No. 13-11816-EE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GREEN PARTY OF GEORGIA and CONSTITUTION PARTY OF GEORGIA, Plaintiffs-Appellants vs. STATE OF GEORGIA and BRIAN KEMP, Georgia Secretary of State, Defendants-Appellees.	)	Appeal from the United States District Court for the Northern District of Georgia No. 1:12-cv-01822-RWS The Honorable Richard W. Story, U.S. District Judge, Judge Presiding

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Richard J. Whitney
Attorney at Law
Milwood Executive Suites
1400 North Wood Rd.
Murphysboro, IL 62966
Telephone: (618) 549-5159
Attorney for Plaintiffs-Appellants

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ARGUMENT

NONE OF THE POINTS RAISED BY DEFENDANTS-APPELLEES ALTERS THE FACT THAT THE COURT BELOW FAILED TO CONDUCT THE THREE-PART ANALYSIS REQUIRED OF IT BY THIS COURT AND FAILED TO CONSIDER THE SPECIAL CONSIDERATIONS THAT APPLY TO PRESIDENTIAL ELECTIONS – EACH OF WHICH REQUIRES REVERSAL.

In their brief, Defendants-Appellees maintain that, in *Swanson v. Worley*, 490 F.3d 894, 902-904 (11th Cir. 2007), this Court "reaffirmed that strict scrutiny does not apply" to ballot-access cases like the instant matter but instead applied a "sliding standard" adopted from such authorities as *Burdick v. Takushi*, 504 U.S. 428 (1992) and *Anderson v. Celebreeze*, 460 U.S. 780 (1983) (Appellees' Br. at 11.) Comparing these authorities to those cited by Plaintiffs in their initial brief, at 11-13, it is fair to say that the Supreme Court's guidance on the question of the appropriate level of scrutiny has not exactly been a model of clarity. But applying what Defendants describe as the "sliding standard" of *Swanson* as our guide, this

only begs another question. As this Court explained in the very passage cited by Defendants:

> [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." But when a state ballot access law provision imposes only "reasonable, nondiscriminatory restrictions" upon the plaintiffs' First and Fourteenth Amendment rights, "a State's 'important regulatory interests' will usually be enough to 'justify reasonable, nondiscriminatory restrictions.'"
>
> 490 F.3d at 903.

Yet how does one determine whether the burden imposed on minority parties, their candidates and supporters, and the voters who may wish to cast a vote for them, are "severe" or "reasonable" in the first instance, without conducting the very inquiries that the court below declined to conduct?

The court below, and Defendants, would have this Court suppose that *Jenness v. Fortson*, 403 U.S. 431 (1971) relieved the district court of its obligation to engage in the very three-part inquiry that this Court held was *required* in *Swanson*, 490 F.3d at 902-903, as it has settled the question of acceptable levels of ballot access restrictions for the State of Georgia for all categories of election contests, for all time. Yet this is not only contrary to *Swanson*'s instructions; it rests on the rickety premise that ballot access restrictions deemed constitutionally sound in 1971 are immutably valid in perpetuity, and that changed societal conditions have no impact on the competing concerns that must be weighed on the constitutional balance.

Surely this Court can take judicial notice of the fact that conditions have changed in the real world since 1971, in ways that make it far more difficult for minority parties or political bodies to gather petition signatures from registered voters. The loss of petitioning opportunities at private shopping centers or malls, (the modern variety of which are typically separated from public sidewalks or streets by privately owned parking lots), already noted by Plaintiffs in their initial brief, at 16 n. 4, was just the beginning. We now live in a more insular society than existed in 1971. Plaintiffs submit that it is common knowledge that more and more community gatherings, such as sporting events, take place behind gated parking lots, in which petitioning may or may not be permitted; that more people live in gated communities, condominiums or other large housing complexes that may forbid door-to-door solicitation; that much of what passes for "community" now takes place on the Internet -- yet the Georgia statutes at issue contain no allowance for electronic signatures.

Whether this Court elects to take judicial notice of such commonly known facts or not, the overarching point is that Plaintiffs were unfairly and improperly deprived of the opportunity to present evidence of same to the court below. These and other changed conditions are reflected in the "facts on the ground" that Plaintiffs sought to bring to the district court's attention via supporting affidavits (Docs. 5-1 – 5-4.) And they lend force to Plaintiffs' argument that courts have a

duty to engage in the three-part inquiry that this Court held was *required* in *Swanson*, 490 F.3d at 902-903, and *Bergland v. Harris*, 767 F.2d 1551, 1554-55 (11th Cir. 1985). The court below failed to perform that duty, instead relying wholly on the fallacious syllogism that, if a 5-percent threshold was fine for a Congressional candidate in 1971, 1 percent must be fine for a presidential candidate in 2012.

Since there can be no disputing the district court's failure to conduct the essential inquiry, Defendants' brief, understandably, simply avoids the subject and asks this Court, at some length, to embrace the same fallacy. (Def.'s' Br. at 3-11.) In response to Plaintiffs' argument citing *Anderson* and three subsequent Opinions of this Court, for the proposition that presidential elections raise unique considerations that further demand fresh analysis, (principal brief at 15-19), Defendants respond with about three pages of sheer evasion. They devote this portion of their brief to an exposition of the same authorities, quoting some qualifying language from *Anderson* and noting that this Court's recognition of the special nature of presidential elections in *Swanson*, *Bergland* and *Shugart v. Chapman*, 366 Fed. Appx. 4, No. 09-14250 (11th Cir. Feb. 10, 2010) was not central to the holdings of each case -- deftly missing the point. (Def.'s' Br. at 14-17.)

Avoidance is not argument. The court below failed to engage in the tripartite analysis required of it by *Swanson* and *Bergland.* It failed to give weight to the special considerations peculiar to presidential elections, as required of it by *Anderson*, *Swanson*, *Bergland* and *Shugart.* Defendants failed to cite any countervailing authority or new argument that can justify these failings. The inevitable conclusion is that the judgment of the court below must be reversed.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants Green Party of Georgia and Constitution Party of Georgia respectfully request that this Court reverse and vacate the district court's Order dismissing Plaintiffs' Complaint, (Doc. 10), and either enter an Order finding the statutes at issue unconstitutional, or, in the alternative, remanding this cause back to the district court with instructions to reinstate this cause, and for further proceedings consistent with its holding.

Respectfully Submitted,
GREEN PARTY OF GEORGIA, and
CONSTITUTION PARTY OF
GEORGIA, PLAINTIFFS

Date: September 29, 2013

By: s/Richard J. Whitney
Richard J. Whitney

Richard J. Whitney
Attorney at Law
ARDC No. 06238355
1400 North Wood Rd.
Murphysboro, IL 62966
(618) 549-5159
richwhitney@frontier.com

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2013, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Samuel S. Olens, Attorney General
Dennis R. Dunn, Deputy Attorney General
Stefan Ritter, Senior Assistant Attorney General
Kelly Campanella, Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, GA 30334-1300

Respectfully submitted,
s/ Richard J. Whitney
Richard J. Whitney