot-access requirements against constitutional challenges. Significantly, the 1986 amendment to the Georgia law had not come into effect at this point, and as a result, the only way that a third-party or independent candidate could be placed on the ballot

for *any* race in Georgia was to file "a nominating petition signed by at least 5% of the number of registered voters at the last general election for the office in question." 403 U.S. at 432. Several prospective candidates challenged the constitutionality of the law, both as a violation of their rights under the First and Fourteenth Amendments and as a violation of the Equal Protection Clause. The Court concluded that the law did "nothing that abridges the rights of free speech and association secured by the First and Fourteenth Amendments." *Id.* at 440. As we will address later in our discussion of the Equal Protection challenge, the Court also rejected the plaintiffs' Equal Protection arguments. *Id.*

We, in turn, rejected a subsequent challenge in *McCrary v. Poythress*, 638 F.2d 1308 (5th Cir. 1981),[2] where our predecessor court upheld the Georgia ballot-access requirements from similar constitutional challenges. We "extensively quote[d]" from the Supreme Court's opinion in *Jenness*, and ultimately concluded that, given the similar nature of the challenges to the law, the plaintiffs' challenge to the law was due to be rejected. *Id.* at 1310-13.

In *Bergland v. Harris*, a decision issued two years after the Supreme Court's decision in *Anderson*, we considered a similar challenge. There, a coalition of plaintiffs—including several third parties, third-party presidential candidates, and a third-party congressional

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

candidate—challenged the Georgia law once again. 767 F.2d 1551, 1552-53, 1553 n.1 (11th Cir. 1985). We reiterated the three-part *Anderson* test but ultimately concluded that there was "an insufficient factual record to carry out the *Anderson* requirements" because the evidentiary materials "filed by the State in this case are simply inadequate to allow a court to conduct" the "weighing of interests" required by the *Anderson* analysis. *Id.* at 1554. We further held that the "two cases which have upheld the Georgia provisions against constitutional attack by prospective candidates and minor political parties"—that is, *Jenness* and *McCrary*—"do not foreclose the parties' right to present the evidence necessary to undertake the balancing approach outlined in *Anderson v. Celebreeze*." *Id.* (citations omitted).

Finally, in *Cartwright v. Barnes*, 304 F.3d 1138, 1142-44 (11th Cir. 2002), and *Coffield v. Handel*, 599 F.3d 1276, 1277 (11th Cir. 2010), we upheld Georgia's ballot-access requirements in different contexts, as discussed more fully below.

In the instant case, the district court granted summary judgment to the Secretary of State. In upholding Georgia's ballot-access requirements, however, the district court did not apply the *Anderson* test at all. It concluded that our opinion in *Bergland*—along with our unpublished opinion in *Green Party of Ga. v. Georgia*, 551 F. App'x 982 (11th Cir. 2014)—"emphasized the uniqueness of presidential elections," and that our opinions in *Cartwright* and *Coffield* demonstrate that we

> ha[ve] continued to reject challenges to Georgia's 5% rule brought by prospective candidates for the United States House of Representatives *without* engaging in the analysis set forth in *Anderson*. Thus, the case law in this circuit simply does not support Plaintiff's argument that this Court must analyze Plaintiffs' claims under *Anderson*, notwithstanding the clear ruling in *Jenness*.

Dist. Ct. Op. at 13 (emphasis in original).

In our view, this is a reversible error of law. We cannot agree with the assertion that our *Bergland* decision—and thus the applicability of the *Anderson* test—is limited to ballot-access requirements as applied to presidential candidates for several reasons. First, by its own text, the Supreme Court's opinion in *Anderson* does not restrict its holding to presidential candidates. Though it certainly emphasizes the "uniquely important national interest" when ballot-access restrictions are applied to presidential candidates, 460 U.S. at 794-95, we do not read that as an implied limitation on *Anderson*'s applicability. Such a limitation would make little sense in context. The Supreme Court in *Anderson* laid out the test for evaluating the constitutionality of ballot-access restrictions, which requires, *inter alia*, the "identif[ication] and evaluat[ion] [of] the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* at 789. Then, in a subsequent section, it explained that "the State has a less important interest in regulating Presidential elections than statewide or local elections," *id.*

at 795; in other words, the unique nature of a presidential election altered the weighing of interests. Our reading of *Anderson* makes clear that its requirements apply in all elections—but with a thumb on the scale in favor of ballot access when the candidates challenging the requirements are presidential candidates.

Second, our precedent makes clear that it is the law in this circuit to apply *Anderson* to ballot-access requirements for all candidates. *See, e.g.*, *Grizzle v. Kemp*, 634 F.3d 1314, 1316, 1321-22 (11th Cir. 2011) (school board candidates); *Swanson v. Worley*, 490 F.3d 894, 896, 902-03 (11th Cir. 2007) (state senate, state house, and sheriff candidates); *Green v. Mortham*, 155 F.3d 1332, 1333, 1335-36 (11th Cir. 1998) (congressional candidate); *New Alliance Party v. Hand*, 933 F.2d 1568, 1570, 1574 (11th Cir. 1991) (congressional candidate and county commission candidate); *Bergland*, 767 F.2d at 1552-53, 1553 n.1 (presidential candidates and a congressional candidate); *Libertarian Party of Fla. v. Florida*, 710 F.2d 790, 792-93 (11th Cir. 1983) (state legislative, statewide office, and presidential candidates).

Third, and most significantly, we conclude that the district court erred when it limited the precedential force of *Bergland* to presidential candidates and declined to apply the *Anderson* analysis, relying upon its belief that the Supreme Court's decision in *Jenness* foreclosed the Party's challenge to Georgia's ballot-access requirements. Contrary to the district court's ruling, our prior, binding decision in *Bergland* expressly held that *Jenness* did not foreclose a challenge to Georgia's "signature requirements

for nominating petitions," *see Bergland*, 767 F.2d at 1553, including the 5 percent rule challenged in this case, *id.* at 1553, 1553 n.3. Rather, *Bergland* held that the challenge must be evaluated pursuant to the "balancing approach outlined in *Anderson v. Celebreeze*." *Id.* at 1554. *Bergland* held that, "[c]ontrary to the State's argument, the two cases"—referring expressly to *Jenness* and *McCrary*, both of which preceded the Supreme Court's opinion in *Anderson*—"which have upheld the Georgia provisions against constitutional attack by prospective candidates and minor political parties do not foreclose the parties' right to present the evidence necessary to undertake the balancing approach outlined in *Anderson v. Celebrezze*." *Id.*

The district court erred in concluding that the precedential force of *Bergland* was limited to candidates for President. Although the *Bergland* plaintiffs did include candidates for President, the case also included a candidate for Congress, whose claim was also vacated and remanded to the district court for analysis pursuant to the *Anderson* balancing approach. *Id.* at 1553 n.1, 1554-55. Moreover, while *Bergland* did note that, in applying the *Anderson* analysis, "the State has a less important interest in regulating Presidential elections than statewide or local elections," *id.* at 1554 (quoting *Anderson*, 460 U.S. at 795), it also noted that the "difference between state and local offices and federal offices . . . requires a different balance than that used in weighing the state interests against the burdens placed on candidates for statewide and local offices," *id.* at 1554-55.

