

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GREEN PARTY OF GEORGIA,
CONSTITUTION PARTY
OF GEORGIA,
Plaintiffs,

v.

STATE OF GEORGIA,
and BRIAN KEMP,
GEORGIA SECRETARY
OF STATE,
Defendants.

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C.A. No.:1:12CV1822

MEMORADUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(1) and (6), the State of Georgia (“Defendant Georgia”) and Brian Kemp, in his official capacity as the Secretary of State of Georgia (“Defendant Kemp”) (collectively, “Defendants”), by and through their counsel, Samuel S. Olens, the Attorney General of Georgia, submit this Memorandum of Law in support of their Motion to Dismiss, by showing that Plaintiffs’ claims are barred as a matter of law as judges in the Northern District and the 11th Circuit have repeatedly held in similar cases. *See e.g. Cartwright v. Barnes*, 304 F.3d 1138, 1141-42 (11th Cir. 2002); *Coffield v. Handel*, 599 F.3d 1276, 1277 (11th Cir. 2010).

FACTUAL AND PROCEDURAL BACKGROUND

1. Background

This case presents yet another attempt in a long line of challenges to Georgia's requirement for independent or political body candidates to demonstrate a modicum of support in order to obtain ballot access for particular candidates.

Like many similar cases, the Green Party of Georgia and the Constitution Party of Georgia (collectively, "Plaintiffs") seek to have this Court reverse the legislative decisions of the Georgia General Assembly regarding what is the sufficient level of support required to obtain ballot access, notwithstanding the fact that the United States Supreme Court¹, the Fifth² and Eleventh Circuit Courts of Appeals and the Northern District of Georgia³ have previously heard and rejected these same arguments while upholding the Georgia statutes in question.

2. The Parties and the Complaint⁴

Plaintiffs filed the present case on May 25, 2012. [Doc. 1] Plaintiffs filed

¹ See e.g. *Jenness v. Fortson*, 403 U.S. 431, 438-39 (1971).

² *McCrary v. Poythress*, 638 F.2d 1308 (5th Cir. 1981).

³ See e.g. *Socialist Workers Party v. Fortson*, 315 F.Supp. 1035 (N.D.Ga. 1970), *aff'd sub nom Jenness v. Fortson*, 403 U.S. 431 (1971); *Amendola v. Miller*, No. 1:96-CV-02103-JEC (N.D. Ga., decided 1997), *aff'd Amendola v. Miller*, 161 F.3d 22 (11th Cir. 1998).

⁴ All the facts recited herein are from the Plaintiffs' Complaint or this Court's docket. On a motion to dismiss, all well-plead facts are assumed by a court to be true. *Pyles v. United Air Lines, Inc.*, 79 F.3d 1046, 1049 (11th Cir. 1996).

their Complaint pursuant to 42 U.S.C. § 1983 and invoke federal question jurisdiction based on 28 U.S.C. §§ 1331 and 1346. (Complaint, ¶¶ 1, 2.) Plaintiffs are two political organizations or “bodies” organized under O.C.G.A. §§ 21-2-110 and 21-2-113. (Complaint, ¶¶ 3, 4.) Plaintiffs seek their relief against both the State of Georgia and Brian Kemp, the duly elected Georgia Secretary of State. (Complaint, ¶¶ 5, 6.) While the Complaint does not express that Plaintiffs sue Defendant Kemp in his official capacity, that mechanism is the appropriate way to seek injunctive and declaratory relief against a state officer. *See Ex Parte Young*, 209 U.S. 123, 157 (1908).

In the sole Count of Plaintiffs’ Complaint, Plaintiffs seek to have this Court hold the signature requirements of O.C.G.A. § 21-2-170 to be unconstitutional. (Complaint, ¶¶ 17, 18.) Plaintiffs cursorily cite various Constitutional provisions in their Complaint such as the Elections Clause, the Privileges and Immunities Clause, the First Amendment, and the Fourteenth Amendment to support their contention that O.C.G.A. § 21-2-170 is unconstitutional. (Complaint, ¶¶ 13-16.) But in their Count, Plaintiffs do not specifically articulate which Constitutional provision the legislative scheme of O.C.G.A. § 21-2-170 violates. (*See* Complaint, ¶¶ 17-19.) In the “Wherefore” paragraph of Plaintiffs’ Complaint (hereinafter

referred to as ¶ 20), Plaintiffs request that this Court enter an order “[d]eclaring that Georgia’s statutory scheme violates the Equal Protection Clause.” (Complaint, ¶ 20.)

