

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

**Martin Cowen**, et al.,

Plaintiffs,

vs.

**Brad Raffensperger**, in his  
official capacity as Secretary of  
State of the State of Georgia,

Defendant.

Case No. 1:17-cv-04660-LMM

**Plaintiffs' Response to  
the Court's August 23  
Order**

The plaintiffs respectfully submit this response to the Court's order of August 23, 2021 (ECF 165), proposing a court-ordered interim remedy for the Court's recent conclusion that Georgia's ballot-access restrictions for independent and third-party candidates violate the First and Fourteenth Amendments to the United States Constitution (ECF 159). As explained below, the plaintiffs object to the Court's proposed remedy because evidence in the record strongly suggests that it will not completely and with certitude cure the violation. The plaintiffs also

submit that the Court's proposed remedy, even if it did completely cure the violation, would need to address several additional items. The plaintiffs also maintain their prior positions on a remedy in this case. (ECF 160, 164.)

**I. The Court's proposed remedy would not cure the violation completely and with certitude.**

It is well settled in the Eleventh Circuit that a court-ordered remedy must "completely" and "with certitude" cure the violation. *Dillard v. Crenshaw Cnty.*, 831 F.2d 246, 252 (11th Cir. 1987); *accord United States v. Dallas Cnty. Comm'n*, 850 F.2d 1433, 1438 (11th Cir. 1988); *Edge v. Sumter Cnty. Sch. Dist.*, 775 F.2d 1509, 1510 (11th Cir. 1983). The record strongly suggests that the Court's proposed remedy won't do that.

The Court proposes to require third-party and independent candidates to submit a nominating petition containing one percent of the voters registered to vote in the applicable district in the last election. (ECF 165 at 6.) That number, according to estimates provided by the Secretary of State, would be an average of 5,151 valid signatures per congressional district, or 72,114 for a full slate of 14 candidates. (ECF 154.) As justification for this number, the Court asserts that "several of

the serious candidates for office addressed in Plaintiffs' motion for Summary Judgment would have qualified." (ECF 165 at 6.) But that is not accurate.

Record evidence shows that, in the 78-year history of Georgia's five-percent petition requirement, only one third-party candidate for United States Representative has ever submitted more than 5,151 valid signatures. That candidate was Wayne Parker, who submitted 8,346 valid signatures in 2002. (ECF 159 at 17.) Approximately 20 other candidates have tried to gather enough signatures since then, and none have succeeded. Three independent candidates have gathered more than 5,151 raw signatures, but none met the threshold with *validated* signatures. In 2016, Hien Dai Nguyen submitted about 25,000 signatures, but the Secretary of State's office validated only 528 (two percent) of them. (*Id.* at 18-19.) Jeff Anderson and Eugene Moon gathered about 12,500 and 13,000 raw signatures, respectively, but they did not submit the signatures for validation. (*Id.* at 18.) Given the Secretary of State's consistently low validation rates, moreover, it is unlikely that either candidate would have met the threshold of 5,151 valid signatures. (*Id.* at 24, 31.)

The *Green Party* case and its aftermath also raise doubts about a one-percent petition. There, Judge Story found that Georgia’s one-percent petition requirement for Presidential candidates, which at the time of the decision required 50,334 valid signatures, imposed a severe burden. *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1357, 1365 (N.D. Ga. 2016). He lowered the requirement to 7,500 signatures, *id.* at 1374, a figure that in 2020 represented 0.12 percent of the voters registered in the previous election (ECF 97 ¶ 23). And yet no candidate has ever satisfied that lowered threshold. (ECF 139-2 ¶ 8.)

No statewide candidate in Georgia’s history, moreover, has ever satisfied the remedy that the Court proposes here: a one-percent petition and filing fee. The Court is explicit in wanting to “bring the non-statewide office threshold in line with the statewide office threshold.” (ECF 165 at 6.) That statewide office threshold, which applies only to non-presidential statewide candidates—has been in effect since 1986, and no candidate has *ever* satisfied it despite multiple attempts. (Ex. 1: Declaration of Richard Winger.) Millionaire Raymond O. Boyd attempted and failed to gain ballot access as an independent gubernatorial candidate in 2010. (Ex. 2: “Boyd quits Georgia governor’s

race”). Businessperson John Dashler tried and failed to gain ballot access as an independent gubernatorial candidate in 2006. (Ex. 3: “Dalton’s Dashler ends run for governor”). With more time and discovery, the plaintiffs might be able to identify other candidates who have tried and failed to meet the standard that the Court proposes here.