Moreover, the district court misapplied our holdings in *Cartwright* and *Coffield*. In *Cartwright*, the primary challenge was that Georgia's 5 percent requirement for ballot access violated the Qualifications Clause of the U.S. Constitution. 304 F.3d at 1139. It is true that the decision also mentioned that "this 5% signature requirement does not violate any other constitutional provision," *id.*; and it did note that the *Jenness* analysis "still equally pertains today," at least with respect to its Equal Protection analysis, *id.* at 1141-42. However, the plaintiffs in *Cartwright* 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. *Id.* at 1141. Similarly, our decision in *Coffield* appears to have rejected an attempt to distinguish *Jenness*, thus affirming the district court's dismissal, because the plaintiff's allegations were wholly insufficient to plausibly distinguish *Jenness*. *See Coffield*, 599 F.3d at 1277. Although both the *Cartwright* and *Coffield* panels rejected challenges to Georgia's ballot-access requirements without explicitly engaging in the analysis set forth in *Anderson*, we do not read those cases as refusing to engage in the *Anderson* analysis. Rather, harmonizing those decisions with our binding precedent in *Bergland*, we read them as recognizing no significant differences from *Jenness* with respect to the relevant considerations. To the extent that those cases could be read to hold that *Jenness* is dispositive and forecloses all challenges to Georgia's ballot-access requirements, such a holding would be inconsistent with our clear holding in *Bergland*. As we recently recognized, "[o]ur adherence to the prior-panel rule is strict, but when there are conflicting

prior panel decisions, the oldest one controls." *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 862 (11th Cir. 2020) (citing *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000)).

For these reasons, we conclude that the district court erred by failing to apply the analysis articulated in *Anderson v. Celebreeze*. We decline the Party's invitation that we address the merits of its claim; we would prefer that the district court address that question in the first instance. As we have explained, the *Anderson* test emphasizes the relevance of context and specific circumstances to each challenge to ballot-access requirements. While this is not a pure question of fact, we nonetheless believe that it is a question that the district court is better equipped to address with testimony and other direct evidence.

But though *Bergland* made clear that the Supreme Court's opinion in *Jenness* does not automatically preclude any subsequent challenges to Georgia's ballot-access requirements, the Party will, on remand, have to satisfactorily distinguish its claims from those rejected in *Jenness*. The Party will have 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.

On appeal, the Party has pointed to numerous differences in the instant case with respect to factors

relevant in the *Anderson* balancing analysis, which it argues are different from the relevant considerations that were before the *Jenness* court. We decline to address those asserted differences from *Jenness* because the district court should address those issues in the first instance on remand. Accordingly, we vacate the district court's grant of summary judgment and remand to the district court with instructions to apply the *Anderson* analysis in the first instance.

B. Equal Protection Clause

The plaintiffs in this case also raise a challenge to Georgia's ballot-access requirements as running afoul of the Equal Protection Clause. As the Supreme Court has recognized, to the extent that ballot-access requirements draw a distinction, the "State must establish that its classification is necessary to serve a compelling interest." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979) (citations omitted).

In *Jenness*, the Supreme Court rejected an Equal Protection challenge to Georgia's requirements. But we note that the Equal Protection challenge in *Jenness* differs from the Party's Equal Protection challenge in the instant case. In *Jenness*, the challenge was as to the distinction between third-party (or "political body") candidates and major-party (or "political party") candidates: the claim was "necessarily bottomed upon the premise that it is inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible electorate than

it is to win the votes of a majority in a party primary." *Jenness*, 403 U.S. at 440. The Supreme Court rejected this assumption, noting that Georgia has provided two "alternative routes" to a candidate for getting his name on the ballot. *Id.* "He may enter the primary of a political party, or he may circulate nominating petitions either as an independent candidate or under the sponsorship of a political organization." *Id.* The Court noted that neither of these two alternative paths "can be assumed to be inherently more burdensome than the other." *Id.* at 441.

The Equal Protection challenge presented by the Party in this case is substantially different from that presented in *Jenness*. The challenge here is not between political party and political body candidates for the same offices, but between political body candidates for *different* offices. Under Georgia law, a Libertarian Party candidate for statewide office is automatically entitled to ballot access in 2020; this is because, in the 2018 general election, it "nominated a candidate for state-wide office and such candidate received a number of votes equal to 1 percent of the total number of registered voters who were registered and eligible to vote in such general election."[3] O.C.G.A.

3. In 2018, there were 6,935,816 voters eligible to vote in the general election. To automatically qualify for ballot access in future statewide elections, the Libertarian Party was required to receive at least 69,359 votes. Given that 3,939,328 votes were cast in the gubernatorial election, this means that the Libertarian Party nominee for some statewide office would have been required to get 1.76% of the vote. They qualified by getting 2.23% for Secretary of State; 2.65% for Commissioner of Insurance; and 2.67% and 2.52% for the Public Service Commission, Districts 3 and 5, respectively.

§ 21-2-180(2). However, pursuant to the different Georgia requirement for non-statewide offices, Libertarian congressional candidates are required to individually qualify for the ballot by submitting a nominating petition "signed by a number of voters equal to 5 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking." *Id.* § 21-2-170(b). Therefore, the Party argues, its statewide candidates need to gather zero signatures while a full slate of congressional candidates would need to gather 321,713 valid signatures.

The district court did not separately address the Party's Equal Protection challenge, instead considering it in tandem with the associational-rights challenge, thus in effect holding that *Jenness* foreclosed the Party's Equal Protection challenge as well as its First and Fourteenth Amendment challenge. We hold only that *Jenness* does not control the Equal Protection issue presented by the Party in this case, because the Equal Protection claim presented here is sufficiently different from that presented in *Jenness*. However, we again decline the Party's invitation that we address the merits of its Equal Protection claim, believing that this question is best resolved by the district court in the first instance on remand, as is the case with the First and Fourteenth Amendment challenge.[4]

4. We note that the plaintiffs in *Bergland* included an Equal Protection challenge to Georgia's ballot-access requirements, in addition to their First and Fourteenth Amendment challenge. 767 F.2d at 1552. Although our opinion in *Bergland* did not explicitly address the Equal Protection claim separately from the First and Fourteenth Amendment challenge, the decision did vacate and

III. CONCLUSION

For the foregoing reasons, we vacate the district court's grant of summary judgment to the Secretary of State and remand the case for further proceedings consistent with this opinion. On remand, the district court is instructed to conduct in the first instance the *Anderson* test with respect to Georgia's ballot-access requirements and consider the Libertarian Party's Equal Protection challenge.

