

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

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

v.

**BRIAN KEMP,
GEORGIA SECRETARY
OF STATE,
Defendant.**

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C.A. No.:1:12CV1822

**DEFENDANT’S RESPONSE TO PLAINTIFFS’ MOTION FOR SUMMARY
JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS’MOTION FOR SUMMARY JUDGMENT**

COMES NOW, Brian Kemp, Secretary of State for the State of Georgia, by and through his counsel of record, and files his Response to Plaintiffs’ Motion for Summary Judgment and Memorandum of Law In Support Of Plaintiffs’ Motion for Summary Judgment¹ and shows this Court as follows:

¹ Secretary Kemp also incorporates by reference his simultaneously filed Response to Plaintiff’s Statement of Material Facts and the Affidavit of Linda Ford (“Ford Aff.”).

I. INTRODUCTION

Plaintiffs’ motion for summary judgment² sets forth a series of fragmented quotes lauding the generally hallowed place that voting holds in terms of constitutional rights, but fails to explain how any of those principles apply to the allegations of this case. Even more problematically, Plaintiffs apparently believe that the sole record evidence they have set forth in support of their motion – four thin affidavits plagued with irrelevant information and inadmissible assertions – are sufficient to demonstrate that “there is no genuine issue as to any material fact” and that Plaintiffs are “entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Yet, Plaintiffs have fallen fall short of showing that “that there is an

² When originally filed on June 27, 2012, Plaintiffs styled their motion as one for “Summary Judgment or Alternatively for Preliminary Injunction.” Because the 2012 election which was the original object of the Complaint has occurred and the next Presidential election is not until 2016, Defendants respectfully submit that Plaintiffs’ contemporaneously filed Motion to Expedite (Doc. 6) is now moot. (*See* Doc. 6 ¶ 7 “An expedited ruling on the issues presented in this action is essential to enable Plaintiffs . . . to effectively participate in the 2012 general election.”) Accordingly, Defendants will approach this Response as one geared toward a summary judgment motion seeking ultimate injunctive relief rather than a preliminary injunction motion seeking to immediately enjoin Defendant.

To the extent the Court chooses to construe Plaintiffs’ Motion as one for preliminary injunction instead of summary judgment, however, Defendant states that the request for injunction must fail because there is little likelihood of success on the merits for the reasons stated throughout this Response. Additionally, given the time between now and the next Presidential election, there is no irreparable harm to the plaintiffs or to the public in declining to issue a preliminary injunction at this juncture. *See Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (discussing preliminary injunction elements).

absence of evidence to support the [Defendant's] case.” *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Rather, as demonstrated by the established case law described below, Georgia’s ballot access law imposes a relatively minimal burden on independent parties; indeed, through either of two statutory mechanisms, a third party Presidential candidate (*i.e.* beyond the established Republican and Democratic parties) has appeared on each of Georgia’s general election ballots since at least 1992. Moreover, Plaintiffs give extremely short shrift to the State’s legitimate interests, which have repeatedly been recognized by United States Supreme Court precedent.

For the reasons set forth below, Plaintiffs are not entitled to judgment as a matter of law. Therefore, Plaintiffs’ motion for summary judgment should be denied.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Rational Basis Review Applies to this Case

While political parties do have First and Fourteenth Amendment rights to associate for the advancement of common beliefs, those rights do not insulate them from state regulation. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). The Supreme Court has established with “unmistakable clarity” that States “have an ‘undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot.’” *Munro v. Socialist*

Workers Party, 479 U.S. 189, 194, (1986) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-789, n. 9 (1983)). The right of States to require a showing of a substantial modicum of support before a political party's candidate is allowed to appear on the ballot furthers the States' compelling interests in reducing election and campaign related disorder such as ballot overcrowding, frivolous candidacies, or voter confusion and preserving the ballot for serious contenders in an election. *Munro*, 479 U.S. at 194-195; *Timmons*, 520 U.S. at 358.

