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Resolving the Ambiguity: How Cowen v. Ga. Sec'y of State Helps Third Parties Climb Georgia's Steep Mountain of Ballot-Access Restrictions

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Resolving the Ambiguity: How *Cowen v. Ga. Sec'y of State* Helps Third Parties Climb Georgia's Steep Mountain of Ballot-Access Restrictions*

I. INTRODUCTION

Minor political parties are rejoicing and celebrating a significant victory[1] in *Cowen v. Ga. Sec'y of State,*[2] as a stepping stone in loosening Georgia's rigorous ballot-access restrictions.[3] Georgia's rigorous 5% petition requirement is one of the highest barriers in the nation for a political body to overcome, a barrier that has never been breached in Georgia since its adoption in 1943.[4] In *Cowen,* the United States Court of Appeals for the Eleventh Circuit held the United States District Court for the Northern District of Georgia erred by granting summary judgment in favor of Georgia's Secretary of State without applying the test established in *Anderson v. Celebrezze*[5] to determine Cowen's

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[1] Jessica Szilagyi, *Libertarian Party of Ga Claims Victory After Ruling in Ballot Access Case Against Sec. of State*, ALLONGEORGIA (June 4, 2020), https://allongeorgia.com/georgia-state-politics/libertarian-party-of-ga-claims-victory-after-ruling-in-ballot-access-case-against-sec-of-state.

[2] 960 F.3d 1339 (11th Cir. 2020).

[3] Szilagyi, *supra* note 1.

[4] Jim Galloway, Greg Bluestein, Tia Mitchell, *The Jolt: Third-party candidates say state law requiring thousands of signatures puts their lives at risk*, AJC (Mar. 27, 2020), https://www.ajc.com/blog/politics/the-jolt-third-party-candidates-say-state-law-requiring-thousands-signatures-puts-their-lives-risk/BstBmD77tJu2fuedXXzSzI/; *see also* O.C.G.A. § 21-2-170(b).

[5] 460 U.S. 780 (1983).

associational rights violation claim under the First and Fourteenth Amendments.

The case was remanded to the district court for the court to apply the *Anderson* test in determining whether Georgia's five percent signature ballot-access restriction violated Cowen's associational rights.[6] The *Anderson* test is a multi-step process for evaluating the constitutionality of ballot-access requirements under the First and Fourteenth Amendments.[7] The ruling in *Cowen* has implications for the future of Georgia's rigorous ballot-access requirements and may lead to the emergence of third-parties within the context of the entrenched two-party system in the state.

II. FACTUAL BACKGROUND

The *Cowen* case arose from challenges by the Libertarian Party of Georgia to Georgia's ballot-access laws for congressional candidates; interested voters and several prospective Libertarian candidates for Congress collectively brought suit alleging the Georgia's ballot-access requirements were unconstitutional. In this suit, the Libertarian Party ("Party") alleged Georgia's ballot-access restrictions were unconstitutional as a violation of the Party's associational rights under the First and Fourteenth Amendments as well as a violation of the Party's Equal Protection rights[8] under the Fourteenth Amendment. The Party contended that Georgia's ballot-access requirements are so rigorous as to preclude the viability of a third-party candidate and are therefore unconstitutional.[9]

In its motion for summary judgment, the Party introduced evidence that demonstrated a requisite of 321,714 valid signatures of registered voters were necessary for a third-party to run a full slate of candidates to get on Georgia's ballot in a federal election. Additionally, the Party provided evidence that a third-party candidate had never successfully petitioned themself onto the ballot despite the attempts of at least twenty candidates since 2002. Furthermore, the Party provided evidence highlighting the pragmatic difficulties of gathering signatures: "the alleged[] error-prone signature-checking process," its inability to access voters, voters' concerns of disclosing confidential information on

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[6] *Cowen,* 960 F.3d at 1340.

[7] *Id.* at 1342.

[8] It is noted that Equal Protection Rights under the Fourteenth Amendment is discussed in *Cowen,* but this Casenote will only address the associational rights claim and the application of the Anderson test.

[9] *Id.* at 1340–41.

the nominating petition, and the substantial cost of petitioning. The latter is particularly burdensome since federal campaign finance laws prohibit candidates from receiving funds from the national party to help alleviate the costs.[10]

Despite noting "a robust record," and that "the Party raised 'some compelling arguments,'" the district court held it was unnecessary to utilize the *Anderson* test to address constitutional challenges to Georgia's ballot-access restrictions.[11] It concluded that *Jenness v. Fortson*[12] had decided the issue and created a *per se* preclusion to any future challenges of Georgia's ballot-access restrictions. The district court also declined to address the Party's Equal Protection challenge.[13] The appellate court reversed the northern district court's grant of summary judgment in favor of Georgia's Secretary of State.