3. **The Georgia Law at Issue**

Under Georgia law, persons who wish to run for office in Georgia as independent or political body candidates may do so by meeting the requirements of O.C.G.A. § 21-2-170. This statute provides that independent or political body⁵ candidates for statewide office may obtain ballot access by a presenting a nominating petition containing a number of voter signatures equivalent to one percent (1%) of the persons eligible to vote at the time of the preceding election for the particular office being sought.⁶ O.C.G.A. § 21-2-170(b). The law provides

⁵ A political “body” is different than a political “party.” A political body becomes a “party” (and its candidates are entitled to be placed on a ballot) if the body’s gubernatorial or presidential candidate draws at least twenty percent (20%) of the votes cast in the state or in the nation respectively in the previous election. O.C.G.A. § 21-2-2(21). Also, political bodies are qualified to nominate candidates for statewide public office if the body had a candidate on a ballot for statewide office in the preceding election who received votes equal to one percent (1%) of the total number of registered voters eligible to vote in that election. O.C.G.A. § 21-2-180. The Libertarian Party has achieved such status. Georgia Secretary of State, Elections Division, *available at* <http://sos.georgia.gov/elections>.

⁶ Independent candidates for *non-statewide* office must present a petition with signatures equaling five percent (5%) of the number of registered voters eligible to vote in the preceding election for that office. O.C.G.A. § 21-2-170(b).

that these signatures may be gathered over a period beginning 180 days prior to the deadline for filing such petitions. O.C.G.A. § 21-2-170(e).

STANDARD OF REVIEW

A party moving for dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted carries the burden of proving that no claim has been stated. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *In re Johannessen*, 76 F.3d 347, 349 (11th Cir.1996). Further, a plaintiff's factual allegations, as plead in her complaint, must rise to the level of plausibility and not depend on speculation. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). As the court explained in *Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp.*, 770 F.Supp.2d 1315 (N.D. Ga. 2011):

To survive a motion to dismiss, the factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Only when the "plaintiffs have not nudged their claims across the line from conceivable to plausible" must the complaint be dismissed. *Id.* at 570. *Twombly* makes clear that a plaintiff's obligation to state adequate grounds for relief under Fed. R. Civ. P. 8(a) "requires more than labels and conclusions." 550 U.S. at 555. In further clarifying the *Twombly* standard, the Supreme Court has adopted a two-

pronged approach to evaluating motions to dismiss; (1) eliminate any allegations in the complaint that are merely legal conclusions, and (2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, [556] U.S. [662], 129 S. Ct. 1937, 1940-41, 173 L. Ed. 2d 868 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949.

770 F. Supp. 2d at 1321-1322.

ARGUMENT AND CITATION OF AUTHORITY

A. Under Well Established Law Binding on this Court, Plaintiffs' claims Must Be Dismissed.

Plaintiffs seek to have this Court declare that Georgia's statutory scheme, specifically the O.C.G.A. § 21-2-170, is unconstitutional. (*See* Complaint, ¶ 20.)

This claim, however, cannot prevail as a matter of law imposed by the binding precedents of the Eleventh Circuit and the Supreme Court of the United States.⁷

⁷ The ballot access rule now at issue is the same one upheld in *Coffield*. It states:

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

See Jenness, 403 U.S. at 438; *Cartwright*, 304 F.3d at 1141; *Coffield*, 599 F.3d at 1277.

There is simply no basis to claim today after so many repeated challenges that O.C.G.A. § 21-2-170 is unconstitutional. As the Eleventh Circuit explained in *Coffield*, “[o]ur Court and the Supreme Court have upheld [O.C.G.A. 21-2-170(b)] before . . . [and] [t]he pertinent laws of Georgia have not changed materially since the decisions in *Jenness* and *Cartwright* were made.” *Coffield*, 599 F.3d at 1277. Further, the *Coffield* decision validated the even more burdensome 5% rule for non-statewide elections. *Id.* In the present case, Plaintiffs seek to void the 1% rule for statewide elections. (Complaint, ¶ 20.) If the 5% rule is constitutional, surely the 1% rule is as well. Accordingly, because Plaintiffs can prove no set of facts that would entitle them to relief, their Complaint should be dismissed with prejudice. *In re Johannessen*, 76 F.3d at 349.

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.
O.C.G.A. 21-2-170(b).

Coffield follows a long line of cases and well established law. In 1971, the U.S. Supreme Court reviewed claims that this very same provision of Georgia law (then designated Ga. Code Ann. § 34-1010) unconstitutionally restricted non-political party candidates' access to the ballot by abridging the freedoms of speech guaranteed to a candidate and his supporters by the First and Fourteenth Amendments and by denying the nonparty candidate the Fourteenth Amendment equal protection of the law. *Jenness v. Fortson*, 403 U.S. 431 (1971), *aff'g sub nom. Georgia Socialist Workers Party v. Fortson*, 315 F. Supp. 1035 (N.D. 1970) (Three-Judge Court). The Court rejected these claims. *Id.*

In *Jenness*, the Court noted that Georgia freely provides for write-in votes. *Id.* at 438; See O.C.G.A. § 21-2-133. Georgia recognizes independent candidates. *Jenness* at 438; *see* O.C.G.A. § 21-2-170. The State does not provide an unreasonably early filing deadline for candidates not otherwise endorsed by established parties. *Jenness* at 438; O.C.G.A. § 21-2-132(h)(4). There is no elaborate requirement for establishing a primary election system for a small or new party. *Jenness* at 438; *See* O.C.G.A. § 21-2-110, 21-2-150 et seq. "[I]n sum,

Georgia's election laws . . . do not operate to freeze the political status quo."