VACATED AND REMANDED.

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remand the Equal Protection challenge as well, notwithstanding *Jenness*. *See id.*

Appendix C

JORDAN, Circuit Judge, concurring.

I join Judge Anderson's opinion for the court. Although I can understand why the district court believed that *Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 29 L. Ed. 2d 554 (1971), was controlling, I offer some additional reasons why it is not.

First, the plaintiffs have challenged not only Georgia's 5% petition requirement, *see* O.C.G.A. § 21-2-170(b), but also the qualifying fee for the office of U.S. Representative, *see* O.C.G.A. § 21-2-132(d), and this latter claim was not at issue in *Jenness*. As the Supreme Court explained in *Jenness*, the qualifying fee had been declared unconstitutional and enjoined by the district court, and that ruling was not challenged on appeal. *See* 403 U.S. at 432. 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, as Judge Anderson points out, the Supreme Court changed the applicable constitutional standard in *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983). And "when the Supreme Court overturns the standard that it had previously used to resolve a particular class of cases," federal and state courts "must apply the new standard and reach the result dictated under that new standard." Bryan Garner et al., The Law of Judicial Precedent § 2, at 31 (2016). So *Jenness*, though not obsolete, does not control the outcome here.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED SEPTEMBER 23, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

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

MARTIN COWEN, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, IN HIS
OFFICIAL CAPACITY AS SECRETARY
OF STATE OF GEORGIA,

Defendant.

September 23, 2019, Decided;
September 23, 2019, Filed

ORDER

This matter is before the Court on Plaintiffs' Motion for Summary Judgment [69] and Defendant's Motion for Summary Judgment [73] and Defendant's Motion to Exclude Expert Report of Darcy Richardson [109]. After due consideration, the Court enters the following Order:

Appendix D

I. BACKGROUND[1]

This matter arises from a constitutional challenge to Georgia's ballot-access restrictions for third-party candidates seeking election to the United States House of Representatives. Plaintiffs are the Libertarian Party of Georgia, prospective Libertarian candidates, and Libertarian voters. *See* Dkt. No. [97] ¶¶ 5-9. 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 by law 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

1. Unless otherwise indicated, the facts relied upon in this section are taken from the statements of material facts provided by the parties. *See* Dkt. Nos. [69-2; 73 1; 96-2].

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, added a filing fee, and imposed a number of other restrictions. *Id.* ¶¶ 17-26.

B. Georgia's Current Ballot Access Restrictions

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). A candidate may appear on Georgia's election ballot for any statewide or district office if he or she is nominated in a primary conducted by a political party. O.C.G.A. § 21-2-130(1).

A "political body" is any political organization other than a political party. O.C.G.A. § 21-2-2(23). Political bodies must nominate candidates for partisan offices by convention. O.C.G.A. § 21-2-170(g). Georgia law provides that 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. Candidates for statewide offices, including the office of the President of the United States, nominated by a political body that is qualified under Section 21-2-180 appear automatically on the general election ballot

without a nomination petition. O.C.G.A. § 21-2-132(e)(5). The Libertarian Party is a political body under Georgia law and has been qualified under Section 21-2-180 since 1988. Dkt. No. [14] ¶ 128.

Candidates for non-statewide offices, including the office of U.S. Representative, nominated by a political body that is qualified under Section 21-2-180 do not appear automatically on the general-election ballot; rather, such candidates must submit: (1) a notice of candidacy and qualifying fee[2], 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, O.C.G.A. § 21-2-170(b).

C. Qualifying Fee and Nomination Petition Requirements

The qualifying fee for most partisan public offices, including U.S. Representative, is three percent 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. House of Representatives is $5,220. *Id.* Among states with a mandatory petition, Georgia's qualifying fees are higher than any other state in the nation. *Id.* ¶ 72.

Qualifying fees for political-party candidates for U.S. Representative are paid directly to the state political

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

party, which retains seventy-five percent and sends twenty-five percent to the Secretary of State. O.C.G.A. § 21-2-131(b)-(c). Qualifying fees for independent and political-body candidates for U.S. Representative are paid to the Secretary of State. O.C.G.A. § 21-2-131(b)(2). For 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 their 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 circular attesting, among other things, that each signature on the sheet was gathered within 180 days of the filing deadline. *Id.*

According to the Secretary of State, Georgia had 6,434,388 active registered voters as of the 2018 general

election. Dkt. No. [97] ¶ 59. Georgia currently has fourteen members of the U.S. House of Representatives, each of which is elected from a single-member district. *Id.* ¶ 60. The Secretary of State estimates that the Libertarian Party would need to gather 321,713 signatures to run a full slate of candidates for the office of United States Representatives in 2020. *Id.* ¶ 63; *see also* Dkt. No. [69-34] at 8. Georgia requires more signatures for third-party candidates for U.S. Representative to appear on the general-election ballot than any other state in the nation, both as a percentage of votes cast and as an absolute number of signatures. Dkt. No. [97] ¶ 65.

D. Past Attempts to Qualify for the General-Election Ballot and Practical Barriers to Petitioning

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. *Id.* ¶ 76. Plaintiffs have submitted evidence that since 2002, at least twenty independent[3] and political body candidates have unsuccessfully attempted to access the ballot. *Id.* ¶¶ 92-131. Plaintiffs also provide evidence of the various practical barriers to gathering

3. Independent candidates do not appear automatically on the ballot for any office unless the candidate is an incumbent; to appear on the general-election ballot independent candidates for non-statewide partisan public offices must submit (1) a notice of candidacy and qualifying fee, O.C.G.A. § 21-2-132(d); and, (2) a nomination petition signed by 5% of the number of registered voters eligible to vote for that office in the last election, O.C.G.A. § 21-2-170(b).

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.

E. Support for the Libertarian Party Nationwide and in Georgia

The Libertarian Party was founded in 1971 and is organized in all fifty states, plus the District of Columbia. Dkt. No. [97] 11189. 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 due-paying members. *Id.* ¶ 25.

II. 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).

Appendix D

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 . 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.

III. DISCUSSION

In moving for summary judgment, Plaintiffs argue that Georgia's ballot-access laws for political-body candidates for U.S. Representative—namely O.C.G.A. § 21-2-170—unconstitutionally burden their First and Fourteenth Amendment rights. Dkt. Nos. [1] ¶ 148; [69-1] at 1. Plaintiffs further challenge Georgia's ballot-access laws under the Equal Protection Clause, in that Georgia law creates a classification by treating Libertarian Party candidates for U.S. Representative differently than Libertarian Party candidates for statewide offices. Dkt. No. [1] ¶ 149; [69-1] at 41.

Appendix D

Defendants have moved for summary judgment on both[4] of Plaintiffs' claims, as well as on Plaintiffs' possible[5] claim that Georgia's petition requirement was enacted with a discriminatory intent. *See* Dkt. No. [73]. Defendants first argue that the very statutory scheme at issue has been repeatedly upheld by both the Eleventh Circuit and the Supreme Court. *See* Dkt. No. [73-2] at 7-14. Because this Court is bound by such rulings, it is to this argument that the Court first turns.