III. LEGAL BACKGROUND

A. Georgia's Election Statutes

In Georgia, a political party is a political organization that has acquired at least twenty percent of the total votes in the last gubernatorial election[14] or at least twenty percent of the electors polled from the total votes of the last presidential election.[15] Political organizations unable to meet this threshold are known as a "political body" under Georgia law.[16] Candidates of a political body are guaranteed ballot-access if they are able to submit a nomination petition signed by the number of registered voters proportionate to the population of voters eligible to vote in the previous election upon the office that a third-party is seeking.[17] Additionally, it is necessary for the candidate to submit a petition certified by a sworn chairperson and secretary of a political body that is registered with Georgia's Secretary

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[10] *Id* at 1341.

[11] *Id.*

[12] 403 U.S. 431 (1971).

[13] *Cowen,* 960 F.3d at 1341.

[14] Gubernatorial is defined as "relating to a governor (the official leader of a state in the [United States of America]." CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/gubernatorial (last visited Nov. 12, 2020).

[15] O.C.G.A. § 21-2-2(25)(A)–(B).

[16] O.C.G.A. § 21-2-2(23)."'A political body' or 'body' means any political organization other than a political party." *Id.*

[17] O.C.G.A. § 21-2-170(b).

of State, certifying that the nominee of a political body was nominated by virtue of a convention.[18]

In 1922, Georgia's legislature enacted its first formal ballot-access restrictions. They required candidates of a minor party for national and statewide offices to file notice of their candidacy by "giving their names and the offices for which they are candidates, with the Secretary of State," but did not require any petition or fee.[19] In 1943, the legislature amended its ballot-access laws by imposing heightened third-party requirements, allowing access: "(1) if the political party received 5 percent of the votes in the last general election for the office in question, which guaranteed ballot access; or (2) by gathering petitions signed by 5 percent of all the registered voters in the state or district."[20] In 1986, the legislature substantially reduced the signature and vote requirements for third-party candidates seeking statewide positions, but kept the five percent requisite for federal and non-statewide elections.[21]

Thus, a candidate of a political body seeking a statewide position is only required to obtain one percent of the total registered voters eligible to vote in the last election; whereas candidates seeking federal or non-statewide positions are still required to obtain five percent of the total registered voters statewide or within their districts.[22] Finally, a candidate of a political body seeking the office of the presidency of the United States must prove the political body either received one percent of the total number of registered voters in the preceding election, or submit a petition signed by at least 7,500 registered voters.[23]

B. The Establishment of the Anderson Test under the First and Fourteenth Amendment

Cowen breathed new life into the *Anderson* test for political bodies challenging Georgia's electoral ballot-access restrictions. This test has an interesting history. Prior to *Anderson*, the Supreme Court of the United States and lower courts determined a claim for an associational

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[18] O.C.G.A. § 21-2-170(g).

[19] *Cowen,* 960 F.3d at 1340 (citing 1922 Ga. Laws 100).

[20] *Id.* (citing 1943 Ga. Laws 292).

[21] *Id.* at 1340-41 (citing 1986 Ga. Laws 292).

[22] O.C.G.A. § 21-2-170(b).

[23] National Association of Secretaries of State (NASS), NATIONAL ASSOCIATION OF SECRETARIES OF STATE, 1, 8–9. https://www.nass.org/sites/default/files/surveys/2020-07/research-ballot-access-president-Jan20_0.pdf (last updated January 2020).

rights violation by evaluating whether the severity of the restrictions imposed by state law infringed on a minor political organization's associational rights, but there was no specific approach defined for this analysis.[24]

For example, in the 1968 decision of *Williams v. Rhodes,*[25] a third-party candidate successfully challenged Ohio's ballot-access restrictions that required a third party to submit petitions containing signatures from a number of qualified voters that equaled fifteen percent of the number of persons who voted in the preceding gubernatorial election. The United States Supreme Court struck down the statute as a violation of the First Amendment and Equal Protection Clause.[26] The Court held that freedom of association was protected by the First Amendment and that the Fourteenth Amendment prevented the states from infringing on this right.[27] For the first time, the Court held that state laws preventing ballot-access by minor political parties were unconstitutional.[28]

Additionally, the Court held that the right of individuals to advance political beliefs regardless of their political persuasion and the right of individuals to cast their votes effectively rank among the "most precious freedoms."[29] Any other freedoms were worthless if the right to vote was undermined by the implementation of rigorous ballot-access restrictions.[30] However, the Court did not provide guidance for future courts to use in evaluating a third party's associational rights claim.

In 1971, the United States Supreme Court upheld Georgia's five percent signature requirement in *Jenness*, concluding that Georgia's electoral requirements did not "freeze[] the status quo," of a duopolistic two-party system and did not abridge the rights of free speech and association guaranteed by the First and Fourteenth Amendments.[31] The Court did not provide guidance in evaluating the validity of future claims of associational rights violations by minor political organizations.[32]

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[24] *See infra* pp.8–11.

[25] 393 U.S. 23 (1968).

[26] *Id.* at 24–25, 31, 34.

[27] *Id.* at 30–31.

[28] *Id.* at 38–39.

[29] *Id.* at 30.

