

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,

v.

**STATE OF GEORGIA and
BRIAN KEMP, GEORGIA SECRETARY OF STATE**

Defendants-Appellees.

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

**PETITION FOR PANEL REHEARING AND REHEARING EN BANC
ON BEHALF OF APPELLANTS**

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NO. 13-11816-EE

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rules 26.1-1 and 35-5 of the Rules of this Court Appellees
certify that the below listed persons and entities have interests in the outcome of
this case:

Campanella, Kelly – counsel for Defendant Appellees

Constitution Party of Georgia – Plaintiff Appellants

Dunn, Dennis – counsel for Defendant Appellees

Green Party of Georgia (a/k/a Georgia Green Party) – Plaintiff Appellants

Georgia, State of - Defendant Appellee

Kemp, Brian – Defendant Appellee, Secretary of State

Olens, Samuel S. - Attorney General and counsel for Defendant Appellees

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Story, Richard W. – District Judge, Northern District of Georgia

Whitney, Richard – counsel for Plaintiff Appellants

STATEMENT REGARDING EN BANC CONSIDERATION

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

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)

Am. Home Assurance Co. v. Glenn Estess & Assoc., 763 F.2d 1237, 1239 (11th Cir. 1985)

Jenness v. Fortson, 403 U.S. 431 (1971)

Cartwright v. Barnes, 304 F.3d 1138 (11th Cir. 2002)

Coffield v. Handel, 599 F.3d 1276 (11th Cir. 2010)

In addition to the above, I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1) Whether a plaintiff challenging the 1% signature provision of O.C.G.A.

§ 21-1-170 is automatically entitled to present evidence in support of the

Anderson v. Celebrezze “balancing factors” any time a presidential election

is implicated when the plaintiff has not plausibly pled a violation of

constitutional rights since a 5% signature requirement—one five times over

the limit plaintiff claims is unconstitutional – has already been upheld?

- 2) Whether, when a plaintiff has untimely raised arguments for the first time in the motion for reconsideration, the court may nonetheless review them *de novo*, lumping them with all other issues raised in a motion for reconsideration?



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**I. STATEMENT OF THE ISSUES ASSERTED TO MERIT
EN BANC CONSIDERATION**

The panel decision in this case raises at least two issues that deserve consideration by the full Court because, if followed to their logical conclusion, they conflict with existing precedent and would have significant and a wide range of unintended consequences as to all independent candidates seeking inclusion on a presidential ballot.

First, although it is unassailable that a signature requirement of 5% to qualify as a political body is valid, as established by numerous cases, the panel suggests that a signature requirement of 1% -- that is, of course, five times *less* -- might somehow be invalid. It is not enough to just suppose that a 1% burden might be invalid in some unexplained way when a 5% requirement is unconstitutional: under well established law such a supposition must be **plausible** to withstand a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The plaintiffs offer no explanation of how it is plausible to think 1% does not pass muster when 5% does – and the burden of pleading plausibility rested with the plaintiffs. Inventing a new theory on a motion for reconsideration on appeal did not somehow magically create plausibility; they have never done so, nor is it possible to show or say that 1% is plausibly invalid when 5% is valid although five times more burdensome.

Moreover, the panel misconstrues *Bergland v. Harris*, 767 F.2d 1551(11th Cir. 1985) to suggest that *Jenness v. Fortson*, 403 U.S. 431 (1971) and its progeny can be ignored simply because this case involves a presidential election. Neither *Jenness* nor its substantial progeny – all of which interpreted the precise statute at issue here – made any distinction on the basis of the elective office at issue. The panel’s ruling has troubling implications that would now require a trial court to permit extensive presentation of evidence any time a presidential election is at issue – regardless of the plausibility of the facts alleged or the degree of harm caused to a plaintiff.

Second, the panel erred procedurally by improperly applying a *de novo* standard of review to the entirety of Appellants’ arguments. The panel failed to even acknowledge that a motion for reconsideration was filed, let alone apply the proper abuse of discretion standard to the district court’s order denying that motion. This error is crucial because the very arguments that form the core of the panel opinion – the argument that presidential elections require a different analysis, that *Bergland* controlled the instant case, and that *Jenness*, *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002) and *Coffield v. Handel*, 599 F.3d 1276 (11th Cir. 2010) are inapposite – were first raised in Plaintiffs’ Motion for Reconsideration. Moreover, the panel

glosses over the “newly discovered evidence” or clear “error of law and fact” standard required by Fed. R.Civ.P. 59(e), which the district court properly applied in analyzing that motion. In doing so, the panel improperly reversed the district court for failing to consider arguments that were not timely made in response to a motion to dismiss.

II. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

The Plaintiffs filed their complaint on May 25, 2012. Plaintiffs, two independent political organizations, allege that the 1% signature requirement imposed by O.C.G.A. § 21-7-170 for non-statewide offices violates various provisions of the U.S. Constitution and entitles Plaintiffs to a declaration that “Georgia’s statutory scheme violates the Equal Protection Clause.” (Doc. 1 ¶ 20.) Defendants moved to dismiss the case pursuant to Fed.R.Civ.P 12(b)(6) as well as lack of subject matter jurisdiction because the State is immune from suit. (Doc. 4.) Specifically, Defendants argued that *Jenness v. Fortson*, 403 U.S. 341 (1971) and subsequent cases interpreting *Jenness*, including *Coffield v. Handel*, 599 F.3d 1276 (11th Cir. 2010) and *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002) were controlling and dispositive. Plaintiffs responded to the motion to dismiss but failed to argue that the instant case is different because it involves a presidential election and otherwise failed to distinguish *Jenness*, *Cartwright*, or *Coffield*. (Doc. 5.) On July 17, 2012, the

district entered an order granting the motion to dismiss on the basis that *Jenness* and its progeny were on point and that Plaintiffs had failed to state a claim (the “Dismissal Order”). (Doc. 10.) It did not reach the sovereign immunity issue.

On July 24, 2012, Plaintiffs filed a motion for reconsideration in which it suggested for the first time that *Jenness* and its progeny were inapposite and that a previously uncited case – *Bergland v. Harris*, 767 F.2d 1551 (11th Cir. 1985) – controlled. On March 20, 2013, the district court denied that motion, finding that it did not meet the standard of “absolute necessity” required by N.D. L.R. 7.2(E) (the “Reconsideration Order.”) (Doc. 14.) Moreover, the motion met none of the considerations required to grant a motion for reconsideration under that same rule.

Plaintiffs/Appellants filed a notice of appeal with this Court on April 24, 2013. On June 3, 2013, the very day that Appellants’ Brief was due, Appellants filed a motion seeking to extend its time to file that brief until June 17, 2013. This Court Granted that Motion. On June 18, 2013, one day out of time, Appellants filed yet another extension motion, explaining that certain “unanticipated developments,” including preparation for another case and printer cartridge issues prevented him from filing his second request for extension on time. (Motion for Leave to File Out of Time at 2.) Although

the appeal was dismissed for want of prosecution on June 20, 2013, this Court later reinstated it on August 13, 2013. The parties briefed the issues and this Court entered an order on January 6, 2014 concluding that the State of Georgia was immune from suit pursuant to the Eleventh Amendment. At the same time, however, the panel found that the Complaint should not have been dismissed for failure to state a claim and reversed and remanded the case on that issue. Appellees now seek *en banc* review of the panel decision finding that the Complaint should not have been dismissed for failure to state a claim and that *Jenness* and its progeny were inapposite.

III. STATEMENT OF THE FACTS

In this case, Appellants challenge the constitutionality of the signature requirement set forth in O.C.G.A. § 21-2-170. (Complaint, Dkt. 1 ¶ 20.)

That law provides that independent or political body¹ candidates for statewide office may obtain ballot access by a presenting a nominating

¹ 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>.

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. O.C.G.A. § 21-2-170(b) specifically provides that:

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.

The law further provides 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).

IV. ARGUMENT AND CITATION OF AUTHORITY

A. THE PANEL ERRED IN FINDING THAT THE DISTRICT COURT MUST UNDERTAKE AN EVIDENTIARY BALANCING BASED ON THE FACTS ALLEGED

1. The Panel Erred in Finding that Plaintiffs Have Alleged a Plausible Constitutional Injury Under *Bell Atlantic Corp. v. Twombly*

In reversing the district court essentially because “none of the [*Jenness, Coffield, and Cartwright*] cases considered ballot access for a

presidential election,” the panel opinion overlooks the crucial standards imposed by *Twombly*, 550 U.S. at 555, and ignores that Plaintiff’s Complaint has not alleged enough plausible facts to suggest a constitutional violation. *See also Ashcroft v. Iqbal*, 556 U.S. 662(2009). 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. Moreover, “[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.” *Iqbal*, 129 S. Ct at 1949. The “plausibility” requirement is now a fundamental part of the law governing motions to dismiss and their responses: a claim can only survive a motion to dismiss if it is a plausible claim.

