

No. 22-101

In The
Supreme Court of the United States

MARTIN COWEN, ALLEN BUCKLEY,
AARON GILMER, JOHN MONDS AND
THE LIBERTARIAN PARTY OF GEORGIA, INC.,

Petitioners,

v.

BRAD RAFFENSPERGER,
GEORGIA SECRETARY OF STATE,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

**BRIEF OF THE COALITION FOR FREE AND
OPEN ELECTIONS AS AMICUS CURIAE
IN SUPPORT OF THE PETITIONERS**

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INTEREST OF AMICUS CURIAE¹

The Coalition for Free and Open Elections (COFOE) is a nonprofit advocacy organization dedicated to the idea that full and fair access to the electoral process is central to democracy. COFOE is a group of independents and representatives from minor political parties. Since 1985 the group has supported efforts to remove barriers to ballot access that prevent non-major-party candidates and would-be voters from fully participating in the electoral process.

The third-party candidates and voters that make up COFOE's constituency have an interest in the question presented because Georgia's ballot access laws for access to the ballot for minor party and independent candidates have effectively meant that no one can run for the U.S. House of Representatives other than Republicans and Democrats.

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SUMMARY OF ARGUMENT

In *Norman v. Reed*, 502 U.S. 279 (1972), this Court stated that the U.S. Constitution “protects the right of citizens to create and develop new political parties.” New political parties in the U.S. have frequently found

¹ No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No one other than the Amicus Curiae and its counsel made any monetary contribution to its preparation and submission. The parties were given timely notice and consented to the filing of this brief of the Amicus Curiae.

their greatest success, not in presidential elections or elections for statewide office, but in U.S. House of Representatives elections. The Georgia laws, permitting the Libertarian Party to freely run for statewide office but not for the U.S. House of Representatives, thus cripples the Libertarian Party and other new parties from participation in the most fruitful races.

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ARGUMENT

I. U.S. History Shows that elections for the U.S. House of Representatives are an essential means for new political parties to develop.

The right of Americans to vote for a member of the U.S. House of Representatives is the bedrock of the people's control over the federal government. Under our Constitution as originally written, the House of Representatives was the only branch of the federal government chosen directly by the voters. Even today, although the voters now vote for presidential electors and U.S. Senators as well, the House of Representatives is the only branch chosen entirely by all the voters every two years. "Sovereignty confers on the people the right to choose freely their representatives to the National Government." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 793 (1995).

Nationally organized political parties frequently use the mid-term congressional election campaigns to "send a message" to the voters of the entire nation. In

1994, the Republican Party (which had been in a minority in the House since 1954) garnered considerable attention with its “Contract with America,” signed by almost all of the party’s House candidates. The party promised that if the voters elected a Republican majority to the House, the House would take particular actions on ten key issues. Over 52% of the voters who voted that year, voted “Republican” for House; it is clear that voters responded to a national “message” by a particular party’s congressional campaign.

New and minor parties in the U.S. have often made a quicker impact for themselves and their ideas in U.S. House elections, than in presidential or Senate elections. The Republican Party was formed on July 6, 1854 (a mid-term year), and in the U.S. House elections of 1854, the results were: 100 Republicans, 83 Democrats, and 51 members of the American (“Know-Nothing”) Party.² By contrast, in the Senate that met in 1855, Democrats outnumbered Republicans 40-15.³ It took the Republicans another six years to elect a president, but the party’s success in the 1854 House elections showed that it had become the major opposition to the Democratic Party, starting only five months after the new party had been formed.

Another party which made its biggest impact by its showing in a U.S. House election, rather than in a

² See *The Historical Atlas of Political Parties in the U.S. Congress, 1789-1989* by Kenneth C. Martis (1989: Macmillan Publishing Co., New York).

³ See *Congressional Quarterly’s Guide to U.S. Elections* (Washington, DC: Congressional Quarterly Publishing, 1975), p. 929.

presidential election or a gubernatorial election, was the Greenback Party, which represented the interests of farmers in need of an expanded money supply. In the 1878 mid-term elections, it polled 910,898 votes for its nominees for U.S. House of Representatives – 12.7% of the total vote cast for that office that year.⁴ The Greenback Party elected 13 members of the House, 4.4% of the membership of the House. It went unrepresented in the U.S. Senate, and never polled more than 3.3% of the presidential vote.⁵ It never elected a Governor.

The Peoples (“Populist”) Party also showed its maximum strength in House elections. In 1892 it polled 8.5% for President, and 9.3% of the U.S. House vote (1,136,022 votes), electing eleven candidates to the House. It polled 1,288,719 votes for its U.S. House candidates in 1894, 11.1% of the total cast for that office, electing nine candidates to the House. In 1896 it endorsed the Democratic candidate for President, yet ran its own candidates for other offices; it polled 940,443 for its House candidates (6.7%) and elected 22 of them.

Until 1910, the Socialist Party’s best showing in a presidential election had been slightly under 3%, in both 1904 and 1908. However, in 1910, it was able to elect its first member of Congress, Victor Berger of Milwaukee. Having a member of Congress greatly enhanced the ability of the party to gain attention for its

⁴ See *United States Congressional Elections, 1788-1997* by Michael J. Dubin (1998: McFarland & Co., Jefferson, N.C.).

⁵ See *A Statistical History of the American Presidential Elections* by Svend Petersen (1963: Frederick Unger, New York).

ideas, and in 1912 it polled 6.0% for President, the best in its history. Similarly, the Prohibition Party, founded in 1869, never polled more than 2.3% for President, but it elected its first member of Congress, Charles Randall, of Los Angeles, in 1914, and re-elected him in 1916 and 1918. It was Randall who introduced the House Resolution in 1917 to propose the 18th amendment, banning the manufacture, sale and transportation of intoxicating liquors.

In 1948, former Vice President Henry Wallace's Progressive Party only polled 2.4% of the presidential vote, but it elected two members to the House that year, Leo Isaacson in a special election in February in New York, and Vito Marcantonio in November, also in New York.

Georgia voters in the past participated in voting in significant numbers for minor party candidates for the U.S. House. For example, in 1896, the Peoples Party candidates for the House polled 20.5% of the total vote cast in Georgia for U.S. House. Although the Democrats won all eleven elections, the Peoples candidates provided the major opposition to the Democrats in four districts.⁶ There were no ballot access barriers for minor party and independent candidates for any office back then, because at the time there were no government-printed ballots in Georgia. Voters were free to make their own ballots, but most voters accepted ballots that had been printed by the political parties. Georgia did not provide for government-printed ballots

⁶ See Dubin, *supra*, p. 314

until 1922.⁷ The first Georgia ballot law provided no barriers whatsoever to minor party and independent candidates. Any party, or any candidate, could be placed on the ballot, simply by request. No petition was required. There were three minor parties on the ballot in Georgia in 1924, two in 1928, three in 1932, three in 1936, one in 1938, and two in 1940.⁸

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CONCLUSION

The Georgia ballot access laws for the U.S. House of Representatives impose a severe burden on the ability of voters to establish a new political party. For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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⁷ Ga. Session Laws of 1922, Ch. 530, p. 100.

⁸ Petersen, *supra*; for the 1938 election, see the Georgia *Official & Statistical Register* for 1939.