[30] *Id.* at 31.

[31] 403 U.S. at 439–40.

[32] *Id.* at 440–41.

Instead, the Court in *Jenness* distinguished the purpose of Georgia's electoral requirements from that in *Williams*, holding that the purpose of Ohio's law was the creation of a two-party duopoly, exclusively comprised of Republicans and Democrats.[33] Justice Stewart distinguished the two statutes by noting that Georgia's statutes recognized write-in votes, provided a reasonable deadline, recognized independent candidates, and did not require signees of the petitions to affirm whether they intended to vote for that candidate.[34] However, once again, the Court did not provide any guidance for the lower courts to utilize in evaluating associational rights violation claims.

A decade later, in *Anderson,* the United States Supreme Court provided a three-pronged balancing test for lower courts to use in evaluating minor parties' challenges to the constitutionality of ballot-access requirements.[35] In a 5-4 decision, the Court struck down an Ohio ballot-access deadline because of the inflexibility and inconsistency of the statute requiring minor parties to register their candidacy by March, when the major parties were merely beginning the primary nomination stage of the presidential election. Furthermore, the Court held that this early deadline impeded third-party candidates' efforts to gather signatures, recruit volunteers, engage in media publicity, and receive campaign contributions.[36] As it did in both *Williams* and *Jenness,* the Court in *Anderson* held that it was unconstitutional for a state to impose requirements that are impossible for a third-party to meet, but the state's law would be held constitutional if a state's interest was considered reasonable depending on the state's justification.[37]

In *Anderson*, the Court required the lower court to determine the constitutionality of a state's ballot access laws by first considering "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments."[38] Second, the court must "identify and evaluate the precise interests put forward by the State as justification for the burden imposed by its rule."[39] In the evaluation of the justification of a State's interest, the court must consider the validity and strength of those injuries as well as the State's interests

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[33] *Id.* at 434–35.

[34] *Id.* at 438–39.

[35] 460 U.S. at 789.

[36] *Id.* at 781, 790–792.

[37] *Id.* at 787–788, 801, 805–06.

[38] *Id.* at 789.

[39] *Id.*

that necessitate burdening a third-party's rights.[40] Third, a court may only determine whether a challenged provision was unconstitutional after weighing all these factors.[41]

C. The Eleventh Circuit handling of Ballot-Access Restriction Claims after Anderson

Even though *Anderson* was decided in 1982 and *Jenness* in 1971, in challenges following *Anderson*, the Eleventh Circuit relied on *Jenness* to uphold the constitutionality of Georgia's ballot-access restrictions. This reliance on *Jenness* created an ambiguity on the controlling authority in the Eleventh Circuit jurisprudence, treating cases from Georgia differently than those from other states.[42]

1. The Eleventh Circuit's evaluation of Associational Rights violation claims in Georgia

In 2002, the United States Eleventh Circuit Court of Appeals in *Cartwright v. Barnes,*[43] upheld Georgia's five percent signature requirement for a third-party candidate seeking a non-statewide office without mentioning the *Anderson* test.[44] There, the Libertarian Party argued that the re-drawing of new congressional districts and Georgia's recently revised statute requiring third-parties to have their petitions notarized had together altered Georgia's political landscape, and made it substantially distinguishable from the facts in *Jenness.* The court rejected this argument, holding the ballot-access restrictions were constitutional. Relying on *Jenness,* the court concluded that the new notary requirement only required a petitioner submit a notarized affidavit that each signer signed their own names and that the redistricting of congressional districts failed to impose any suffocating restrictions or a significant burden on the circulation of petitions for political bodies.[45] The court did not mention the *Anderson* test.

Similarly, in 2010, the Eleventh Circuit rejected the argument that Georgia's five percent requirement was too burdensome even though no independent candidate had ever overcome this threshold.[46] In *Coffield v. Handel*, the court upheld the ballot-access restriction, citing the lack

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[40] *Id.*

[41] *Id.*

[42] *See infra* section C.

[43] 304 F.3d 1138 (11th Cir. 2002).

[44] *Id.* at 1139.

[45] *Id.* at 1140–41.

[46] Coffield v. Handel, 599 F.3d 1276, 1277 (11th Cir. 2010).

of changes to Georgia's electoral laws from *Jenness* and *Cartwright*.[47] Even though *Anderson* predated *Cartwright* and *Coffield* by more than two decades, the court never mentioned the *Anderson* test in evaluating the validity of the ballot-access provisions.[48] This omission created an ambiguity in Eleventh Circuit jurisprudence as to whether challenges to Georgia's ballot-access restrictions were precluded by *Jenness* or should be determined by a standard that merely does not "freeze the political status quo," of the two-party political system derived from *Jenness* that previously upheld the restriction.