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4. Plaintiffs argue that Defendant's brief only addresses Plaintiffs' First Amendment claim and therefore urge the Court to treat Defendant's motion as one for partial summary judgment. *See* Dkt. No. [96] at 2 n.1. The Court, however, reads Defendant's motion as one for summary judgment on both of Plaintiffs' claims and will therefore treat it as such. *See* Dkt. No. [73-2] at 1-2 (discussing Plaintiffs' claims under the First and Fourteenth Amendment and the Equal Protection clause).

5. Plaintiffs point out that although their claims under the First and Fourteenth Amendment and the Equal Protection Clause could "conceivably encompass a claim of discriminatory intent or viewpoint discrimination," they have not sought summary judgment on this issue. *See* Dkt. No. [96] at 20 n.4. Moreover, Defendant has since filed a Motion to Exclude the Expert Report of Darcy Richardson [109], which is largely redundant of Defendant's argument in his motion for summary judgment on this point. As discussed *infra*, because both the Eleventh Circuit and the Supreme Court have held the challenged provisions constitutional, the issue of discriminatory intent is moot. Thus, both this portion of Defendant's motion for summary judgment and the Expert Report of Darcy Richardson [109] are **DENIED as MOOT**.

Appendix D

A. Prior Cases Upholding Georgia's Ballot-Access Restrictions

In *Jenness v. Fortson*, the Supreme Court rejected a constitutional challenge to essentially the same ballot-access restrictions that Plaintiffs challenge today—that is, the 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. 403 U.S. 431, 432, 91 S. Ct. 1970, 29 L. Ed. 2d 554 (1971). In upholding Georgia's statutory scheme, the Supreme Court explained that "[t]here is a 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." *Id.* at 442. The Supreme Court acknowledged that "[t]he 5% figure is, to be sure, apparently somewhat higher than the percentage of support required to be shown in many States," but determined that this was "balanced by the fact that Georgia has imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes." *Id.*

In the years following the *Jenness* decision, the Eleventh Circuit has repeatedly affirmed the constitutionality of Georgia's 5% signature requirement. *See Coffield v. Kemp*, 599 Fad 1276, 1277 (nth Cir. 2010) (upholding Georgia's 5% petition requirement as not "too burdensome"); *Cartwright v. Barnes*, 304 F.3d 1138,

1139 (11th Cir. 2002) (upholding 5% petition requirement under Georgia law); *McCrary v. Poythress*, 638 F.2d 1308, 1313 (5th Cir. Mar. 1981) (provisions of Georgia Election Code did not place unconstitutional restrictions upon the plaintiffs' access to general election ballot). Nevertheless, Plaintiffs aver that such cases do not foreclose their claims for two primary reasons. *See* Dkt. No. [96] at 8-11.

First, Plaintiffs argue that the Eleventh Circuit has "repeatedly rejected" such a "litmus-paper test" approach and instead require district courts to follow the three-step process for analyzing constitutional challenges to state statutes restricting ballot access set forth by the Supreme Court in *Anderson v. Celebrezze*, 46o U.S. 780 (1983). *See id.* at 8-9. By way of background, in *Anderson*, the Supreme Court laid out the following approach for determining whether a ballot access law violates the First and Fourteenth Amendments:

> It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiffs rights.

460 U.S at 789. Relying on *Bergland v. Harris*, Plaintiffs urge the Court that "cases which have upheld the Georgia provisions against constitutional attack by prospective candidates and minor political parties do not foreclose the parties' right to present the evidence necessary to undertake the balancing approach outlined in *Anderson v. Celebrezze*." *Id.* at 8 (citing 767 F.2d 1551, 1554 (11th Cir. 1985)). In *Bergland*, the district court dismissed the plaintiffs' constitutional challenges to provisions of the Georgia Election Code, including the signature requirements for nominating petitions, for failure to state a claim. 767 F.2d at 1552. On appeal, the Eleventh Circuit reversed and remanded, finding "an insufficient factual record to carry out the *Anderson* requirements." *Id.* at 1554. In holding that *Jenness* and *McCrary* did not bar the plaintiffs' claims, however, the court emphasized the uniqueness of a constitutional challenge by a prospective presidential candidate. *See id.* at 1554-55.

As further support for their argument that prior cases upholding Georgia's 5% requirement are not controlling, Plaintiffs cite to *Green Party of Georgia v. Georgia*, an unpublished decision from the Eleventh Circuit. Dkt. No. [96] at 8-9 (citing 551 F. App'x 982, 983 (nth Cir. 2014)). In *Green Party*, the Eleventh Circuit determined that the district court had erred in dismissing the plaintiffs' constitutional challenges to Georgia's petition-signature requirement for presidential candidates not affiliated with any recognized political party based on *Jenness* and subsequent cases. 551 F. App'x at 982-83. The court remanded the matter to the district court with instructions to apply the *Anderson* balancing approach, explaining that

"we previously addressed whether our past decisions upholding a 5% petition-signature requirement preclude a challenge to a lower petition-signature requirement for a presidential candidate and we concluded that our past decisions are distinguishable." *Id.* at 983.

Plaintiffs' reliance on *Bergland* and *Green Party* is misplaced. As set forth above, both cases emphasized the uniqueness of presidential elections, citing *Anderson* for the proposition that the State has "a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will largely be determined by voters beyond the State's boundaries." *Bergland*, 767 F.2d at 1554 (citing *Anderson*, 460 U.S. at 795); *Green Party*, 551 F. App'x at 984 (same). Plaintiffs argue that the State "has even less interest in regulating elections for U.S. Representative than it does in regulating elections for president" because the Constitution establishes federal law as the "ultimate authority over elections for U.S. Representative." Dkt. No. [105] at 18 (citing U.S. Const. art. I, §§ 1, 4-5). But following *Bergland*, the Eleventh Circuit has continued to reject challenges to Georgia's 5% rule brought by prospective candidates for the United States House of Representatives *without* engaging in the analysis set forth in *Anderson*. *See Coffield*, 599 F.3d at 1277; *Cartwright*, 304 F.3d at 1139. Thus, the case law in this circuit simply does not support Plaintiff's argument that this Court must analyze Plaintiffs' claims under *Anderson*, notwithstanding the clear ruling in *Jenness*. *See* Dkt. No. [96] at 9.