There is no bright-line rule or litmus test to determine whether a particular ballot restriction is constitutional. *Id.* at 193. "When deciding whether a state election law violates First and Fourteenth Amendment associational rights, [the Supreme Court] weighs the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons*, 520 U.S. at 358. A ballot access regulation imposing "severe burdens" on a person's rights must be narrowly tailored and further a compelling State interest. *Id.* "Lesser burdens, however, trigger less exacting review," and, thus, require only a showing that the restrictions are reasonable and non-discriminatory when they are justified by a state's important regulatory interests. *Id.*

Like the Petitioners in *Burdick v. Takushi*, 504 U.S. 428, 432 (1992), Plaintiffs in this case “proceed from the erroneous assumption that a law that imposes *any* burden upon the right to vote must be subject to strict scrutiny.” (emphasis added). (See MSJ, Doc. 7, at 7, 9.) As the Supreme Court explained in *Burdick*, however, this assumption is misplaced. While voting is “one of the most fundamental significance under our constitutional structure, ... the right to vote in any manner and the right to associate for political purposes through the ballot are [not] absolute. *Id.* At 433 (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, (1979)); see also U.S. Const Art. I, § 4, cl. 1, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). This is because “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Id.* at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730, (1974)).

The Court further explained that because any election laws will necessarily impose some burden upon individual voters, “subject [ing] every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Id.* (“[T]he mere fact that a State's system "creates barriers . . . tending to limit the field of

candidates from which voters might choose . . . does not of itself compel close scrutiny.") (internal citations omitted)).

Instead, the Court made clear that a “more flexible standard,” as set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) applies: a court considering a challenge to a state election law must first weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule.” Finally, the court must consider “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.* at 253 (citing *Anderson*, 460 U.S. at 789). The Court explained that:

Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 289 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.

Id. at 254 (citing *Anderson*, 460 U.S. at 788-89). In sum, the “totality” of the statutory election machinery must be examined. *McCrary v. Poythress*, 638 F.2d 1308, 1312 (5th Cir. 1981); *see also Storer v. Brown*, 415 U.S. 724, 737 (1974).

Significantly, plaintiffs bear the “ ‘initial burden of showing that [the state’s] ballot access requirements seriously restrict the availability of political opportunity.’ ” *Nader v. Cronin*, 620 F.3d 1214, 1217-18 (9th Cir. 2010) (quoting *Libertarian Party of Wash. V. Munro*, 31 F.3d 759 761-62 (9th Cir. 1994); *see also Burdick*, 504 U.S. at 432.

B. Plaintiffs Have Failed to Demonstrate that Georgia Law Imposes a Significant Burden

1. Relevant Precedent Suggests that Plaintiffs Have Not Been Unconstitutionally Burdened

Though Georgia’s election laws have an impact on the right to vote, Plaintiffs have failed to show that the challenged law is a “severe” restriction warranting strict scrutiny. *See Burdick*, 504 U.S. at 438-39 (finding Hawaii’s wholesale ban on write-in voting imposes only a limited burden on voters’ First and Fourteenth Amendment rights); *Timmons* , 520 U.S. at 363 (1997) (concluding burdens imposed by Minnesota’s fusion candidacy ban on plaintiffs’ First and Fourteenth Amendment associational rights “though not trivial – are not severe.”)

Georgia’s ballot access regulations impose reasonable limitations on a party’s access to the general election ballot. As a preliminary matter, Georgia’s election machinery has long been blessed by the U.S. Supreme Court as “far from merely theoretical” and as within the bounds of free speech and association contemplated by the First and Fourteenth Amendments. *Jenness*, 403 U.S. at 439-

40; *see also McCrary*, 638 F.2d at 1310 (recognizing the Supreme Court’s “broad approval of Georgia’s election procedures.”)³