This ambiguity is further complicated by the distinctive nature of presidential elections. In 1984, the Eleventh Circuit extended the *Anderson* test in *Bergland v. Harris.*[49] There, the district court dismissed the political bodies' complaint that challenged the distinction between "'a political party' and a 'political body,'" the signature requirements, and the filing deadline, without applying the *Anderson* test.[50] Concluding that the record was inadequate, it remanded the case to the district court to establish a record to decide the associational rights violation claim.[51] The court held that prior cases upholding the constitutionality of Georgia's ballot-access restrictions were not a foreclosure from future challenges and that a court must evaluate the evidence using the *Anderson* test.[52] However, the court emphasized the distinction between a presidential candidate and one for a state office, concluding the state had a lesser interest in the former because the outcome "will be largely determined by voters beyond the State's boundaries."[53] Over time in the Eleventh Circuit, the holding of this case came to be limited to restrictions concerning presidential candidates.[54]

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[47] *Id.*

[48] In 2002, the existence of the *Anderson* test had been the controlling authority for over twenty years, and by 2010, it had been the controlling authority for twenty-eight years. *See Cartwright,* 304 F.3d at 1138; *See Coffield,* 599 F.3d at 1276.

[49] 767 F.2d 1551 (11th Cir. 1985).

[50] *Id.* at 1552–53.

[51] *Id.* at 1552.

[52] *Id.* at 1554; *See Jenness,* 403 U.S. at 431; *See also* McCrary v. Poythress, 638 F.2d 1308 (5th Cir. 1981).

[53] *Id.* (quoting *Anderson,* 460 U.S. at 795).

[54] Due to the omission of the *Anderson* test in *Cartwright* and *Coffield*, the emphasis upon the uniqueness of presidential elections created an ambiguity over time where the district court in Georgia believed the *Anderson* test only applied to presidential ballot-access challenges. *See* District Court Order at *12-13, Cowen v. Raffensperger, No. 1:17-CV-04660-LMM (N.D.Ga. Sept. 23, 2019).

2. The Application of the *Anderson* test outside of Georgia

In addressing ballot-access restrictions in states other than Georgia, there was not any ambiguity regarding the controlling authority, as the Eleventh Circuit consistently applied the *Anderson* test to evaluate associational rights violation claims. For example, in *New Alliance Party v. Hand,*[55] the United States Court of Appeals for the Eleventh Circuit overturned an Alabama statute that imposed an April 6th deadline on candidates seeking a statewide position to submit their signature petitions.[56] The court found the statute was unconstitutional under the *Anderson* test[57] because it burdened the plaintiff's efforts to access the Alabama ballot,[58] and Alabama failed to justify its interest in requiring an earlier deadline when the previous deadline was in July.[59]

Similarly, the Eleventh Circuit Court of Appeals applied the *Anderson* test in *Green v. Mortham*,[60] to determine that Florida's election statute requiring a "qualifying fee equal to seven and a half percent of the annual salary for the office [Green] sought,"or filing a petition with signatures of three percent from the registered party in that district, was not an associational rights violation.[61] After the court applied the *Anderson* test, the court upheld Florida's ballot-access restrictions because filing fees were always considered reasonable and non-discriminatory.[62] Additionally, the court upheld Florida's 3% petition signature requirements because it was not burdensome for Green to collect the necessary signatures if he had collected fifty-two signatures every day.[63]

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[55] 933 F.2d 1568 (11th Cir. 1991).

[56] *Id.* at 1570.

[57] *Id.* at 1574.

[58] *Id.* at 1576.

[59] *Id.* Additionally, the court noted that the new deadline in April was when most candidates for the major parties are announcing their candidacy, which undermines the interest of the state in justifying an earlier deadline for minor political organizations. *Id.* Furthermore, the court noted that "[n]o one can seriously contend that a deadline for filing for a minor party and its candidate seven months prior to the election is required to advance legitimate state interests." *Id.*

[60] 155 F.3d 1332 (11th Cir. 1998).

[61] *Id.* at 1333–34.

[62] *Id.* at 1337 (*citing* Lubin v. Panish*,* 415 U.S. 709, 718–19 (1974); Bullock v. Carter*,* 405 U.S. 134 (1972), *see also* Little v. Florida Dept. of State, 19 F.3d 4, 5 (11th Cir.1994) (noting the constitutionality of the filing fees as long as there was an alternative method).

[63] *Id.* at 1337-38. The magistrate judge in the district court noted that Green could have achieved the necessity signatures if he had asked five volunteers to collect ten signatures each day within the ninety-six days that Green was authorized to collect the requisite signatures. *Id.* at 1338.

Thus, the confusion regarding the applicability of the *Anderson* test seemed to arise from the Supreme Court's upholding Georgia's 5% signature requirement in *Jenness.* This generated the ambiguity as to whether *Anderson* should be used to evaluate a Georgia ballot-access statute or whether the constitutionality of all Georgia ballot-access statutes was decided under *Jenness,* and any future nonpresidential challenges are precluded.

