

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

MOTION FOR STAY OF MANDATE FOR 90 DAYS

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NO. 13-11816-EE

CERTIFICATE OF INTERESTED PERSONS

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

Raffauf, J.W. - former counsel for Plaintiff Appellants

Ritter, Stefan – counsel for Defendant-Appellees

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

Whitney, Richard – counsel for Plaintiff Appellants

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Defendants-Appellees.

**MOTION OF APPELLEES
TO STAY MANDATE**

Come Now, Brian Kemp, Secretary of State for the State of Georgia, and the State of Georgia, Appellees in the above-styled case, through counsel, Samuel S. Olens, Attorney General for the State of Georgia, and pursuant to Federal Rule of Appellate Procedure 41(d)(2)(A) and Eleventh Circuit Rule 41, move to stay the mandate pending Appellees' filing of a petition for a writ of certiorari to the United States Supreme Court and the Supreme Court's final disposition of that petition. As shown below, the certiorari will present two substantial questions, and there is good cause for a stay.

Specifically, substantial questions exist as to whether: (1) under existing Supreme Court precedent, 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*, 460 U.S. 780 (1983) 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 has already been upheld; and (2) when a plaintiff has untimely raised arguments for the first time in a motion for reconsideration, the court may nonetheless review them *de novo*, lumping them with all other issues raised in a motion for reconsideration?

This appeal arises out of a complaint filed by then-Plaintiffs, two independent political organizations, on May 23, 2012. That complaint alleges 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.) 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. On July 17, 2012, the District Court 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.)

Plaintiffs/Appellants filed a notice of appeal with this Court on April 24, 2013, and the parties briefed the issues. On January 6, 2014, this Court entered an order 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, as to Secretary Kemp, remanded the case on that

issue. Appellees filed a timely motion for reconsideration *en banc*, which was denied on March 28, 2014.

In concluding that Plaintiffs are entitled to present evidence on the 1% signature requirement, this panel's decision conflicts with the consistent precedent established by *Jenness*, *Coffield*, and *Cartrwright*. Further, the panel ignores that Plaintiffs' complaint has not alleged enough plausible facts to suggest a constitutional violation pursuant to the standards established by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). 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% requirement is well known to be valid. Indeed, they did not even make this assertion until seeking reconsideration from the District Court. This panel's decision establishes the need for the Supreme Court to clarify whether and in what circumstances a 1% requirement – which is five times less than the 5% requirement which has already been upheld – can be plausibly invalid.

Additionally, the panel decision reviews arguments Plaintiffs made for the first time in a motion for reconsideration *de novo*, essentially lumping them with all other issues raised in a motion to dismiss. This conflicts with existing law making clear that an abuse of discretion standard is applicable

to orders on motion for reconsideration. Indeed, the panel decision fails to recognize that a motion for reconsideration was filed at all. Thus, Appellees also intend to ask the Supreme Court to clarify this inconsistency.

As this case presents the questions stated, Appellees believe that it may present an ideal forum for Supreme Court review of the issue and thus are exploring seeking certiorari on this issue. Should the Supreme Court accept certiorari, this Court's finding would be at issue thus supporting the need to stay the mandate.

CONCLUSION

WHEREFORE, for all these reasons, Appellees pray that this Court stay the mandate for a period of 90 days pending Appellees filing a petition of writ of certiorari in the Supreme Court. Once Appellees file their petition they will notify the Court in writing and seek a further stay.


[Signatures on following page]

Respectfully submitted this 4th Day of April, 2014,

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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:

Richard Whitney
Milwood Executive Suites
1400 North Wood Rd.
Murphysboro, IL 62966

This 4th day of April, 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 897 words according to the word processing system utilized by the Office of the Attorney General.



Kelly Campanella
Georgia Bar No. 360501
Assistant Attorney General