For example, in *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 792 (1983), the Eleventh Circuit upheld a Florida statute requiring that a minor party obtain a nominating ballot signed by 3% of the state’s registered voters to have the name of its candidates for statewide office. The burden presented on the plaintiffs

³ Although not explicitly raised in their opening summary judgment brief, Plaintiffs will likely argue that *Jenness* – or any other case involving a non-Presidential election – must be disregarded since the state has an arguably diminished interest in creating ballot-access requirements for candidates seeking the presidency. *See Anderson*, 460 U.S. at 795. In considering this limit, however, it must be remembered that *Anderson* necessarily recognizes a state may still regulate the ballot in the presidential election context. *See Coalition for Free and Open Elections, Prohibition Party v. McElderry*, 48 F.3d 493, 501 (10th Cir. 1995) (“*Anderson* does not . . . stand for the proposition that every state regulation of Presidential elections will fail to pass constitutional muster. Instead, . . . *Anderson* simply instructs us to consider the uniquely national interests involved in Presidential elections when we balance the interests at stake.”). Additionally, numerous cases considering similar ballot access restriction laws in the context of Presidential elections, have nonetheless upheld those restrictions after analyzing the totality of the circumstances. *See, e.g., Hall v. Simcox*, 766 F.2d 1171 (7th Cir. 1985) (rejecting presidential candidates’ challenge to an Indiana law requiring independent candidates to submit a petition containing signatures of 2% of the total number of voters who voted for the state’s secretary of state in the last general election); *Barr & Libertarian Party v. Ireland*, 575 F.Supp. 2d 747, 759 (S.D. WV 2008) (rejecting presidential candidates’ challenge to a West Virginia law requiring independent groups seeking ballot access to submit a certificate bearing the signatures of at least 2% of the entire vote cast in the last presidential general election).

in that case is analogous, if not patently greater than the burden imposed on Plaintiffs here.⁴ Indeed, from a sheer volume perspective, 144,492 signatures were required in that case – nearly **three times** the amount required here. *Id.* at 794. Nonetheless, the Court concluded that the statute was not impermissibly burdensome but “provide[d] a realistic means of access.” *Id.*; *see also Storer*, 415 U.S. at 740 (noting that, while substantial, “gathering 325,000 signatures in 24 days would not appear to be an impossible burden. Signatures at the rate of 13,542 per day would be required, but 1,000 canvassers could perform the task if each gathered 14 signers a day. On its face, the statute would not appear to require an impractical undertaking for one who desires to be a candidate for President.”)

In making this determination, the Court found significant that Florida’s statute – like Georgia’s – prescribed no geographical limitation on the number of signatures that can be gathered from a certain area. *Id.* Thus, a minor party could efficiently concentrate its signature gathering efforts in densely populated areas. *Id.* The Court also found significant that Florida’s Election Code “places no restrictions on who can sign a petition other than requiring that a signer be a registered voter.” *Id.* In other words, any person can sign regardless of party

⁴ Although the case involved only plaintiff candidates who had run for local or statewide office by the time it reached the Eleventh Circuit, Ed Clark, one of the original Plaintiffs, was a 1980 candidate for United States President. The district court dismissed him, however, for lack of standing because he was not a current member of the Libertarian Party of Florida.

affiliation. The same is true of Georgia's code. *See Jenness* 403 U.S. at 438-39 (“Georgia imposes no suffocating restrictions whatever on the free circulation of nominating petitions”) Third, the Court recognized that the 188 days provided for a minor party to conduct its petitioning efforts was eminently reasonable given the Supreme Court had approved much shorter periods of time as permissible. *Id.* (citing *Jenness*, 403 U.S. at 433 (180 days); *Storer*, 415 U.S. at 739-40 (24 days); *Am. Party of Tex.*, 415 U.S. at 786 (55 days)). Georgia, of course, also freely allows for write-in votes. *Jenness*, at 438.