IV. COURT'S RATIONALE

A. Judge Anderson's Majority Opinion

In *Cowen v. Georgia Sec'y of State,* the Eleventh Circuit Court of Appeals held the District Court for the Northern District of Georgia erred by not applying the *Anderson* test to determine the constitutionality of Georgia's 5% signature requirement for political bodies to place their candidates on the ballot.[64] Thus, the court finally clarified the lingering ambiguity regarding the appropriate approach for deciding Georgia's associational rights violation challenges under ballot access statutes.[65] In this case, the Georgia Secretary of State argued that *Jenness* precluded Cowen's challenge to Georgia's 5% signature requirement. The court rejected this argument and provided three different rationales that justified the application of the *Anderson* test for challenges by candidates seeking congressional offices.[66]

First, the court noted that the text of *Anderson* did not restrict its application exclusively to presidential elections, which received a heightened level of scrutiny for a state to overcome in justifying their interests in those restrictions.[67] Additionally, it concluded that limiting the application of the *Anderson* test exclusively to presidential candidates would be irrational and would undermine the constitutionality of a minor political organization's association rights.[68] It would be irrational because exclusively applying to presidential

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[64] 960 F.3d at 1340.

[65] *Id.*

[66] *Id.* at 1343–44.

[67] *Id.* at 1344.

[68] *Id.* However, the court notes the emphasis regarding presidential elections in that "*Anderson* makes it clear that its requirements apply in all elections—but with a thumb on the scale in favor of ballot access when the candidates challenging the requirements are presidential candidates.") *Id.*

elections would permit the state to discriminate against political bodies for non-presidential offices.[69]

Second, the court had already extended the *Anderson* test to cases involving candidates seeking offices other than the presidency.[70] These extensions included minor political organization or independent candidates seeking state senate, state house, sheriff, congressional, and county commission candidates.[71] To clarify any lingering ambiguity, the court emphasized that the *Anderson* test applied in ballot-access challenges by all candidates seeking any elected position.[72]

Third, the court held that *Jenness* did not preclude third-parties from challenging the constitutionality of Georgia's ballot-access restrictions because the *Anderson* test was developed twelve years after *Jenness* and supersedes its precedential authority.[73] Furthermore, the court noted that *Bergland* expressly held that *Jenness* did not preclude a minor political organization from challenging Georgia's signature requirements and used the *Anderson* test to evaluate the constitutionality of the State's ballot-access restriction.[74] The court emphasized the district court's misapplication of *Coffield* and *Cartwright*, and concluded that these decisions did not foreclose future challenges.[75]

B. Judge Jordan's Concurring Opinion

In a concurring opinion, Judge Jordan agreed with Judge Anderson's analysis in the application of the *Anderson* test in all ballot-access constitutionality claims, but sympathized with the district court's

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[69] *Id.* ("[B]y its own text, the Supreme Court's opinion in *Anderson* does not restrict its holding to presidential candidates . . .we do not read that as an implied limitation on Anderson's applicability. Such a limitation would make little sense in context").

[70] *Id.*

[71] *Id.* (citing Grizzle v. Kemp, 634 F.3d 1314, 1316, 1321–22 (11th Cir. 2011) (school board candidates); Swanson v. Worley, 490 F.3d 894, 896, 902-03 (11th Cir. 2007) (state senate, state house, and sheriff candidates); *Green,* 155 F.3d at 1333, 1335-36 (11th Cir. 1998) (congressional candidates); *New Alliance Party,* 933 F.2d at 1570, 1574 (11th Cir. 1991) (congressional candidate and county commission candidates); *Bergland*, 767 F.2d at 1552–53, 1553 n.1 (presidential candidates and a congressional candidate); Libertarian Party of Fla. v. Florida, 710 F.2d 790, 792-93 (11th Cir. 1983) (state legislative, statewide office, and presidential candidates*).*

[72] *Id.*

[73] *Id.* at 1344–45.

[74] *Id.* at 1345.

[75] *Id.*

rationale that *Jenness* was the controlling authority.[76] Judge Jordan provided additional reasoning that was omitted from the majority's opinion, in that once the Supreme Court had overturned a previous standard, the lower courts must apply the newer standard to resolve future cases.[77] Although Judge Jordan acknowledged that *Anderson* is controlling, he concluded that *Jenness* is not obsolete without providing any explanation regarding how it continues to be relevant.[78]

V. IMPLICATIONS

A. Overcoming Jenness

The court in *Cowen* resolved the ambiguity regarding the controlling authority in determining challenges to ballot-access restrictions in Georgia.[79] However, the court emphasized that *Anderson* did not overrule *Jenness*, and that a challenging party is still required to distinguish itself from *Jenness*.[80] Further, a minor political organization will have to demonstrate how its First Amendment rights are overly burdened when weighed against Georgia's interest in maintaining the five percent signature requirement. Thus, a third-party candidate's ability to overcome *Jenness* will have to adequately provide substantial evidence proving the excessive burden that Georgia's five percent signature restriction imposes upon political bodies.[81]

If a political body wants to climb the mountain and reach its peak by getting on Georgia's ballots, it is imperative it proves why it cannot overcome the obstacles set forth by Georgia's electoral restrictions. In a large majority of the prior Eleventh Circuit cases, the challenging party lost its ballot-access restriction claim because it failed to adequately demonstrate that a state's ballot-access restrictions imposed a great enough burden on a minor political organization. In most of these cases, the minor party conceded that it failed to collect anywhere close to the requisite signature amount.[82]

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[76] *Cowen,* 960 F.3d at 1347 (Jordan. J., concurring).