Lastly, a comparison to other states further raises questions about the Court’s proposed remedy. According to data on which the Court relied, the number of signatures required for the Libertarian Party to run a full slate of congressional candidates in Georgia under the Court’s proposal would be higher than all but three states (California, New York, and Illinois), all of which have substantially more representatives in Congress than Georgia does. (ECF 69-25 at 16-17.)

Under these circumstances, it does not appear with certitude that a one-percent petition requirement—particularly when coupled with the highest filing fee in the nation—would completely cure the violation. Indeed, the overwhelming balance of the evidence suggests otherwise.

If the Court still wishes to impose a percentage-based petition requirement, the plaintiffs suggest that .25 percent has some support in the record. That would be an average of 1,288 valid signatures per

congressional district and 18,032 valid signatures for a full slate of 14 congressional candidates. (ECF 154.) While still more than double the as-yet unmet percentage imposed by Judge Story and accepted without modification by the General Assembly, at that level, independent candidates Anderson and Moon would likely have qualified in 2010, and Billy McKinney and Maceo Dixon would have met that threshold in 1982. (ECF 159 at 18-20; ECF 97 ¶ 111.) Many other genuine candidates, however, would not have met even that threshold.

Finally, the Court's August 23 order suggests that a one-percent petition and high filing fee are "appropriate" to protect the State's interest in avoiding an overcrowded ballot. (ECF 165 at 4.) But the record doesn't support that assertion, either.

First, the record shows that the Libertarian Party has demonstrated substantial voter support in Georgia. (ECF 159 at 7-8.) Its candidates for other offices have received millions of votes. Ballot-access requirements that keep Libertarian candidates off of Georgia's ballots thus do not serve any legitimate interest in avoiding overcrowded ballots; they only protect the existing parties from legitimate

competition. Any remedy should account for the Libertarian Party's support at the ballot box.

Second, under current Georgia law, the only ballot-access requirements in *special elections* for United States Representative are a notice of candidacy and the qualifying fee. (ECF 97 ¶ 228.) No nomination petition is required. And ballots have not been crowded with independent and third-party candidates. In 2020, there was one independent candidate and one political-body candidate on the ballot in the special election in Georgia's Fifth Congressional District. In 2017, there were two independent candidates on the ballot in the special election in the Sixth Congressional District. (*Id.* ¶ 231.) In 2010, there was one independent candidate on the ballot in the special election in the Ninth Congressional District. In 2007, there was one political-body candidate on the ballot in the special election in the Tenth Congressional District. (*Id.* ¶ 233.)

There is also no petition required to appear on any primary ballot, and Georgia's primaries have not been overcrowded. Between 2010 and 2020, no primary election for United States Representative has ever had more than nine candidates, and most have three or fewer. (ECF 139-06.)

That does not add up to a “laundry list” ballot that justifies measures to keep ballot-length “manageable.” *Lubin v. Panish*, 415 U.S. 709, 715 (1974) (suggesting that a ballot with “a dozen or more aspirants who are relatively unknown or have no prospects of success” might warrant restrictions).

The Secretary of State has admitted, moreover, that his office is unaware of any elections where voters have reported any significant confusion based on the number of candidates on the ballot. (ECF 97 ¶235.) The Court’s proposed remedy thus imposes requirements that are substantially greater than necessary or appropriate, in a court-ordered plan, to protect the state’s interest in preventing overcrowded ballots. The State itself has determined that only a filing fee is necessary to do that, and the record supports that judgment.

For these reasons, the Court’s proposed remedy does not satisfy the standards required of a court-ordered remedial plan. The record suggests that a one-percent petition is too high and that keeping ballots to a manageable length does not require both a petition and a fee. The Court should therefore modify its proposed remedy accordingly.

**II. The Court's proposed remedy should address other items as well.**

The Court's proposed remedy also raises several other issues that the Court should address if it chooses to proceed.

First, as the plaintiffs have already noted, a percentage petition is particularly problematic in a redistricting year. (ECF 160 at 6.) As of this filing, the Governor has not yet called a special session for redrawing districts to account for the 2020 Census, and that session appears unlikely to occur until November or December of this year. Once the districts **are** finished, the Secretary of State's office will have to re-assign registered voters to the new districts and, to determine the number of signatures required for a percentage petition, figure out how many voters were registered in the new districts as of the 2020 election. That process doesn't happen overnight. It is thus questionable, at best, that the Secretary of State's office will complete this task (among the many other tasks that result from redrawing districts) before the 180-day petitioning window opens on January 13, 2022. Under similar circumstances in the past, courts have prorated the number of signatures required to account for redistricting. (ECF 159 at 17.) As a result, if the Court chooses to impose a percentage petition, it should

make clear that the number of signatures will be automatically prorated based on the date on which the Secretary of State's office produces the required calculations and publishes them on its website.