In the face of this established law approving similar, if not more burdensome, election structures, Plaintiffs offer only a handful of disjointed and thinly supported arguments. At the core of Plaintiffs protests is the argument that “Georgia is one of the most restrictive states in that it requires 1% of actual registered voters or over 50,000 votes.” (Doc. 7 at 7.) Notwithstanding that cases like *Libertarian Party of Florida* and *Barr v. Ireland* demonstrate that other states have indeed adopted ballot access requirements more stringent than Georgia's, Plaintiffs ignore that the Eleventh Circuit has already found this argument unavailing. *See Libertarian Party of Fla.*, 710 F.3d at 793-94 (rejecting plaintiffs' argument that Florida's 3% requirement is unconstitutionally burdensome because a majority of states protect similar interests by imposing a lesser requirement). This is because a “court is no more free to impose the legislative judgments of

other states on a sister state than it is free to substitute its own judgment for that of the state legislature.”; *see also Swanson v. Worley*, 490 F.3d 894 (11th Cir. Ala. 2007) (rejecting assertion in a similar affidavit by Richard Winger that Alabama is one of the “most restrictive” ballot access states); *see also Storer*, 415 U.S. at 729-30, 736.⁵

Second, Plaintiffs contend – without any factual support– that “Georgia lacks a legitimate state interest” in the signature requirement and that it must choose a “less drastic means” to achieve its goals. (Doc. 7 at 7.) From an evidentiary standpoint, such an empty assertion does nothing to move forward Plaintiff’s burden of establishing an undue hardship absent some facts in the record. (*See* Section II.C. below regarding Georgia’s legitimate interests). Legally, the assertion is also unavailing since the Supreme Court has recognized that “Obviously any percentage or numerical requirement is ‘necessarily arbitrary.’” *Am. Party of Texas*, 415 U.S. at 783. Thus, the Court’s focus should not be on whether the particular percentage could be lowered and still protect the states

⁵ In this vein, Plaintiffs also suggest that *American Party of Texas v. White* stands for proposition that 1% is the maximum percentage of voter signatures that the stat may require for qualification purposes. (Doc. 7 at 5.) Aside from cases that have specifically upheld *higher* percentages, this suggestion flies in the face of *McCrary*, which recognized that “[Plaintiffs] are simply wrong in stating . . . that the Court in *White* established 1% as the maximum percentage of voter signatures that the state may require for qualification purposes.” 638 F.2d at 1313.

interests but whether the state's election machinery as a whole operates to "freeze" the status quo by effectively barring all candidates other than those of the major parties and provide a realistic means of ballot access. *Libertarian Party of Fla.*, 710 F.2d at 794.

2. Plaintiffs Have Offered No Reliable Record Evidence Establishing an Impermissible Burden

The sole factual "evidence" Plaintiffs present in support of their motion for summary judgment – four affidavits – allege sparse facts that fall far short of demonstrating that Plaintiffs have been unconstitutionally burdened. Moreover, the affidavits are riddled with admissibility issues including lack of foundation and hearsay. They do nothing to satisfy the Plaintiffs' burden of demonstrating a significant burden on the Green and Constitutional Parties. *See Libertarian Party of Fla.*, 710 F.2d 70 at 794 ("conclusory allegations cannot prevail.") (citing *Am. Party of Texas*, 415 U.S. at 781); *see also Bergland v. Harris*, 767 F.3d 1551, 1553-54 (finding that bare-bones assertions in two affidavits presented an "insufficient factual record" to carry out the *Anderson* analysis necessary to award summary judgment). Nor do the affidavits effectively counter the State's recognized interests cited below.

Under Federal Rule of Civil Procedure 56, an affidavit filed in support of a motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is

competent to testify on the matters stated.” Fed. R. Civ. P. 56(c)(4). Summary judgment cannot be granted on the basis of inadmissible hearsay. *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293 (11th Cir. 2012). “Hearsay” is defined as a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Moreover, the Court cannot accept testimony that is not based on personal knowledge. *See Citizens Concerned About Our Children v. School Bd. Of Broward County*, 193 F.3d 1285, 1295, n. 11 (11th Cir. 1999).