[77] *Id.* at 1348.

[78] *Id.*

[79] *Id.* at 1344–45.

[80] *Id.* at 1346 (A political body "will have to demonstrate why a different result from *Jenness* is required in this case—either because of different facts in the instant record, as compared to the record in *Jenness*; changes in the relevant Georgia legal framework; or the evolution of the relevant federal law") *Id.*

[81] *Id.*

[82] *See Bergland,* 767 F.2d at 1555 (indicating that "the Libertarian Party had only collected 8,488 signatures, the Independent Party collected 258 signatures, Williams

It is highly unlikely that any minor political organization in Georgia will overcome *Jenness* unless it can demonstrate the substantial difficulty of complying with Georgia's 5% signature requirement. It is necessary for a political body to demonstrate a good-faith effort in obtaining a number of signatures that is relatively close to the statutory requisite. This effort will allow a third-party to demonstrate two crucial points. First, it will highlight the impossibility of a third-party candidate ever getting onto Georgia's ballot when the requisite percentage number is 5%.[83] Second, it will also demonstrate that a substantial proportion of Georgia citizens' have an interest in voting for a third-party candidate.

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collected 15 signatures, Robinson collected 1,723 signatures for Lowery, and the Citizens Party and Garland did not file any petition at all"); *Swanson,* 490 F.3d at 897 (indicating that the Independent candidate only collected 11,000 out of the required 39,536 signatures); *Green,* 155 F.3d at 1338 (indicating that "[t]he magistrate judge aptly noted that Green could comply by asking five volunteers each to collect ten signatures a day. Moreover, Green admitted that he never tried to collect signatures"); *Libertarian Party,* 710 F.2d at 794 (indicating that Libertarian Party never attempted to collect the requisite number of signatures because they believed Florida's 3% requirement was impossible to achieve); *Coffield,* 599 F.3d at 1276 (indicating that the third-party candidate only collected 2,000 out of the 13,000-signature requirement).

[83] It should be noted that in 2020, Georgia was required by court order to temporarily lower their requisite signature requirement by thirty percent due to the Pandemic caused by COVID-19. Cooper v. Raffensperger, No. 1:20-CV-01312, 2020 U.S. Dist. LEXIS 122237 at *21, 24 (N.D. Ga. Sept. 14, 2020). Additionally, Georgia's Secretary of State did not oppose the reduction in the amount of signature requirements. *Id.* at 23 n.9. Due to this decision, candidates seeking access to Georgia's ballots were only required to collect 36,180 signatures, instead of the normal requisite, 51,686 signatures. *See Number of Signatures Required for Nomination Petitions November 2020 General Election ONLY,* GEORGIA'S SECRETARY OF STATE, https://sos.ga.gov/admin/files/Number%20of%20Signatures%20Required%20for%20November%202020%20Nomination%20Petitions.pdf (last visited Nov. 13,2020). This reduction was a result of Governor Kemp's declaration of public health state of emergency in response to COVID-19 that mandated social distancing, recommended masks, and at one point included a shelter-in-place order. *Cooper,* 2020 U.S. Dist. LEXIS, at *14-15. These restrictions substantially impeded third-parties' ability in safely and pragmatically gather signatures. *Id.* Despite this difficulty, Shane Hazel, a candidate of the Libertarian Party successfully petitioned himself onto Georgia's election ballot in Georgia's Senate Race between Republican David Perdue and Democrat Jon Ossoff for the first time Georgia's history. Jessica Szilagyi, *2020 CANDIDATE INSIDER: Shane Hazel, Candidate for U.S. Senate*, ALLONGEORGIA (Oct. 1, 2020) https://allongeorgia.com/georgia-state-politics/2020-candidate-insider-shane-hazel-candidate-for-u-s-senate/.

B. Georgia's Election laws in comparison with other States

By its electoral ballot-access restrictions, the Georgia legislature has deterred competition and insured that political power will be restricted to two political parties. In today's contentious political climate, people have turned to a third choice rather than selecting a candidate nominated by the two-party system.[84] However, the Georgia legislature's unwillingness to loosen ballot-access restrictions has been attributed to the fear of increasing competition by potentially dividing the vote among more candidates and making it more difficult to be re-elected, or insuring the election of a candidate from a particular party.[85] The Georgia General Assembly has declined to lower the threshold for access by political bodies by rejecting any loosening of ballot-access restrictions.[86]