Second, if the Court mandates a filing fee, it must also prescribe a ballot-access procedure for those unable to pay. The State's current procedure permits an impecunious candidate to file an affidavit of poverty accompanied by a wholly separate petition signed by one percent of the registered voters eligible to vote for the office in the last election. (ECF 96 ¶¶ 53-57.) That petition is due in early March of an election year, and the petitioning window for 2022 opens on September 8, 2021. (*Id.* ¶¶ 56-57.) Any requirement that a would-be candidate essentially gather two percent of registered voters in his or her district is far too high for the reasons discussed above, and the number of signatures required will not be known before the petitioning window opens. As a result, the Court should prorate the pauper's petition and/or require the Secretary of State to accept a single petition for both purposes that would be due at the time of the nominating petition.

Lastly, the Court should address the discriminatory nature of the filing fee. As the Court has recognized, qualifying fees for political-body

candidates are paid to the Secretary of State, who retains twenty-five percent and must send seventy-five percent to the political body. (ECF 159 at 5-6.) While the law requires the Secretary of State to distribute the funds to the political body “as soon as practicable,” the Court found that the Secretary of State did not distribute the Libertarian Party’s share of those funds paid in March 2018 until April 2019, thus depriving the Libertarian Party of the use of those funds during the election. (*Id.*) Any court-ordered remedy that requires a filing fee should therefore also require the Secretary of State to distribute that money to the applicable political body within 30 days of receipt, so that political bodies, like the Democratic Party and the Republican Party, can use those funds to promote their candidates during the election cycle.

Respectfully submitted this 2nd day of September, 2021.

**/s/ Bryan L. Sells**

Attorney Bar No. 635562

Attorney for the Plaintiffs

The Law Office of Bryan L. Sells, LLC

PO Box 5493

Atlanta, Georgia 31107-0493

Telephone: (404) 480-4212

Email: [bryan@bryansellsllaw.com](mailto:bryan@bryansellsllaw.com)

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing **Plaintiffs' Response to the Court's August 23 Order** was prepared in 13-point Century Schoolbook in compliance with Local Rules 5.1(C) and 7.1(D).

**/s/ Bryan L. Sells**

Attorney Bar No. 635562

Attorney for the Plaintiffs

The Law Office of Bryan L. Sells, LLC

PO Box 5493

Atlanta, Georgia 31107-0493

Telephone: (404) 480-4212

Email: [bryan@bryansellslaw.com](mailto:bryan@bryansellslaw.com)

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Case No. 1:17-cv-04660-LMM

**Declaration of  
Richard Winger**

**Introduction**

1. My name is Richard Winger. I am over the age of 18 and competent to testify to the matters in this declaration.
2. I am a recognized expert in ballot-access laws for independent and third-party candidates.
3. Since 1985 I have published a newsletter, Ballot Access News (12 issues per year), which covers legal, legislative and political developments of interest to third parties and independent candidates.
4. For 53 years I have researched the ballot-access laws of all states, for the period 1888 to the present (there were no ballot access laws in the

**EXHIBIT**

**1**

U.S. before 1888 because there were no government-printed ballots until that year).

5. I previously submitted a declaration in this case (ECF 69-25), and my curriculum vitae is attached to that declaration.

6. I was asked by the plaintiffs to determine whether any independent or third-party candidates in Georgia have ever satisfied the requirements that the Court has proposed to impose as a remedy in this case; namely, a one-percent petition requirement and three-percent filing fee.

7. As the Court notes, these are the same requirements currently in effect for independent or non-qualified third-party non-presidential statewide candidates in Georgia.

8. These requirements have been in effect since 1986, and no independent or third-party candidate has ever satisfied them.

9. I am currently aware of two failed attempts to satisfy the requirements. In 2010, Richard O. Boyd tried and failed to gain ballot access as a candidate for governor. And in 2006, John Dashler did the same. There may be others, but those are the ones that I can remember and verify.

10. I was also asked to determine how the Court's proposed remedy would fit into the context of other states in 2022.

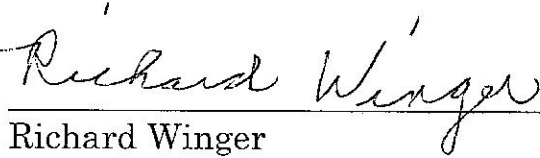
11. Because of the Libertarian Party's widespread support across the nation, no Libertarian Party candidate for United States Representative in

any other state would have to gather more than 5,000 signatures to appear on the general-election ballot. The party is ballot-qualified in many states, some states do not require nominating petitions at all, and all of the remaining states that require nominating petitions for a single candidate have lower requirements than the Court proposes.