The plaintiffs failed to plead any facts in their complaint (or otherwise) that would lead one to believe that a 1% signature requirement is somehow invalid when a 5% signature requirement is well known to be valid. Indeed, they did not even make this assertion until seeking reconsideration after losing in the District Court.

To the contrary, the facts pleaded in the Complaint or materials attached to Plaintiff’s’ Response to the Motion to Dismiss fail to raise the reasonable inference that O.C.G.A § 21-2-270 violated Plaintiff’s

constitutional rights. First, Plaintiff's Complaint only cursorily cites various Constitutional provisions 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). The Complaint does not specifically articulate which Constitutional provision the legislative scheme imposed by O.C.G.A. § 21-2-170 violates, let alone "the character and magnitude of the asserted injury the plaintiff seeks to vindicate" as required by *Anderson. Id.* at 789.

Second, neither the Complaint nor the Response to the Motion to Dismiss makes any plausible allegations to support the assertion that Georgia has "no legitimate interest for its high signature requirement" that "other presidential candidates obtain signatures from 1% of registered voters." (Doc. 5 at 2). By contrast, the *Anderson* standard the panel opinion relies upon expressly recognizes the great deference to the State and its interest in regulating its election process. While the Court concluded that the burdens imposed by the Ohio law at issue outweighed the "minimal interest in imposing a March deadline," it recognized that "not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens." *Id.* at 788. Moreover, *Anderson* specifically recognized that "the state's important regulatory interests are

generally sufficient to justify reasonable nondiscriminatory restrictions such as the requirement that candidates make a preliminary showing of substantial support in order to qualify for a place on the ballot.” *Id.* at 788, 788 n. 9 (citing *Jenness*, 403 U.S. 431). *See also Burdick v. Tashuki*, 504 U.S. 428, 433 (1992).² The panel opinion overlooks these important considerations also outlined by *Anderson*, instead finding simply that presidential elections “ ‘require a different balance’ than a restriction for state elections.” (Panel Op. at 5.)

Third, the panel ignores that Georgia’s electoral scheme has burdened plaintiff’s rights relatively minimally, as independent candidates have typically enjoyed success in Georgia. *See Jenness*, 403 U.S. at 439 (recognizing the success that independent candidates in Georgia have typically had and that “[t]he open quality of the Georgia system is far from merely theoretical”). The signature requirements analyzed in *Jenness*

² Beyond just the legitimate interests recognized by *Anderson*, of course, the Constitution itself gives the States authority over “the Times, Places and Manner of holding Elections for Senators and Representatives.” U.S. Const. art I, § 4, cl. 1. The States’ interests include maintaining fairness, honesty, and order, *Burdick*, 504 U.S. at 433, minimizing frivolous candidacies, *Lubin v. Panish*, 415 U.S. 709, 715 (1974), and “avoiding confusion, deception, and even frustration of the democratic process,” *Jenness*, 403 U.S. at 442. All of these have been found in this Circuit to be compelling interests. *See, e.g., Swanson v. Worley*, 490 F.3d 894, 902 (11th Cir. 2007); *Green v. Mortham*, 155 F.3d 1335-36 (11th Cir. 2008).

remain the same now as then; Georgia's system is now not more "closed" to independent candidates.³ Overall, the panel's bare conclusion that presidential elections require a different balancing test ignores the paucity of plausible Plaintiffs allege, as well as the recognized interests of the State in imposing the signature requirement, and should be reversed.

2. The Panel Improperly Dispenses with *Jenness v. Fortson* and its Progeny

Further, the panel opinion's overwhelming emphasis on the presidential election aspect of Appellants' argument ignores that *Jenness* and its progeny are still good law, on point, and do not amount to an impermissible "litmus test" under *Anderson*. The precise law at issue – O.C.G.A. § 21-2-170 and its predecessor, Ga. Code Ann. § 34-1010 – have been repeatedly upheld against challenge after challenge. In doing so, none of the cases analyzing this particular statute have suggested that the office being run for should impact the constitutionality analysis. *See Jenness* (validating 5% signature requirement for independent congressional and gubernatorial candidates prescribed by O.C.G.A. § 21-2-170(b)); *Coffield*, 599 F.3d at 1277 (validating 5% signature requirement for independent

³ As Appellants themselves note, Libertarian Party presidential candidate Gary Johnson achieved ballot status in Georgia just last year in 2012. (Appellants' Brf. at 14 n. 3.)

congressional candidates); *Cartwright*, 304 F.3d 1139 (upholding 5% signature requirement brought by members of the Libertarian party who wished to run for congressional office).