Defendant objects to large portions of three of Plaintiffs’ affidavits. First, the affidavit of Hugh Esco (Doc. 7, Ex. 1) is largely irrelevant in that it purports to establish information regarding Green Party candidacies beyond the scope of a Presidential Election, which is the subject of this lawsuit. (*See* Esco Aff. ¶¶ 5, 7-8, 12, 14, 16). Second, the Affidavit offers no basis for the Court to infer that Mr. Esco has personal knowledge of the particular numbers he cites as total signatures received during a nominating petition drive or total write-in votes a particular candidate received during a particular election. (Esco Aff. ¶¶ 5, 9, 11, 12, 19, 21). Finally, Mr. Esco’s affidavit relies heavily on hearsay statements without any basis in fact. (*See* Esco Aff. ¶ 13 (describing “an oral conversation” with a member of the Carter Center staff and a story told by President Carter’s former security detail); ¶ 24 (describing the purported legislative intent in Georgia’s 1943 election

law and citing books written by others); ¶ 27 (quoting remarks made by President John Kennedy). And regardless of these admissibility issues, the Esco Affidavit simply does not set forth information sufficiently describing particular efforts the Green Party has taken to gather signatures such that the Court can undertake the proper balancing test. *See Bergland*, 767 F.3d at 1553-54.

The affidavit of Garland Favorito (Doc. 7, Ex. 3) on behalf of the Constitution Party suffers from many of the same admissibility issues as the Esco Affidavit. Much of the affidavit discusses purported incidents that are utterly unrelated to the recent attempts to gain Constitution Party access to a presidential general election ballot and/or the Anderson balancing test. (*See Favorito Aff.* ¶¶2, 5-6; ¶¶8-9). Second, the Affidavit is premised largely on hearsay statements and/or information of which there is no reason to believe Mr. Favorito has personal knowledge. (*See Favorito Aff.* ¶ 1 (conveying purported communications from State officials to the Constitution party regarding the 1996 Presidential Election); ¶ 4 (offering the purported hearsay statements of Edva Smith); ¶ 8-9 (conveying purported requests from the public and the corresponding reaction and “acknowledgement” of Mark Hamilton); ¶10 (conveying purported hearsay findings included in “Ballot Access News,” a publication that is in not in any way described). Finally, the affidavit makes several statements that appear to be Mr. Favorito’s legal conclusions or are utterly unconnected to any facts in evidence.

(Favorito Aff. ¶ 3 (“we do not know if the reported vote totals are correct”); ¶ 6 (“We still do not believe the reported results were correct.”); ¶ 10 (“Georgia continues to have many of the most restrictive ballot access petitioning requirements” and “Georgia is not providing fair and equal elections according to the U.S. Constitution.”) All of these statements are inadmissible in a summary judgment affidavit and may not be considered by the Court. *See* Fed. R. Civ. P. 56(c)(4); *UPS Ground Freight*, 683 F.3d at 1293.

Finally, the affidavit of “expert” Richard Winger does not sufficiently demonstrate a severe burden on Plaintiffs constitutional rights. To the extent Plaintiffs seek to offer the Winger Affidavit as an “expert opinion,” Defendant objects since the affidavit does not remotely meet the requirements of Federal Rule of Evidence 702. The affidavit gives no indication of Mr. Winger’s “skill, experience, training, or education” beyond the fact that he has previously served as an expert. Further, the affidavit gives no indication of the data on which it is based or how Mr. Winger applied his purported “principles and methods” to the facts of this case. Despite the Winger Affidavit’s assertion to the contrary, Mr. Winger’s basic resume or curriculum vitae is not even attached.