12. For a full slate of candidates for United States Representative in 2022, the Court's proposed remedy would be the Libertarian Party's fourth highest in the nation. Only Illinois (90,000), New York (91,000), and Pennsylvania (85,955) would require the Libertarian Party to submit more signatures to qualify a full slate for the general-election ballot. California would also be higher than the Court's proposed remedy for a new third party, but the Libertarian Party is ballot-qualified in that state.

13. In short, the Court's proposed remedy would be one of the most onerous set of ballot-access requirements in the nation.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on September 1, 2021.

  
\_\_\_\_\_  
Richard Winger  
San Francisco, California

# The Augusta Chronicle

**EXHIBIT****2**

## Boyd quits Georgia governor's race

Posted Jun 27, 2010 at 3:26 PM

ATLANTA - Millionaire Ray Boyd announced today that he is giving up his longshot bid for Georgia governor as an independent candidate.

Boyd burst on the political scene in April when he announced he would run for governor as a Republican with the help of \$2 million of his own cash.

But when Boyd wouldn't sign a GOP loyalty oath, state party leaders refused to put him on the primary ballot.

Boyd then began the arduous process of collecting signatures from nearly 50,000 registered voters to qualify for the November ballot as an independent. Boyd said today that it proved to be too much of a challenge. A report he received Saturday from a private company he hired showed he would not be able to collect enough signatures.

Boyd told supporters he was pulling out of the race in an e-mail and posted it on his Web site.

"The last thing I want to do is waste anyone's valuable time, so I have stopped before the deadline arrives," Boyd wrote.

Reached by phone, Boyd declined further comment.

He said in the e-mail that he planned to find other ways to help the state and the country and asked his supporters to "stay energized."

Boyd's decision to end his bid is likely a boost to the eventual Republican nominee because his presence on the general election ballot would have likely siphoned at least some votes from the GOP candidate. Democrats and Republicans are both holding their primaries July 20.

Boyd launched his independent run after Republican Party Chairwoman Sue Everhart said Boyd had to sign the pledge to run on the GOP line.

"I don't know what the big problem is - you either are a Republican or you're not," she said at the time.

Boyd said he provided the state party with alternative language - saying he would not be bound by any position of the Georgia Republican Party.

[https://www.dailycitizen.news/archives/dalton-s-dashler-ends-run-for-governor/article\\_60c046e1-fe80-53a0-b286-52795e405d21.html](https://www.dailycitizen.news/archives/dalton-s-dashler-ends-run-for-governor/article_60c046e1-fe80-53a0-b286-52795e405d21.html)

**EXHIBIT**  
**3**

## Dalton's Dashler ends run for governor

By  
Jul 5, 2006



Dalton businessman John Dashler has dropped out of his independent run for governor of Georgia.

Dashler says he decided last week not to try to qualify for the November ballot because he had less than 10,000 of the approximately 40,000 signatures of registered voters required to get on the ballot. Those signatures are due Tuesday.

"I realized that I was hopelessly behind and had no chance," he said.

But Dashler said the end of his gubernatorial campaign marks the start of another campaign.

"Many Georgians have expressed an interest in and have encouraged me to lead the fight to change Georgia's restrictive ballot access laws. I have decided to do so," he said.

Democratic, Republican and Libertarian nominees for statewide offices have automatic ballot access.

But independents and third-party candidates for statewide races, including governor, have to gather the signatures of 1 percent of Georgia's registered voters.

That may not sound high, but election law experts say Georgia has some of the toughest ballot access requirements in the nation.

In Florida, Louisiana and Oklahoma, Dashler says, there's no petition requirement. In Tennessee, candidates have to gather just 25 signatures, he says.

"I can't tell you specifically what we want to do, but the end goal is to reform ballot access laws to the point that anybody that wants to seek public office will have the ability to do that," Dashler said.

Dashler says he'll be putting together a statewide organization.

"I've already got just slightly less than 100 people that have committed. I would envision that sometime between now and September we'll have a statewide meeting, somewhere in metropolitan Atlanta, and map out the

strategy and the mechanics of what we are going to do,” he said.

Dashler said he traveled 10,000 miles crisscrossing Georgia several times in his campaign for governor. He visited about 100 different communities and spoke to approximately 3,000 people.

“It was a wonderful experience,” he said.

Dashler says he isn’t sure exactly yet how much money he spent on his campaign.

“I’m going to guess that I put in \$30,000 and had maybe \$7,000 or \$8,000 in kind and maybe \$5,000 or so in contributions,” he said.

“I learned that Georgians are not very happy with governance, and they wanted a choice,” he said.

## **TRENDING VIDEO**