Neither the face of the law nor the numerous cases upholding it make any meaningful distinction based on the type of office for which a candidate is running – whether presidential, gubernatorial, or congressional. Indeed, in validating Georgia’s electoral system, *Jenness* recognized “a candidate for Governor in 1966 **and a candidate for President in 1968** gained ballot designation by nominating petitions.” *Id.* at 439 (emphasis added).

Accordingly, the district court properly concluded that Plaintiffs could prove no set of facts that would entitle them to relief and dismissed their Complaint. *In re Johannessen*, 76 F.3d 341, 349 (11th Cir. 1996).

**B. THE PANEL ERRED IN FAILING TO REVIEW TO THE
RECONSIDERATION ORDER FOR AN ABUSE OF
DISCRETION**

The panel analyzes Plaintiffs’ appeal as though it only implicated the district court’s ruling on Defendants’ Motion to Dismiss. (See Panel Op. at 3.) In doing so, it mentions only the *de novo* standard of review applicable to the Dismissal Order and ignores that an abuse of discretion standard is applicable to the Reconsideration Order. *Kante v. Countrywide Home Loans*, 430 Fed. Appx. 844, 847-848 (11th Cir. 2011); *Sec’y, Fla. Dep’t of*

Corr., 358 Fed. Appx. 60, 64 (11th Cir. 2009); *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1254 (11th Cir. 2007). Indeed, the panel fails to recognize that a Motion for Reconsideration was filed at all. This omission is particularly significant because the primary case on which the panel relies – *Bergland*, 767 F.2d at 1551 (*see* Panel Op. at 3-5), was not cited by Plaintiff until it filed its Motion for Reconsideration and **after** the District Court’s order granting the Motion to Dismiss. Similarly, Plaintiffs felt compelled to attempt distinguish *Jenness* and its progeny – all of which were extensively relied upon in Defendants’ Motion to Dismiss – and argue that those cases do not apply to presidential elections for the first time only in their Motion for Reconsideration and after judgment. Thus, applying a *de novo* standard to the entirety of Appellees’ arguments is improper.

Additionally, the very arguments that form the core of the panel opinion – the argument that presidential elections require a different analysis, that *Bergland* controlled the instant case, and that *Jenness*, *Cartwright*, and *Coffield* are inapposite – were properly analyzed by the district court under the standards applicable to motions for reconsideration. The district court properly noted that under Northern District LR 7.2(E) motions for reconsideration should be filed only where the petitioner has shown: (1) newly discovered evidence; (2) an intervening development or

change in controlling law; or (3) a need to correct a clear error of law or fact.” (Doc. 14 at 3) (internal citations omitted);⁴ *see Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (To obtain relief under Rule 59(e), a party must identify “newly-discovered evidence or manifest errors of law or fact.”). Significantly, a Rule 59(e) motion cannot be used to raise arguments or present evidence that could have been raised before the judgment was

⁴ Although Plaintiffs styled the Motion for Reconsideration as one under Fed. R.Civ. P. 60(b), the district court essentially treated it as a motion to alter or amend the judgment under Rule 59(e). This is because, regardless of how the parties label the motion, the district court will treat a post-judgment motion as having been filed under Federal Rule of Civil Procedure 59 or 60, depending on the type of relief sought. *Burnam v. Amoco Container Co.*, 738 F.2d 1230, 1231 (11th Cir. 1984). A Rule 59(e) motion under the Federal Rules of Civil Procedure seeks to alter or amend a judgment and must be filed no later than ten business days after the entry of judgment. Fed.R.Civ.P. 59(e); *see Mays v. U.S. Postal Serv.*, 122 F.3d 43, 46 (11th Cir. 1997). By contrast, a Rule 60(b) motion under the Federal Rules of Civil Procedure, by contrast, may provide relief from a judgment due to: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which could not have been discovered earlier with due diligence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) a void judgment; (5) a judgment that has been satisfied, released, discharged, reversed, or vacated; or (6) any other reason justifying relief from the operation of the judgment. Fed.R.Civ.P. 60(b). Regardless of the type of motion, Plaintiffs’ Motion for Reconsideration was properly denied, as it failed to meet the standards of either Rule 59(e) or Rule 60(b).