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[84] Christian Collet, Trends: *Third Parties and the Two-Party System*, 60 Public Opinion Quarterly 431, 436 (1996) (examining the public's desire in having more choices at the polls); Howard J. Gold, *Americans Attitudes Toward the Political Parties and the Party System*, Government: Faculty Publications Smith College, Northampton, MA 1,4, 9, 10, 12-13 (2015) (examining that almost two decades of research (1996–2014))
have indicated the discontent of a substantial portion of the population regarding the two major political parties as too ideological and an inadequate representation of the populace, as well as an increase in the receptivity of electing a third party for presidential and congressional positions.); Grace Sparks, *Almost 40% of Americans want a third political party, even if they don't like the candidates*, CNN POLITICS, https://www.cnn.com/2019/03/04/politics/two-party-system-poll/index.html. (last updated Mar. 4, 2019).(examining that in 2019, forty percent of Americans believe it is necessary for an independent third-party to fix the political system).

[85] Reed Galen, *How Republicans and Democrats prevent independent candidates from getting on the ballot,* NBC THINK (Apr. 17, 2018, 4:37 AM) https://www.nbcnews.com/think/opinion/how-republicans-democrats-prevent-independent-candidates-getting-ballot-ncna866466.(examining how State legislators have enacted stringent ballot-access restrictions to ensure the duopoly of offering voters only two options).

[86] On February 8, 2019, Dar'Shun Kendrick, a member of Georgia's House of Representatives introduced House Bill 191 along with bi-partisan support of five other members of Georgia's House of Representatives. *2019–2020 Regular Session - HB 191*, Georgia General Assembly, http://www.legis.ga.gov/Legislation/en-US/display/20192020/HB/191 (last visited Nov. 13, 2020). The Bill was then read a second time on the next legislative day as procedurally required by Georgia's House on February 11, 2019. The bill was sent to the Governmental Affairs Committee where the bill died. *Id.* If passed, this bill would have lowered the signature requirement from five percent to one percent "of the total number of electors who voted in the last election for the filling of the office the candidate is seeking or 200 signatures, whichever is less, and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected." H.B. 191, 2019–2020 Regular Session, LC 28 8975, 1, 19 (Ga. 2019).

Georgia's rigorous 5% petition requirement applicable for political bodies running for either the United States Senate or the House of Representatives is one of the highest in the nation.[87] Significantly, political bodies running for a State legislative post, a local position, or the office of the United States President have a substantially lesser barrier to overcome, as they only need to meet the one percent signature requirement.[88] However, Georgia's harsh signature requirement is only applicable for political bodies running for a federal position (excluding the office for the president of the United States).

Georgia's rigorous ballot-access restrictions for federal and non-statewide offices are also uniquely restrictive in comparison to its neighboring states. Alabama only requires a political body to meet a 3% signature requirement as measured by the total number of persons who voted in the previous gubernatorial election.[89] In Tennessee, a political body must only meet a 2.5% signature requirement measured by the total number of votes in the previous gubernatorial election.[90] Most notably, North Carolina merely requires a political body obtain a low threshold of 0.25% to gain ballot-access.[91] Afterwards, that political body could maintain ballot-access in North Carolina by receiving 2% percent of the votes in that election.[92]

Although South Carolina's ballot-access restrictions seems similar to Georgia's in imposing a 5% signature requirement, South Carolina implements a cap of 10,000 signatures based on the geographical area where a political body is seeking office.[93] Georgia's ballot-access restriction is substantially more restrictive than Florida's ballot-access requirement, in that a political body has a signature requirement of 1% of the total registered voters in the geographical area to gain access to Florida's ballot.[94] Since Georgia's 5% signature requirement is the most stringent in the Southeastern United States, it is likely only a matter of time before its ballot-access restrictions are deemed unconstitutional.

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[87] *See* Mitchell, *supra* note 4.

[88] O.C.G.A. § 2-2-170(b).

[89] Code of Ala. § 17-6-22.

[90] Tenn. Code Ann. § 2-1-104(a)(23).

[91] N.C. Gen. Stat. § 163-96(a)(2).

[92] N.C. Gen. Stat. § 163-96(a)(1).

[93] S.C. Code Ann. § 7-11-70.

[94] Fla. Stat. § 99.096; see also Fla. Stat. § 99.095; see also Fla. Stat. § 99.061

C. Cowen as a steppingstone to electoral reform in Georgia?

The decision in *Cowen* brings a significant change to the ability of a political body to challenge the constitutionality of Georgia's ballot-access restrictions as a violation of a third parties associational rights under the First Amendment. This change in the application of the *Anderson* test for political bodies could serve as a steppingstone in overturning Georgia's rigorous 5% requirement. The question arises, however, as to whether loosening Georgia's ballot-access restrictions would result in more runoff elections.

