**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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**No. 09-13277**

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**FAYE COFFIELD, JASON CROWDER and BEATRICE WILLIAMS,**

**Plaintiffs-Appellants,**

**v.**

**KAREN C. HANDEL, in her Official Capacity as Georgia Secretary of State and Chairperson of the Georgia State Election Board,**

**Defendant-Appellee.**

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

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# REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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## IN LIGHT OF THE HISTORICAL AND COMPARATIVE DATA PRESENTED BY THE PLAINTIFFS-APPELLANTS, THE DISTRICT COURT'S DETERMINATION SHOULD BE REVERSED AND THE 5% SIGNATURE REQUIREMENT DECLARED UNCONSTITUTIONAL

The plaintiffs do not lightly challenge the constitutionality of Georgia's 5% petition signature requirement, which was upheld nearly four decades ago by the Supreme Court in Jenness v. Fortson, 403 U.S. 431 (1971). They do so because experience has shown that the 5% requirement is too difficult a burden for candidates to overcome.

The plaintiffs in Jenness v. Fortson did not present the Court with information about how often candidates for public office actually succeed in meeting Georgia's 5% requirement, or how the 5% requirement compares with other states. However, the plaintiffs in the case at bar have presented such information. They have pointed out that no independent candidate for the United States House of Representatives has met Georgia's 5% requirement since 1964, Doc 14 - Att 1 - ¶ 13; that no minor party candidate for the United States House of Representatives has ever met Georgia's 5% requirement, id., ¶ 14; that no independent candidate for the United States House of Representatives in any state has ever overcome a petition requirement greater than 12,919 signatures (the

requirement in plaintiff Coffield's district in 2008 was 15,061 signatures), id., ¶¶ 6, 8; that Georgia is one of only two states which require an independent candidate for the United States House of Representatives to obtain signatures exceeding three percent of the registered voters in the district in question, (the other such state, North Carolina, requires a 4% petition) id., ¶¶ 11, 12; that in 2008 the nationwide median signature requirement for independent candidates for the United States House of Representatives was 2,750, and that the requirement was less than 5,000 in 318 congressional districts, between 5,000 and 9,999 in 62 districts, and 10,000 or more in only 55 districts, including all of Georgia's congressional districts, Id., ¶ 15.

Three years after deciding Jenness v. Fortson, the Supreme Court emphasized the importance of considering such information in order to determine whether a signature requirement is unconstitutionally burdensome:

> ... [California's five-percent petition requirement], as such, does not appear to be excessive, see Jenness v. Fortson, supra, but to assess realistically whether the law imposes excessively burdensome requirements upon independent candidates it is necessary to know other critical facts which do not appear from the evidentiary record in this case.
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> * * *
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> [O]nce [such critical facts are ascertained], there will arise the inevitable question for judgment: ... *could 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? Past experience will be a helpful, if not always an unerring, guide:*

> *it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not*. We note here that the State mentions only one instance of an independent candidate's qualifying for any office under [the statute in question], but disclaims having made any comprehensive survey of the official records that would perhaps reveal the truth of the matter.

Storer v. Brown, 415 U.S. 724, 738, 742 (1974) (emphasis added).

Unlike the parties in Jenness v. Fortson and Storer v. Brown, the instant plaintiffs have made a comprehensive survey of the historical record. Their survey demonstrates that Georgia's 5% requirement *does*"operate to freeze the political status quo," Jenness at 438. Independent candidates for the United States House of Representatives have not qualified for the ballot in Georgia with any regularity and will only rarely, if ever, satisfy the 5% signature requirement and succeed in getting on the ballot in Georgia.

Under the circumstances, Georgia's 5% petition requirement cannot be justified by any of the state interests which defendant has proffered. Those state interests, identified by defendant to this Court but not to the district court, are "requir[ing] a preliminary showing of a 'significant modicum of support' before a candidate or party may appear on the ballot," Brief of Appellee at 5; "regulating [the state's] election process," id. at 8; "maintaining fairness, honesty, and order," id.; "minimizing frivolous candidacies," id.; and "'avoiding confusion, deception,

and even frustration of the democratic process,'" id.