Yet, even if treated as the affidavit of a mere fact witness, Mr. Winger’s affidavit still suffers from the same admissibility issues inherent in Mr. Esco’s and Mr. Favorito’s affidavits. It avers information that is entirely irrelevant to the

Anderson balancing factors. (Winger Aff. ¶¶ 1-2 (describing the ballot access practices of other states); ¶ 3 (describing the failed efforts of a purported “Americans Elect” party to nominate a candidate); ¶ 7 (describing the history of government printed ballots since 1922)). Mr. Winger’s affidavit also gives no indication as to where he obtained the data and vote tallies he cites respecting independent party financing and/or election results in several states. (Winger Aff. ¶¶ 1-2, 3-6.)

In sum, these affidavits, which serve as Plaintiff’s sole record evidence in support of their motion, provide shoddy support for the Statement of Material Facts required by LR 56.1(B), and do nothing to demonstrate that Georgia’s ballot access laws have imposed a severe burden on them in the context of Presidential races.. Nearly the entire content of Plaintiff’s affidavits is unreliable, lack foundation, or is irrelevant. And even if they were not plagued with such admissibility issues they do not sufficiently demonstrate the particular burdens the Green and Constitution parties have faced in attempting to access Georgia’s general election presidential ballot. *See Bergland*, 767 F.3d at 1553-54

C. Georgia Has a Legitimate and Compelling Interest in Imposing a 1% Signature Requirement

The Supreme Court has long recognized that ballot access restrictions similar to Georgia’s 1% requirement serve the legitimate interest if “avoiding the possibility of unrestrained factionalism” and ballot overcrowding at the general

election.” *Burdick*, 504 U.S. at 439 (internal citations omitted). Similarly, Georgia’s election laws ensure an efficient election process that seeks to avoid voter confusion and ballot overcrowding. (Ford Aff. ¶ 7.) This is particularly true in the context of a Presidential election, which in Georgia, typically attracts a large number of people interested in being candidates. (Ford Aff. ¶ 7.)

Eleventh Circuit and U.S. Supreme Court precedent make clear that avoiding voter confusion is a “compelling” state interest. *Libertarian Party of Fla.*, 710 F.2d at 793(citing *Lubin v. Panish*, 415 U.S. 709, 715 (1974); *Am. Party of Texas*, 415 U.S. 767, 782 n.14, 1307 n. 14; *Bullock v. Carter*, 405 U.S. 134, 145 (1972)). In *Jenness*, for example, the Court recognized that the State has an important 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.” *Jenness*, 403 U.S. at 442.

Plaintiffs inaccurately believe these recognized interests may be ignored because, in the purported “expert” opinion of Richard Winger, “Georgia has never suffered form an over-crowded general election ballot for President” (Doc. 7, Ex. 4 ¶ 7.) Setting aside the admissibility and reliability issues inherent in Mr. Winger’s Affidavit (*see* Section II. B. above), whether or not Georgia has demonstrated a

crowded ballot is irrelevant. When a person challenges a State's requirement for a political party to demonstrate a significant, measurable quantum of community support, there is **no** requirement that the State make a particular showing of voter confusion, ballot overcrowding, or frivolous candidacies to support a reasonable restriction on ballot access. *Munro*, 479 U.S. at 195. ("We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access."). To require states to make such a showing as a predicate to the imposition of reasonable ballot restrictions would:

invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Id. at 195-196. Thus, the State may rely on these interests, and is not required to prove that any of them have actually manifested themselves in the general election ballot.

Accordingly, this Court need simply review the particular restriction at issue, in the context of the entire ballot access scheme as a whole, to determine whether it is a reasonable, non-discriminatory restriction or, as a practical matter, it renders ballot access merely theoretical. *Am. Party of Texas*, 415 U.S. at 781 ("[I]t

is only ‘invidious discrimination’ which offends the Constitution.”). Where a ballot access scheme does not impose “insurmountable obstacles to fledgling political party efforts to generate support among the electorate and to evidence that support within the time allowed” the Court has upheld the scheme. *Id.* at 784. Similar cases upholding arguably more restrictive statutes combined with the absence of evidence Plaintiff has presented demonstrating an “insurmountable burden” suggest that Plaintiffs have not shown Georgia ballot access to be “merely theoretical.” Their summary judgment motion should be denied.