Second, Plaintiffs contend that "the facts and the law before the Court are distinguishable from those

earlier cases." Dkt. No. [96] at 10. Plaintiffs stress that no Libertarian Party 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. *See id.* While the Court is sympathetic to Plaintiffs' plights, the Eleventh Circuit squarely rejected this argument in *Cartwright*, on the basis that "*Jenness* directly addressed the 5% figure . . . ." 304 F.3d at 1141. In a similar vein, the current federal campaign finance laws that Plaintiffs claim limit their ability to fund petition drives is not sufficient to establish that *Jenness* no longer applies. *See* Dkt No. [96] at 10; *cf. Cartwright*, 304 F.3d at 1141 (refusing to find that the plaintiffs' evidence with respect to reapportionment imposed "suffocating restrictions" sufficient to render *Jenness* inapplicable).

Plaintiffs' attempts to distinguish their claims from prior cases likewise fall short. *See* Dkt. No. [96] at 10-11. Although *Cartwright* primarily involved a claim under the Qualifications Clause, the Eleventh Circuit explicitly stated that the "analysis in *Jenness* still equally pertains today" with respect to the Supreme Court's holdings under the First and Fourteenth Amendments and the Equal Protection Clause. 304 F.3d at 1141. In *Coffield*, the Eleventh Circuit noted that Plaintiff failed to "allege how many candidates have tried" to qualify for the ballot. Dkt. No. [96] at 11 (citing 599 F.3d at 1277). However, contrary to Plaintiffs' argument, the Court does not find that this language provides a sufficient foothold for distinguishing *Coffield* from the instant case because the *Coffield* court ultimately emphasized that "[t]he pertinent laws of

Georgia have not changed materially since the decisions in *Jenness* and *Cartwright* were made." 599 F.3d at 1277.

Thus, while Plaintiffs present a robust record and some compelling arguments, the Court cannot ignore the fact that similar challenges to the Georgia Election Code have been rejected by higher courts. The Court is bound by the clear rulings of both the Eleventh Circuit and the Supreme Court. Therefore, Plaintiffs' Motion for Summary Judgment [69] is **DENIED** and Defendant's Motion for Summary Judgment [73] is **GRANTED** as to Plaintiffs claims under the First and Fourteenth Amendments and the Equal Protection Clause.

IV. CONCLUSION

Plaintiffs' Motion for Summary Judgment [69] is **DENIED**. Defendant's Motion for Summary Judgment [73] is **GRANTED in PART and DENIED IN PART AS MOOT**. Defendant's Motion to Exclude Expert Report of Darcy Richardson [109] is **DENIED AS MOOT**.

The Clerk is **DIRECTED** to **CLOSE** this case.

IT IS SO ORDERED this 23rd day of September, 2019.

/s/ Leigh Martin May
Leigh Martin May
United States District Judge

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MARCH 31, 2022

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-13199-GG

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,

versus

SECRETARY OF STATE OF THE STATE OF GEORGIA,

Defendant-Appellant-Cross-Appellee.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, Chief Judge, GRANT, and HULL, Circuit Judges.

Appendix E

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

APPENDIX F — RELEVANT STATUTORY PROVISIONS

Ga. Code Ann., § 21-2-131

§ 21-2-131. Qualification fees; when and to whom paid, distribution of fees

(a) Qualification fees for party and public offices shall be fixed and published as follows:

(1)(A) The governing authority of any county or municipality, not later than February 1 of any year in which a general primary, nonpartisan election, or general election is to be held, and at least 35 days prior to the special primary or election in the case of a special primary or special election, shall fix and publish a qualifying fee for each county or municipal office to be filled in the upcoming primary or election. Except as otherwise provided in subparagraph (B) of this paragraph, such fee shall be 3 percent of the total gross salary of the office paid in the preceding calendar year including all supplements authorized by law if a salaried office.

(B) For the offices of clerk of the superior court, judge of the probate court, sheriff, tax commissioner, and magistrate, the qualifying fee shall be 3 percent of the minimum salary specified in subsection (a) of Code Section 15-6-88, paragraph (1) of subsection (a) of Code Section 15-9-63, subsection (a) of Code Section 15-10-23, paragraph (1) of subsection (a)

of Code Section 15-16-20, and paragraph (1) of subsection (b) of Code Section 48-5-183, exclusive of supplements, cost-of-living increases, and longevity increases. For the office of members of the county governing authority, the qualifying fee shall be 3 percent of the base salary established by local Act of the General Assembly or by Code Section 36-5-25 as adjusted pursuant to Code Section 36-5-24, if applicable, exclusive of compensation supplements for training provided for in Code Section 36-5-27 and cost-of-living adjustments pursuant to Code Section 36-5-28. If not a salaried office, a reasonable fee shall be set by the governing authority of such county or municipality, such fee not to exceed 3 percent of the income derived from such county office by the person holding the office for the preceding year or more than $35.00 for a municipal office;

(2) Within the same time limitation as provided in subparagraph (A) of paragraph (1) of this subsection, the Secretary of State shall fix and publish a qualifying fee for any candidate qualifying by this method with a state political party and for any candidate qualifying with the Secretary of State for a nonpartisan election and for any candidate filing with the Secretary of State his or her notice of candidacy for a general or special election. Such fee shall be 3 percent of the annual salary of the office if a salaried office, except that the fee for members of the General Assembly shall be $400.00. If not a salaried office, a reasonable fee shall be set by the Secretary of State, such fee not to exceed

3 percent of the income derived from such office by the person holding the office for the preceding year;

(3) A reasonable qualifying fee may be set according to party rule for each political party office to be filled in a primary. Such fees shall be set and published by the county or state political party not later than February 1 of the year in which the primary is to be held for the filling of such party office.

(b) Qualifying fees shall be paid as follows:

(1) The qualifying fee for a candidate in a primary shall be paid to the county or state political party at the time the candidate qualifies;

(2) The qualifying fee for all other candidates shall be paid to the superintendent or Secretary of State at the time the notice of candidacy is filed by the candidate.

(c) Qualifying fees shall be prorated and distributed as follows:

(1) Fees paid to the county political party: 50 percent to be retained by the county political party with which the candidate qualified; 50 percent to be transmitted to the superintendent of the county with the party's certified list of candidates not later than 12:00 Noon of the third day after the deadline for qualifying in the case of a general primary and by 12:00 Noon of the day following the closing of qualifications in the case of a special primary. Such fees shall be transmitted as soon

as practicable by the superintendent to the governing authority of the county, to be applied toward the cost of the primary and election;

(2) Fees paid to the state political party: 75 percent to be retained by the state political party; 25 percent to be transmitted to the Secretary of State with the party's certified list of candidates not later than 12:00 Noon of the third day after the deadline for qualifying in the case of a general primary and by 12:00 Noon of the day following the closing of qualifications in the case of a special primary. Such fees shall be transmitted as soon as practicable by the Secretary of State as follows: one-third to the state treasury and two-thirds divided among the governing authorities of the counties in the candidate's district in proportion to the population of each such county according to the last United States decennial census, such fees to be applied to the cost of holding the election;

(3) Qualification fees paid to the superintendent of the county:

(A) If the person qualifies as a candidate of a political body, 50 percent shall be transmitted to the state executive committee of the appropriate political body and 50 percent shall be retained by the superintendent of the county;

(B) If the person qualifies directly with the election superintendent as a candidate of a political party in accordance with subsection (c) of Code Section

21-2-153, 25 percent shall be transmitted to the state executive committee of the appropriate political party and 75 percent shall be retained by the superintendent of the county; and

(C) If the person qualifies as an independent or nonpartisan candidate, the superintendent of the county shall retain the entire amount of the fees.