More candidates on the ballot could lead to no candidates receiving a majority, thus requiring a runoff between the top two candidates. In Georgia's electoral system, a candidate must win a majority of the votes (essentially 50% plus one) for a candidate to win, but if a candidate is unable to win that majority, then a runoff ensues between the top two candidates.[95] Georgia, is one of ten states[96] that impose a candidate to receive a majority of votes, with most of those states located in the southern region of the United States and having a long history of one-party rule.[97]

In this electoral system, Georgia is responsible for financing both the primary election as well as the ensuing runoff election and loosening the ballot-access requirements could ultimately be financially burdensome.[98] Additionally, voter participation generally plummets in runoff elections, sometimes showing a twenty to thirty percent decline.[99] However, a third-party's associational rights should not suffer in a state that knowingly chose to implement a majority vote election system where there was a substantial likelihood that a runoff would ensue due to their electoral system.[100] Thus, the financial burdens of

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[95] Wendy Underhill & Katharina Hubler, *Primary Runoff Elections*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Aug. 2017), https://www.ncsl.org/research/elections-and-campaigns/primary-runoff-elections.aspx.

[96] The other states requiring a majority vote win: Alabama, Arkansas, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, and Vermont. NCSL, *Primary Runoffs,* NATIONAL CONFERENCE OF STATE LEGISLATURES (May 8, 2017) https://www.ncsl.org/research/elections-and-campaigns/primary-runoffs.aspx.

[97] Hubler, *supra* note 95.

[98] *Id.*

[99] *Id.*

[100] The most common electoral scheme in America is a plurality voting system. In a plurality voting system, the candidate who receives the most votes in a general election are declared the winner. It is unnecessary for a candidate to receive over fifty percent of the votes like in a majority vote electoral system. For example, in Maine, in the last previous nine out of eleven elections, the elected governor received less than fifty percent

having runoff elections and voters' disinclination in participating in runoff elections are not a sufficient justification to support Georgia's restrictive ballot-access requirements.

If political bodies are finally able to persuade a court to lower the restrictions, would the Georgia legislature adopt legislation with the intention to keep political bodies off the ballots by trying to circumvent a court's opinion in order to reduce the competition and prevent additional runoff elections?[101] After all, there are people who attribute the loss of a major party candidates to interference from a third-party candidate on a ballot and spoiling the election.[102] However, this perception is not a sufficient merit in limiting the rights guaranteed by the First and Fourteenth Amendments in order to preserve a duopolistic system.[103]

In conclusion, *Cowen* resolving the ambiguity in the Eleventh Circuit jurisprudence is a victory worth celebrating by political bodies in

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of the vote. In order to circumvent the expensive cost of financing runoff elections, Georgia could easily adopt a plurality voting scheme without infringing upon the political bodies' associational rights. *Id.*

[101] It should be noted that out of the ten states that impose a majority vote electoral system, both Alabama and North Carolina require a substantially lesser percentage of petition signatures, (3% percent for Alabama, and 0.25% for North Carolina) and have not deviated from their majority vote electoral system. *See* Code of Ala. § 17-6-22.; *see also* N.C. Gen. Stat. § 163-96.

[102] *See* Morgan Philips, *Spoiler alert? Difference between Trump, Biden in key swing states is Libertarian votes*, Fox News (Nov. 10, 2020), https://www.foxnews.com/politics/libertarian-jo-jorgensen-difference-for-joe-biden-key-swing-states (referencing to the 2020 election in that Libertarian candidate Jo Jorgenson "could have swung the Electoral College by at least 22 votes by supporting Trump in battleground states Wisconsin, Michigan and Nevada. By throwing away their votes, they've likely become spoilers for the Trump reelection effort"); *see also* Brian Doherty, *Libertarian Shane Hazel Is Proud To Be a Spoiler in Georgia Senate Race*, REASON (Nov. 10, 2020 10:40 AM), https://reason.com/2020/11/10/libertarian-shane-hazel-is-proud-to-be-a-spoiler-in-georgia-senate-race/(referencing the 2020 Libertarian senator candidate "spoiling" the election and causing a runoff between Jon Ossoff and David Purdue); *see also* Alex Thompson & Holly Otterbein, *Jill Stein cost Hillary dearly in 2016. Democrats are still writing off her successor.* POLITICO (June 20, 2020 7:00 AM), https://www.politico.com/news/2020/06/20/democrats-shrug-off-potential-green-party-spoiler-in-2020-329170 (referencing the 2016 election in that Green Party candidate, Jill Stein cost the election for Democrat nominee Hillary Clinton the presidency, noting that "had voters in Pennsylvania, Michigan and Wisconsin cast their ballots for Clinton rather than the Green Party's Stein, Clinton would be president.").

[103] *See Williams,* 393 U.S. at 32 (noting that a "State does have an interest in attempting to see that the election winner be the choice of a majority of its voters. But to grant the State power to keep all political parties off the ballot until they have enough members to win would stifle the growth of all new parties." Such severe restrictions were not justifiable and infringed on both voting and associational rights)

Georgia. Although courts in Georgia are now required to use the *Anderson* test in evaluating political bodies' associational rights violation claims, political bodies have a long way to go before they reach the peak of Georgia's mountain of ballot-access restriction. But for now, at least some of the obstacles impeding the path have been cleared.

Sean Callihan