Moreover, regardless of the type of motion, this Court must review that decision for an **abuse of discretion**. *Sec’y, Fla. Dep’t of Corr.*, 358 Fed. Appx. at 64 (“[a]ccordingly, regardless of whether it fell under Rule 59(e) or Rule 60(b), we conclude that the district court did not abuse its discretion by denying the motion for relief from the judgment . . .”) (citing *Burke*, 252 F.3d at 1263; (addressing Rule 60(b) motions); *Drago v. Jenne*, 453 F.3d 1301, 1305 (11th Cir. 2006) (addressing Rule 59(e) motions)).

entered. *Id.* Because Plaintiffs failed to raise *Bergland* – a 25-year old, three-judge opinion – until after judgment, that case did not present “an intervening development in controlling law” such that it formed a proper basis for reconsideration. (Doc. 14 at 7.) Moreover, the district court properly noted that “Plaintiffs have not provided a reason why they failed to respond to Defendants arguments before this Court issued its Order” dismissing the Complaint. (Doc. 14 at 11, n. 3.) Thus, the district court was entirely within its discretion in denying the Motion for Reconsideration. *Am. Home Assurance Co. v. Glenn Estess & Assoc.*, 763 F.2d 1237, 1239 (11th Cir. 1985) (affirming district court’s denial of motion to amend based on new legal argument because allowing reconsideration of arguments raised for the first time in a motion to amend because doing so “affords the litigant ‘two bites at the apple.’”).

In sum, the district court applied the proper standards review in rejecting the arguments made in Plaintiffs’ Motion for Reconsideration. To have held that Plaintiffs’ belated arguments provided a proper basis for reconsideration would have been an error that ignores the standards for reconsideration prescribed by Fed.R. Civ. P. 59(e) and N.D.Ga. L.R. 7.2(E). Moreover, district court cannot be reviewed *de novo* and reversed for failing to review arguments that were never made at the motion to dismiss stage.

The panel improperly failed to make any of these distinctions, instead lumping the whole of the arguments together as though they were timely argued in response to the Motion to Dismiss. Such error merits reconsideration and reversal of the panel opinion.

V. CONCLUSION

For the foregoing reasons Appellees the State of Georgia and Secretary Brian Kemp, in his official capacity, respectfully request that the Eleventh Circuit rehear this case *en banc* or, in the alternative, that the panel reconsider its opinion and reverse.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing pleading, prior to filing the same, by depositing a copy thereof in the United States Mail, properly addressed upon:

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This 27th day of January, 2014.




KELLY CAMPANELLA 360501
Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

The body of the brief has been typed in “Times New Roman,” 14 point.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 2,964 words according to the word processing system utilized by the Office of the Attorney General.



Kelly Campanella
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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-11816
Non-Argument Calendar

D.C. Docket No. 1:12-cv-01822-RWS

GREEN PARTY OF GEORGIA,
CONSTITUTION PARTY OF GEORGIA,

Plaintiffs-Appellants,

versus

STATE OF GEORGIA,
SECRETARY, STATE OF GEORGIA,

Defendants-Appellees.

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

(January 6, 2014)

Before TJOFLET, JORDAN, and COX, Circuit Judges.

PER CURIAM:

The Green Party of Georgia and the Constitution Party of Georgia (the “Plaintiffs”) challenge in this appeal the district court’s order dismissing their complaint for failure to state a claim upon which relief may be granted.¹ Because the district court erred by concluding that this case was indistinguishable from controlling decisions we reverse the district court’s order and remand for further proceedings.

I. Procedural History

The Plaintiffs filed this suit claiming that Georgia’s petition-signature requirement for ballot access violates the First and Fourteenth Amendments of the United States Constitution. To be listed on the ballot in Georgia, any presidential candidates not affiliated with a political party recognized by Georgia must present a petition with signatures from 1% of the total number of registered voters in Georgia.² The Georgia Secretary of State and the State of Georgia moved to

¹ The State of Georgia contended in its motion to dismiss that it was immune from suit under the Eleventh Amendment. (R. 4-1 at 14-15.) The Plaintiffs did not contest the State of Georgia’s immunity in response. (R. 5.) The district court dismissed the action for failure to state a claim without considering the State of Georgia’s immunity. (R. 10.) The Plaintiffs do not dispute the State of Georgia’s immunity on appeal. (Appellant’s Br. at 3.) Because the State of Georgia is immune from this suit under the Eleventh Amendment, we instruct the district court to dismiss the State of Georgia from this action for want of jurisdiction on remand. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 908 (1984).