Such fees shall be transmitted as soon as practicable by the superintendent to the governing authority of the county, to be applied toward the cost of holding the election;

(4) Qualification fees paid to the Secretary of State shall be prorated and distributed as follows:

(A) If the person qualifies as the candidate of a political body, 75 percent shall be transmitted to the appropriate political body and 25 percent shall be retained by the Secretary of State; and

(B) If the person qualifies as an independent or nonpartisan candidate, the Secretary of State shall retain the entire amount of the fees.

Such fees shall be transmitted as soon as practicable by the Secretary of State as follows: one-third to the state treasury and two-thirds divided among the governing authorities of the counties in proportion to the population of each county according to the last United States decennial census, such fees to be applied to the cost of holding the election;

(5) Qualification fees paid to the superintendent of a municipality:

(A) If the person qualifies as a candidate of a political body, 50 percent shall be transmitted to the state executive committee of the appropriate political body and 50 percent shall be retained by the superintendent of the municipality; and

(B) If the person qualifies as an independent or nonpartisan candidate, the superintendent of the municipality shall retain the entire amount of the fees.

Such fees shall be transmitted as soon as practicable by the superintendent to the governing authority of the municipality, to be applied toward the cost of holding the election.

Ga. Code Ann., § 21-2-132

§ 21-2-132. Filing notice of candidacy, generally; qualifying fees; affidavits

Effective: May 8, 2018

(a) The names of nominees of political parties nominated in a primary and the names of nominees of political parties for the office of presidential elector shall be placed on the election ballot without their filing the notice of candidacy otherwise required by this Code section.

(b) Candidates seeking election in a nonpartisan election shall comply with the requirements of subsections (c) and (f) of this Code section, as modified by subsection (g) of this Code section, by the date prescribed and shall by the same date pay to the proper authority the qualifying fee prescribed by Code Section 21-2-131 in order to be eligible to have their names placed on the nonpartisan election ballots.

(c) All candidates seeking election in a nonpartisan election shall file their notice of candidacy and pay the prescribed qualifying fee by the date prescribed in this subsection in order to be eligible to have their names placed on the nonpartisan election ballot by the Secretary of State or election superintendent, as the case may be, in the following manner:

(1) Each candidate for the office of judge of the superior court, Judge of the Court of Appeals, or Justice of the Supreme Court, or the candidate's agent, desiring to have his or her name placed on the nonpartisan election ballot shall file a notice of candidacy, giving his or her name, residence address, and the office sought, in the office of the Secretary of State no earlier than 9:00 A.M. on the Monday of the eleventh week immediately prior to the election and no later than 12:00 Noon on the Friday immediately following such Monday, notwithstanding the fact that any such days may be legal holidays;

(2) Each candidate for a county judicial office, a local board of education office, or an office of a consolidated

government, or the candidate's agent, desiring to have his or her name placed on the nonpartisan election ballot shall file notice of candidacy in the office of the superintendent no earlier than 9:00 A.M. on the Monday of the eleventh week immediately prior to the election and no later than 12:00 Noon on the Friday immediately following such Monday, notwithstanding the fact that any such days may be legal holidays;

(3)(A) Each candidate for a nonpartisan municipal office or a designee shall file a notice of candidacy in the office of the municipal superintendent of such candidate's municipality during the municipality's nonpartisan qualifying period. Each municipal superintendent shall designate the days of such qualifying period, which shall be no less than three days and no more than five days. The days of the qualifying period shall be consecutive days. Nonpartisan qualifying periods shall commence no earlier than 8:30 A.M. on the third Monday in August immediately preceding the general election and shall end no later than 4:30 P.M. on the following Friday; and, in the case of a special election, the municipal nonpartisan qualifying period shall commence no earlier than the date of the call and shall end no later than 25 days prior to the election.

(B) In any case in which no individual has filed a notice of candidacy and paid the prescribed qualifying fee to fill a particular office in a nonpartisan municipal election, the governing authority of the municipality shall be authorized to reopen qualifying for candidates at 9:00 A.M. on the

Monday next following the close of the preceding qualifying period and cease such qualifying at 5:00 P.M. on the Tuesday immediately following such Monday, notwithstanding the fact that such days may be legal holidays; and

(4) In any case where an incumbent has filed notice of candidacy and paid the prescribed qualifying fee in a nonpartisan election to succeed himself or herself in office but withdraws as a candidate for such office prior to the close of the applicable qualifying period prescribed in this subsection, qualifying for candidates other than such incumbent shall be reopened at 9:00 A.M. on the Monday next following the close of the preceding qualifying period and shall cease at 5:00 P.M. on the Tuesday immediately following such reopening, notwithstanding the fact that any such days may be legal holidays.

(d) All political body and independent candidates shall file their notice of candidacy and pay the prescribed qualifying fee by the date prescribed in this subsection in order to be eligible to have their names placed on the election ballot by the Secretary of State or election superintendent, as the case may be, in the following manner:

(1) Each elector for President or Vice President of the United States, or his or her agent, desiring to have the names of his or her candidates for President and Vice President placed on the election ballot shall file a notice of his or her candidacy, giving his or her name, residence address, and the office he or she is seeking,

in the office of the Secretary of State during the period beginning at 9:00 A.M. on the fourth Monday in June immediately prior to the election and ending at 12:00 Noon on the Friday following the fourth Monday in June, notwithstanding the fact that any such days may be legal holidays;

(2) Each candidate for United States Senate, United States House of Representatives, or state office, or his or her agent, desiring to have his or her name placed on the election ballot shall file a notice of his or her candidacy, giving his or her name, residence address, and the office he or she is seeking, in the office of the Secretary of State during the period beginning at 9:00 A.M. on the Monday of the thirty-fifth week immediately prior to the election and ending at 12:00 Noon on the Friday immediately following such Monday, notwithstanding the fact that any such days may be legal holidays, in the case of a general election. In the case of a special election to fill a federal office listed in this subsection, each candidate shall file a notice of his or her candidacy, giving his or her name, residence address, and the office he or she is seeking, in the office of the Secretary of State no earlier than the date of the call of the special election and no later than 60 days prior to the special election. In the case of a special election to fill a state office, each candidate shall file a notice of his or her candidacy, giving his or her name, residence address, and the office he or she is seeking, in the office of the Secretary of State no earlier than the date of the call of the special election and no later than 25 days prior to the special election;