Left unanswered is the question of how any of these wholly legitimate state interests are served by a signature requirement that candidates are unable to meet. After all, under Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) and its progeny, the reviewing court is required not only to determine the legitimacy and strength (which these plaintiffs do not contest) of the interests asserted by the state to justify its restrictions, but also to "consider the extent to which those interests make it necessary to burden the plaintiff's rights."

Defendant and the district court have asserted that the present case is foreclosed by Jenness v. Fortson. Yet this Court has recognized that "the ... cases which have upheld the Georgia provisions against constitutional attack by prospective candidates and minor political parties do not foreclose the parties' right to present the evidence necessary to undertake the balancing approach outlined in *Anderson v. Celebrezze."* Bergland v. Harris, 767 F.2d 1551, 1554 (11th Cir. 1985). In that case this Court noted that "[i]n Mandel v. Bradley, 432 U.S. 173, 97 S.Ct.2238, 53 L. Ed.2d 199 (1977), the [Supreme] Court reviewed a three-judge district court's decision that prior precedents ... rendered unconstitutional *per se* provisions of the Maryland election laws ...." and that "[t]he Supreme Court reversed, instructing the district court to take evidence and

apply constitutional standards announced by the Court in earlier cases." Id. at 1555. This Court then noted that in "weigh[ing] the precise interests advanced by the State as justifications for the burdens imposed by its rules," the district court "may analyze the past experience of minor party and independent candidates in Georgia as an indication of the burden imposed on those who seek ballot access," Id., citing Mandel v. Bradley, supra, 432 U.S. at 178. In the present case, the district court did not engage in any such analysis.

Neither the district court nor the defendant seriously engaged the plaintiffs' demonstration that candidates have not succeeded in meeting Georgia's 5% signature requirement. Defendant erroneously states that the "crux" of plaintiffs' argument "is that the present case has a new and special impact that was not recognized in *Jenness* or since then and that this case should be decided under strict scrutiny and reject (sic) the State's interest." Brief of Appellee at 7. To the contrary, plaintiffs argue (and show) that Georgia law has long had a profoundly restrictive impact which the courts have not been aware of because they have never been presented with the information that the plaintiffs in this case have provided.

The district court erroneously states that plaintiffs "suggest that the Supreme Court has now mandated a strict scrutiny analysis ... citing language used

by Justice Scalia in Crawford v. Marion County Election Board, 553 U.S. ___, 128 S.Ct. 1610 (2008)," Doc 29 - Pg 2. Rather, plaintiffs clearly informed the district court of their position that "There is no New Standard of Review," that "[t]he applicable standard of review was articulated in Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) and its progeny," and that "[t]he Eleventh Circuit has aptly described it as 'a balancing test that ranges from strict scrutiny to a rational basis analysis, depending upon the factual circumstances in each case,'" citing Duke v. Clelland, 5 F.3d 1399, 1405 (11th Cir. 1993) and Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir. 1992). Doc 27 - Pg 2.

Simply put, plaintiffs urge that in light of the historical and comparative data they have presented, Georgia's 5% requirement cannot survive any standard of review on the continuum from rational basis analysis to strict scrutiny. They submit that the 5% petition requirement effectively precludes independent candidates from running for the United States House of Representatives, thereby unnecessarily burdening the availability of political opportunity to such candidates and to the electorate. For that reason, the 5% requirement is unconstitutional.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on November 19, 2009 I served the within Brief by sending a true copy thereof by prepaid United States mail to Stefan Ritter, Senior Assistant Attorney General, 40 Capitol Square, S.W., Atlanta, GA 30334-1300.

Dated: November 19, 2009

/s/ *Gary Sinawski*
Gary Sinawski