² Georgia classifies political organizations as either a “political body” or a “political party.” To be a political party, the organization must have received at least 20% of the total vote in an election for governor or president. OCGA §§ 21-2-2(23)-(25). While political parties receive automatic ballot access, a political body must file a nomination petition signed by either 1% of the total number of registered voters for a statewide office (including the presidential

dismiss this case contending that past decisions of the United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit have conclusively resolved the issue. The Defendants referenced a number of cases where a 5% petition-signature requirement for non-statewide ballot access was upheld and reasoned that if a 5% requirement was constitutional, the lower 1% requirement must also be constitutional. *See, e.g., Jeness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970 (1971); *Coffield v. Kemp*, 599 F.3d 1276 (11th Cir. 2010); *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002). Though none of the cases Georgia referenced considered ballot access for a presidential election, the district court agreed with Georgia Defendants reasoning and dismissed the action for failure to state a claim. The Plaintiffs appeal.

II. Discussion

We review de novo a motion to dismiss for failure to state a claim. *Timpson v. Sampson*, 518 F.3d 870, 872 (11th Cir. 2008).

The Plaintiffs contend that the district court erred by concluding that this case is indistinguishable from previous decisions upholding Georgia's 5% petition-signature requirement for non-statewide elections. As the Plaintiffs note, we previously addressed whether our past decisions upholding a 5% petition-signature

election) or 5% of the total number of registered and eligible voters for any other office. OCGA § 21-2-170.

requirement preclude a challenge to a lower petition-signature requirement for a presidential candidate and we concluded that our past decisions are distinguishable. *See Bergland v. Harris*, 767 F.2d 1551 (11th Cir. 1985).

To determine whether a ballot access law violates the First and Fourteenth Amendments, we follow the approach laid out in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564 (1983). *Bergland*, 767 F.2d at 1553. In *Anderson*, the Court rejected “the use of any ‘litmus-paper test’ for separating valid from invalid restrictions.” *Id.* (citing *Anderson*, 460 U.S. at 789, 103 S. Ct. at 1570). Rather, a court must first “evaluate the character and magnitude of the asserted injury to rights protected by the First and Fourteenth Amendments. Second, it must identify the interests advanced by the State as justifications for the burdens imposed by the rules. Third, it must evaluate the legitimacy and strength of each asserted state interest and determine the extent to which those interests necessitate the burdening of the plaintiffs’ rights.” *Bergland*, 767 F.2d at 1553-54.

In *Bergland*, the district court dismissed an action challenging Georgia’s then 2.5% petition signature requirement for a presidential candidate. The district court based its dismissal on our past decisions that upheld a 5% petition signature requirement for other offices. We rejected this “litmus-paper test” approach and held that our past decisions “do not foreclose the parties’ right to present the evidence necessary to undertake the balancing approach outlined in *Anderson*.” *Id.*

at 1554. Furthermore, a state's interest in regulating a presidential election is less important than its interest in regulating other elections because the outcome of a presidential election "will be largely determined by voters beyond the State's boundaries" and "the pervasive national interest in the selection of candidates for national office . . . is greater than any interest of an individual State." *Anderson v. Celebrezze*, 460 U.S. 780, 795, 103 S. Ct. 1564, 1573 (1983). Consequently, a ballot access restriction for presidential elections "requires a different balance" than a restriction for state elections. *Bergland*, 767 F.2d at 1554; *see also McCrary v. Poythress*, 638 F.2d 1308, 1314 n.5 (5th Cir. 1981) (holding that the constitutionality of Georgia's ballot access law may be different as applied to a presidential election).

The same analysis we applied in *Bergland* also applies to this case. The district court's approach employs the type of "litmus-paper test" the Supreme Court rejected in *Anderson*. *See Anderson*, 460 U.S. at 789, 103 S. Ct. at 1570. And, the district court failed to apply the *Anderson* balancing approach.

III. Conclusion

Accordingly, we conclude that this case is distinguishable from our past decisions and that the district court erred by dismissing the action against the Defendants for failure to state a claim. We reverse the judgment of the district court and remand for further proceedings consistent with this opinion. On remand,

the district court should dismiss the action against the State of Georgia for want of jurisdiction because it is immune from suit under the Eleventh Amendment.

REVERSED AND REMANDED WITH INSTRUCTION.