(3) Each candidate for a county office, or his or her agent, desiring to have his or her name placed on the election ballot shall file notice of his or her candidacy in the office of the superintendent of his or her county during the period beginning at 9:00 A.M. on the Monday of the thirty-fifth week immediately prior to the election and ending at 12:00 Noon on the Friday immediately following such Monday, notwithstanding the fact that any such days may be legal holidays, in the case of a general election and no earlier than the date of the call of the election and no later than 25 days prior to the election in the case of a special election;

(4) Each candidate for municipal office or a designee shall file a notice of candidacy in the office of the municipal superintendent of such candidate's municipality during the municipality's qualifying period. Each municipal superintendent shall designate the days of the qualifying period, which shall be no less than three days and no more than five days. The days of the qualifying period shall be consecutive days. Qualifying periods shall commence no earlier than 8:30 A.M. on the third Monday in August immediately preceding the general election and shall end no later than 4:30 P.M. on the following Friday; and, in the case of a special election, the municipal qualifying period shall commence no earlier than the date of the call and shall end no later than 25 days prior to the election; and

(5)(A) In extraordinary circumstances as described in Code Section 21-2-543.1, each candidate, or his or her agent, desiring to have his or her name placed

on the election ballot shall file a notice of his or her candidacy, giving his or her name, residence address, and the office he or she is seeking, with the office of the Secretary of State no earlier than the date of the call of the special election and no later than ten days after the announcement of such extraordinary circumstances.

(B) The provisions of this subsection shall not apply where, during the 75 day period beginning on the date of the announcement of the vacancy:

(i) A regularly scheduled general election for the vacant office is to be held; or

(ii) Another special election for the vacant office is to be held pursuant to a writ for a special election issued by the Governor prior to the date of the announcement of the vacancy.

The hours of qualifying each day shall be from 8:30 A.M. until 4:30 P.M. with one hour allowed for the lunch break; provided, however, that municipalities which have normal business hours which cover a lesser period of time shall conduct qualifying during normal business hours for each such municipality. Except in the case of a special election, notice of the opening and closing dates and the hours for candidates to qualify shall be published at least two weeks prior to the opening of the qualifying period.

(e) Each candidate required to file a notice of candidacy by this Code section shall, no earlier than 9:00 A.M. on the fourth Monday in June immediately prior to the election and no later than 12:00 Noon on the second Tuesday in July immediately prior to the election, file with the same official with whom he or she filed his or her notice of candidacy a nomination petition in the form prescribed in Code Section 21-2-170, except that such petition shall not be required if such candidate is:

(1) A nominee of a political party for the office of presidential elector when such party has held a national convention and therein nominated candidates for President and Vice President of the United States;

(2) Seeking office in a special election;

(3) An incumbent qualifying as a candidate to succeed himself or herself;

(4) A candidate seeking election in a nonpartisan election; or

(5) A nominee for a state-wide office by a duly constituted political body convention, provided that the political body making the nomination has qualified to nominate candidates for state-wide public office under the provisions of Code Section 21-2-180.

(f) Each candidate required by this Code section to file a notice of candidacy shall accompany his or her notice of candidacy with an affidavit stating:

(1) His or her full name and the name as the candidate desires it to be listed on the ballot. The surname of the candidate shall be the surname of the candidate as it appears on the candidate's voter registration card unless the candidate provides proof that his or her surname as it appears on the candidate's registration card is incorrect in which event the correct name shall be listed. After such name is submitted to the Secretary of State or the election superintendent, the form of such name shall not be changed during the election for which such notice of candidacy is submitted;

(2) His or her residence, with street and number, if any, and his or her post office address;

(3) His or her profession, business, or occupation, if any;

(4) The name of his or her precinct;

(5) That he or she is an elector of the county or municipality of his or her residence eligible to vote in the election in which he or she is a candidate;

(6) The name of the office he or she is seeking;

(7) That he or she is eligible to hold such office;

(8) That the candidate has never been convicted and sentenced in any court of competent jurisdiction for fraudulent violation of primary or election laws,

malfeasance in office, or felony involving moral turpitude or conviction of domestic violence under the laws of this state or any other state or of the United States, or that the candidate's civil rights have been restored and that at least ten years have elapsed from the date of the completion of the sentence without a subsequent conviction of another felony involving moral turpitude;

(9) That he or she will not knowingly violate this chapter or rules and regulations adopted under this chapter; and

(10) Any other information as may be determined by the Secretary of State to be necessary to comply with federal and state law.

The affidavit shall contain such other information as may be prescribed by the officer with whom the candidate files his or her notice of candidacy.

(g) A pauper's affidavit may be filed in lieu of paying the qualifying fee otherwise required by this Code section and Code Sections 21-2-131 and 21-2-138 of any candidate who has filed a qualifying petition as provided for in subsection (h) of this Code section. A candidate filing a pauper's affidavit instead of paying a qualifying fee shall under oath affirm his or her poverty and his or her resulting inability to pay the qualifying fee otherwise required. The form of the affidavit shall be prescribed by the Secretary of State and shall include a financial statement which lists the total income, assets, liabilities, and other relevant

financial information of the candidate and shall indicate on its face that the candidate has neither the assets nor the income to pay the qualifying fee otherwise required. The affidavit shall contain an oath that such candidate has neither the assets nor the income to pay the qualifying fee otherwise required. The following warning shall be printed on the affidavit form prepared by the Secretary of State, to wit: "WARNING: Any person knowingly making any false statement on this affidavit commits the offense of false swearing and shall be guilty of a felony." The name of any candidate who subscribes and swears to an oath that such candidate has neither the assets nor the income to pay the qualifying fee otherwise required shall be placed on the ballot by the Secretary of State or election superintendent, as the case may be.

(h) No candidate shall be authorized to file a pauper's affidavit in lieu of paying the qualifying fee otherwise required by this Code section and Code Section 21-2-138 unless such candidate has filed a qualifying petition which complies with the following requirements:

> (1) A qualifying petition of a candidate seeking an office which is voted upon state wide shall be signed by a number of voters equal to one-fourth of 1 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected. A qualifying petition of a candidate for any other office shall be signed by a number of voters equal to 1 percent of the

total number of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected. However, in the case of a candidate seeking an office for which there has never been an election or seeking an office in a newly constituted constituency, the percentage figure shall be computed on the total number of registered voters in the constituency who would have been qualified to vote for such office had the election been held at the last general election and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected;

(2) Each person signing a qualifying petition shall declare therein that he or she is a duly qualified and registered elector of the state entitled to vote in the next election for the filling of the office sought by the candidate supported by the petition and shall add to his or her signature his or her residence address, giving municipality, if any, and county, with street and number, if any. No person shall sign the same petition more than once. Each petition shall support the candidacy of only a single candidate. A signature shall be stricken from the petition when the signer so requests prior to the presentation of the petition to the appropriate officer for filing, but such a request shall be disregarded if made after such presentation. Each sheet shall bear on the bottom or back thereof the affidavit of the circulator of such sheet, which shall be subscribed and sworn to by such circulator before a notary public and shall set forth:

(A) His or her residence address, giving municipality with street and number, if any;

(B) That each signer manually signed his or her own name with full knowledge of the contents of the qualifying petition;

(C) That each signature on such sheet was signed within 180 days of the last day on which such petition may be filed; and

(D) That, to the best of the affiant's knowledge and belief, the signers are registered electors of the state qualified to sign the petition, that their respective residences are correctly stated in the petition, and that they all reside in the county named in the affidavit;

(3) A qualifying petition shall be in the form and manner determined by the Secretary of State and approved by the State Elections Board;

(4) No qualifying petition shall be circulated prior to 180 days before the last day on which such petition may be filed, and no signature shall be counted unless it was signed within 180 days of the last day for filing the same; and

(5) A qualifying petition shall not be amended or supplemented after its presentation to the appropriate officer for filing.