D. Georgia’s Ballot Access Laws Ballot Are Reasonably Related to the Protection of its Legitimate and Compelling State Interests

Plaintiff’s motion asserts, without any citation to record evidence, that the burdens imposed by Georgia’s ballot access laws are not reasonably related to its interests and that the State must use a “less drastic means” to achieve its goals. (Doc. 7 at 7.)

To the contrary, Georgia’s ballot access laws have a demonstrable record of imposing reasonable burdens that have been met by minor parties. There are two separate routes for a political body to gain ballot access in a Presidential election:

- (1) Via nomination petition – *i.e.* obtaining signatures from one percent of registered voters eligible to vote in the last election (O.C.G.A. § 21-2-170(b)); OR
- (2) Via convention nomination – *i.e.* nominating a candidate for statewide office or President and having that candidate receive a number of votes equal to one percent

of the total number of registered voters who were registered and eligible to vote in such general election (O.C.G.A. § 21-2-180(2)). (*See* Ford Aff. ¶¶ 5-6.) Political parties other than the established Republican and Democratic Parties have repeatedly achieved access to Georgia’s ballot via both methods in the past twenty plus years. (*Id.* ¶¶ 8-9.) Specifically, independent Presidential candidates gained access to Georgia’s general election ballot via the first method in 1992 (Ross Perot), 1996 (Ross Perot), and 2000 (Pat Buchanan), respectively. (*Id.* ¶ 8.) Several Libertarian Party presidential candidates have also gained access to Georgia’s general election ballot in every presidential election year since 1992: 1992, 1996, 2000, 2004, 2008 and 2012. (*Id.* ¶ 9.) Thus, the proposition that it is “impossible” for political bodies to achieve general election ballot access (*see* SMF, Doc. 8, ¶ 7) is simply untenable. *See Storer*, 415 U.S. at 742 (“Past experience will be a helpful, if not always unerring guide; it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not.”)

While Plaintiffs will presumably take issue with the fact that their political bodies have not met the 1% threshold available under O.C.G.A. §§ 21-2-170(b) or 21-2-180(2), this argument assumes that they have made serious attempts to garner this percentage either via petition or at the ballot box and have failed. Plaintiffs have not produced sufficient evidence on which to base this assumption. Nearly the

entire content of Plaintiff's affidavits is unreliable, lack foundation, or is irrelevant (*See* Section II.B above.) And even if they were not plagued with such admissibility issues they simply do not demonstrate the particular efforts Plaintiffs have taken to obtain petition signatures. There is simply no evidence that Georgia's ballot access laws unconstitutionally impede the development of third parties. Prior elections in Georgia, rather, suggest that the 1% figure is an entirely possible total for a third party to gather in the form of votes during a presidential election or signatures prior to an election. Taken as a whole, Georgia's ballot access regulations provide constitutional access to Georgia's general election ballot, even for small political parties.

III. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court deny Plaintiffs' Motion for Summary Judgment.

Respectfully submitted this 10th day of June 2014,

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CERTIFICATION OF COMPLIANCE WITH RULE AND ORDER

I hereby certify that the forgoing Defendant's Response to Plaintiffs' Motion for Summary Judgment and Memorandum of Law In Support of Plaintiffs' Motion For Summary Judgment were prepared in 14-point Times New Roman in compliance with Local Rules 5.1(C) and 7.1(D).

CERTIFICATE OF SERVICE

I do hereby certify that I have this day filed electronically, the within and foregoing Defendants' Response to Plaintiffs' Motion For Summary Judgment and Memorandum Of Law In Support Thereof, with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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This 10th day of June, 2014.

/s/ Kelly Campanella
KELLY CAMPANELLA
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