Jenness at 438.

Instead, the Court noted:

Anyone who wishes, and who is otherwise eligible, may be an independent candidate for any office in Georgia. Any political organization, however new or however small, is free to endorse any otherwise eligible person as its candidate for whatever elective public office it chooses. So far as the Georgia election laws are concerned, independent candidates and members of small or newly formed political organizations are wholly free to associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish. They may confine themselves to an appeal for write-in votes. Or they may seek, over a six months' period, the signatures of 5% of the eligible electorate for the office in question.

Jenness at 438.

The Court noted that a voter may sign multiple petitions while still voting in a party primary or voting for another candidate at the actual election. *Id.* at 438-39. Additionally, once a political body obtains at least 20% of the vote at an election, it becomes a "party" rather than a political body; and once a party fails to maintain a 20% level of voter support, it reverts to the status of a political body. *Id.* at 439. Given all of this, the Court concluded, "We can find in this system nothing that abridges the rights of free speech and association secured by the First

and Fourteenth Amendments.” *Id.* at 440.

The Supreme Court also rejected the claims that the 5% petition requirement infringed on the Fourteenth Amendment right to equal protection of the laws. *Id.* This claim was based on the premise that the gathering of signatures was "inherently more burdensome for a candidate to gather" than it is to win votes of a majority in a party primary. *Id.* However, the Court noted, Georgia does provide this petitioning process as an alternative method to the primary system for gaining access to the ballot. *Id.* The Court concluded, "We cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths, neither of which can be assumed to be inherently more burdensome than the other." *Id.*

Instead, the Court recognized that Georgia had a strong and appropriate interest in having such ballot access regulation.

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. The 5% figure is, to be sure, apparently somewhat higher than the percentage of support required to be shown in many States as a condition for ballot position, but this is 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. Georgia in this case has insulated not a single potential voter from the appeal of new political voices within its borders.

Jenness at 442 (Footnote omitted).

Subsequently, the U.S. Supreme Court has reiterated its continuing approval of its decision in *Jenness*. In *Illinois State Board of Elections v. Socialist Workers Party, et al.*, 440 U.S. 173 (1979), the Court noted that in *Jenness* they had "upheld properly drawn statutes that require a preliminary showing of a 'significant modicum of support' before a candidate or party may appear on the ballot." *Socialist Workers Party* at 185. In *Norman v. Reed*, 502 U.S. 279, 295 (1992), the Court again noted that it had upheld the Georgia 5% petition requirement. *See also Morse v. Republican Party of Virginia*, 517 U.S. 186, 198 (1996); *Burdick v. Takushi*, 504 U.S. 428, 435 (1992); *New York State Board of Elections v. Margarita Lopez Torres*, 128 S. Ct. 791 (2008); *Crawford v. Marion County Election Board*, 553 U.S. ____, 128 S.Ct. 1610 (2008)(Scalia, J. concurring). In fact, the Supreme Court in *Lopez Torres* as recently as January of this year has again reaffirmed the correctness of the *Jenness* decision, noting:

Just as States may require persons to demonstrate "a significant modicum of support" before allowing them access to the general-election ballot, lest it become unmanageable,

Jenness v. Fortson [Citation omitted], they may similarly demand a minimum degree of support for candidate access to a primary ballot. The signature requirement here is far from excessive. *Norman v. Reed* [Citation omitted] (approving requirement of 25,000 signatures, or approximately two percent of the electorate); [*American Party of Texas v. White*, 415 U.S. 767, 783 (1974)](approving requirement of one percent of the vote cast for governor in the preceding general election, which was about 22,000 signatures.)

Lopez Torres, 128 S. Ct. at 798-99.