Appendix F

No notary public may sign the petition as an elector or serve as a circulator of any petition which he or she notarized. Any and all sheets of a petition that have the circulator's affidavit notarized by a notary public who also served as a circulator of one or more sheets of the petition or who signed one of the sheets of the petition as an elector shall be disqualified and rejected.

(i) Reserved.

(j)(1) Notwithstanding any provision of law to the contrary, any elected public officer who is performing ordered military duty, as defined in Code Section 38-2-279, shall be eligible for reelection in any primary or general election which may be held to elect a successor for the next term of office, and may qualify in absentia as a candidate for reelection to such office. The performance of ordered military duty shall not create a vacancy in such office during the term for which such public officer was elected.

(2) Where the giving of written notice of candidacy is required, any elected public officer who is performing ordered military duty may deliver such notice by mail, agent, or messenger to the proper elections official. Any other act required by law of a candidate may, during the time such officer is on ordered military duty, be performed by an agent designated in writing by the absent public officer.

Appendix F

Ga. Code Ann., § 21-2-170

§ 21-2-170. Nomination petitions

(a) In addition to the party nominations made at primaries, nominations of candidates for public office other than municipal office may be made by nomination petitions signed by electors and filed in the manner provided in this Code section, and such nomination by petition may also be made for municipal public office if provided for by the municipality's charter or by municipal ordinance. Such petition shall be in the form prescribed by the officers with whom they are filed, and no forms other than the ones so prescribed shall be used for such purposes, but such petitions shall provide sufficient space for the printing of the elector's name as well as for his or her signature. In addition to the other requirements provided for in this Code section, each elector signing a nomination petition shall also print his or her name thereon.

(b) A nomination petition of a candidate seeking an office which is voted upon state wide shall be signed by a number of voters equal to 1 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected. A nomination petition of a candidate for any other office shall be signed by a number of voters equal to 5 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking and the signers of such petition shall

be registered and eligible to vote in the election at which such candidate seeks to be elected. However, in the case of a candidate seeking an office for which there has never been an election or seeking an office in a newly constituted constituency, the percentage figure shall be computed on the total number of registered voters in the constituency who would have been qualified to vote for such office had the election been held at the last general election and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected.

(c) Each person signing a nomination petition shall declare therein that he or she is a duly qualified and registered elector of the state, county, or municipality entitled to vote in the next election for the filling of the office sought by the candidate supported by the petition and shall add to his or her signature his or her residence address, giving municipality, if any, and county, with street and number, if any, and be urged to add the person's date of birth which shall be used for verification purposes. No person shall sign the same petition more than once. Each petition shall support the candidacy of only a single candidate, except any political body seeking to have the names of its candidates for the offices of presidential electors placed upon the ballot through nomination petitions shall not compile a separate petition for each candidate for such office, but such political body shall compile its petitions so that the entire slate of candidates of such body for such office shall be listed together on the same petition. A signature shall be stricken from the petition when the signer so requests prior to the presentation of the petition

to the appropriate officer for filing, but such a request shall be disregarded if made after such presentation.

(d) A nomination petition shall be on one or more sheets of uniform size and different sheets must be used by signers resident in different counties or municipalities. The upper portion of each sheet, prior to being signed by any petitioner, shall bear the name and title of the officer with whom the petition will be filed, the name of the candidate to be supported by the petition, his or her profession, business, or occupation, if any, his or her place of residence with street and number, if any, the name of the office he or she is seeking, his or her political body affiliation, if any, and the name and date of the election in which the candidate is seeking election. If more than one sheet is used, they shall be bound together when offered for filing if they are intended to constitute one nomination petition, and each sheet shall be numbered consecutively, beginning with number one, at the foot of each page. Each sheet shall bear on the bottom or back thereof the affidavit of the circulator of such sheet, which affidavit must be subscribed and sworn to by such circulator before a notary public and shall set forth:

(1) His or her residence address, giving municipality with street and number, if any;

(2) That each signer manually signed his or her own name with full knowledge of the contents of the nomination petition;

(3) That each signature on such sheet was signed within 180 days of the last day on which such petition may be filed; and

(4) That, to the best of the affiant's knowledge and belief, the signers are registered electors of the state qualified to sign the petition, that their respective residences are correctly stated in the petition, and that they all reside in the county or municipality named in the affidavit.

No notary public may sign the petition as an elector or serve as a circulator of any petition which he or she notarized. Any and all sheets of a petition that have the circulator's affidavit notarized by a notary public who also served as a circulator of one or more sheets of the petition or who signed one of the sheets of the petition as an elector shall be disqualified and rejected.

(e) No nomination petition shall be circulated prior to 180 days before the last day on which such petition may be filed, and no signature shall be counted unless it was signed within 180 days of the last day for filing the same.

(f) A nomination petition shall not be amended or supplemented after its presentation to the appropriate officer for filing.

(g) Only those candidates whose petitions are accompanied by a certificate sworn to by the chairperson and secretary of a political body duly registered with the Secretary of State as required by Code Section 21-2-110, stating that

the named candidate is the nominee of that political body by virtue of being nominated in a convention, as prescribed in Code Section 21-2-172, shall be listed on the ballot under the name of the political body. All petition candidates not so designated as the nominee of a political body shall be listed on the ballot in the independent column.

(h) Notwithstanding the provisions of this Code section, candidates for municipal offices may be nominated by petitions as provided for in this Code section only if the municipality authorizes such nominations by petitions in its charter or by ordinance.

Ga. Code Ann., § 21-2-180

§ 21-2-180. Political bodies authorized to nominate candidates by convention; conditions

Any political body which is duly registered as provided for in Code Section 21-2-110 is qualified to nominate candidates for state-wide public office by convention if:

(1) The political body files with the Secretary of State a petition signed by voters equal in number to 1 percent of the registered voters who were registered and eligible to vote in the preceding general election; or

(2) At the preceding general election, the political body nominated a candidate for state-wide office and such candidate received a number of votes equal to 1 percent of the total number of registered voters who were registered and eligible to vote in such general election.