Jenness has, of course, long been accepted as the law of this Circuit as well. In *McCrary v. Poythress*, 638 F.2d 1308 (5th Cir. 1981), this Court specifically adopted *Jenness'* holdings and applied them to claims raised by a political body, rather than an individual, that the 5% petition requirement violated the rights of free speech and association under the First and Fourteenth Amendments or the right to equal protection as guaranteed under the Fourteenth Amendment. *McCrary* at 1312. This Court rejected these claims and once again upheld the 5% requirement. *Id.*

In 1996, the Libertarian Party and its candidates challenged the “5% rule.” *Amendola. v. Miller*, No. 1:96-CV-02103-JEC (N.D. Ga., decided 1997). Plaintiffs in that case argued that Georgia should require signatures equaling only one percent (1%) for all independent candidates, regardless of whether the office they

sought was statewide or not. *Id.* The district court rejected that claim and that decision was affirmed on appeal. *Amendola v. Miller*, 161 F. 3d 22 (11th Cir. 1998).

In 2002, Libertarian Party candidates for United States House of Representatives again challenged Georgia's "5% rule" under the Qualifications Clause of the Constitution. *See Cartwright v. Barnes*, 304 F 3d 1138 (11th Cir. 2002). In *Cartwright*, there were several putative congressional candidates as plaintiffs. *Id.* at 39. The complaint stated that the "candidate" plaintiffs were required to collect approximately 14,846 signatures in a single Congressional district. *Id.* at 1140. (It should be noted that this figure is very close to the figure of 15,061 complained of in the instant case. Complaint ¶ 12.) Plaintiffs challenged the 5% petition requirement on the grounds that it violated the Qualifications Clause of the United States Constitution. *Id.* at 1139. The Eleventh Circuit again rejected the plaintiffs/appellants' argument and found that Georgia's petition requirement was procedural rather than adding a qualification for potential candidates. *Id.* at 1139. In so doing, the circuit court, relying on *Jenness*, emphasized that Georgia's 5% petition requirement "does not 'even arguably impose' any substantive qualification. Instead, it requires that a candidate

‘demonstrate substantial community support’ before obtaining a place on the ballot, an interest that the Supreme Court recognized over thirty years ago when it upheld Georgia’s 5% requirement.” *Cartwright* at 1144. *See also Swanson v. Worley*, 490 F. 3d 894 (11th Cir. 2007).

B. The State of Georgia is Immune From Suit Under the Eleventh Amendment and Secretary Kemp is Only a Proper Defendant In his Official Capacity.

Even if the Court were not to dismiss this case – and it must as a matter of law – the only viable Defendant would be the Secretary of State in his official capacity. The Eleventh Amendment bars all claims for prospective injunctive or declaratory relief or for damages against the “State” or the “arms” of the State – the State’s departments, agencies, boards, authorities, etc. (but not local governments such as counties). U.S. Const. amend. XI; *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 97-103 (1984) (discussing in detail history of 11th Amendment and its scope); *Hans v. Louisiana*, 134 U.S. 1 (1890) (seminal case). Thus under well established law, the State of Georgia is not a proper party.

Likewise, only the office of Secretary of State, not the actual office holder, is a proper party to an action challenging a statute and seeking prospective injunctive relief. *Kentucky v. Graham*, 473 U.S. 159, 165-68 (1985) (seminal case

discussing official and individual capacity distinction); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. at 102-103 (discussing history of doctrine); compare *Edelman v. Jordan*, 415 U.S. 651 (1974) (“equitable restitution” even if entered against state officer under *Ex Parte Young*, not permissible), with *Quern v. Jordan*, 440 U.S. 33 (1979) (ordering officials to prospectively send notice did not violate 11th Amendment). Official capacity suits are prospective relief suits against the *office* (although sometimes the officeholder is named), and survive against the office, not the individual holding office. *Kentucky v. Graham*, 473 U.S. at 166. Individual capacity suits, on the other hand, are suits for damages against an *individual official* and are barred (if at all) by the official’s qualified immunity, not by the 11th Amendment. *Id.* at 165-67; *Hafer v. Melo*, 502 U.S. 21 (1991) (individual capacity suits are not barred by the 11th Amendment). The present case is not a suit for damages and only lies as an official capacity suit against the office of the Secretary of State (although it is meritless even then).

CONCLUSION

For the foregoing reasons Plaintiffs’ claims are meritless and should be dismissed.

Respectfully submitted,

SAMUEL S. OLENS 551540
Attorney General

DENNIS R. DUNN 234098
Deputy Attorney General

 /s/Stefan Ritter
STEFAN RITTER 606950
Senior Assistant Attorney General

Please address all
communications to:
STEFAN RITTER
Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-7298
FAX (404) 657-9932
sritter@law.ga.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 22th day of June, 2012, I electronically served the foregoing **MEMORADUM OF LAW IN SUPPORT OF MOTION TO DISMISS** upon the following attorney of record using the Court's ecf system:

J. M. Raffauf
248 Washington Avenue
Marietta, GA 30060
RaffaufMike@gmail.com

This 22nd day of June, 2012.

_____/s/Stefan Ritter

STEFAN RITTER

Senior Assistant Attorney General