IN THE SUPREME COURT OF GEORGIA

Case Nos. S25A0177, S25A0182, S25A0183, S25X0184

HASAN AL-BARI, *et al.*,
Appellants/Cross-Appellees

v.

CRAIG PIGG, *et al.*,
Appellees/Cross-Appellants

On Appeal from the Superior Court of Fulton County
Civil Action No. 24CV011035

Case No. S25A0178

CORNEL WEST,
Appellant

v.

ROBERT WITTENSTEIN, *et al.*,
Appellees

On Appeal from the Superior Court of Fulton County
Civil Action No. 24CV011079

WEST APPELLANTS' BRIEF

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I. INTRODUCTION

"Elections are critical to our democratic republic," in part because they are about "the choices citizens make when they engage in the democratic process by voting to select" candidates. *Martin v. Fulton County Bd. of Registration and Elections*, 307 Ga. 193, 193 (2019). In these cases, Appellees seek to thwart Georgia voters' opportunity to cast a vote that counts for Dr. Cornel West for President.

Dr. West and his electors complied with the requirements of Georgia law to access the ballot as an independent presidential candidate. The Secretary then correctly concluded that Dr. West and his electors met those requirements. The superior court's reversal of that decision was wrong on the law, particularly given the appellate posture in which it sat.

Georgia law makes clear that independent presidential candidates, not presidential electors, submit nominating petitions. But even if the applicable statutory provisions could be construed as ambiguous, the Secretary made no error of law when he reasonably relied on the permanent injunction issued by the federal district court in *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340 (N.D. Ga. 2016), to determine that Dr. West's nominating petition was correctly submitted. This Court should reverse the decisions of the superior court to the contrary and uphold the Secretary's final decisions in both appeals.

II. JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction because it granted Appellants'[1] application for discretionary appeal pursuant to O.C.G.A. § 5-6-35 on

[1] For purposes of this brief, "Appellants" are Dr. West in Case No. S25A0178 and the West Electors (Hasan Al Bari, Miranda Baumann, David Meadows, Bryan Shepard, Fatima Mustafaa, Joseph Rogers, Courtney Caamano, Donnetta Washington, William Mathis,

September 17, 2024. As directed by that Order, Appellants filed their Notices of Appeal in Fulton County Superior Court in both cases on September 18, 2024.[2] [W. V2-1, V2-26]; [W.E. V2-1, V2-21].

This Court, rather than the Court of Appeals, has jurisdiction over this appeal because it has exclusive appellate jurisdiction over "[a]ll cases of election contest." GA. CONST. Art. VI, Sec. VI, Par. II (2). And because this appeal involves a pre-election qualification challenge to the ability of Dr. West and his electors to qualify for office, it falls firmly within that jurisdiction. *Cook v. Bd. of Registrars*, 291 Ga. 67, 70 (2012). For purposes of candidate challenges, qualifications "include[] all of the prerequisites for seeking and holding office." *Camp v. Williams*, 314 Ga. 699, 700 (2022).

III. QUESTIONS PRESENTED BY THE COURT

In its order granting Appellants' application for discretionary appeal, the Court identified the following four questions:

1. Does OCGA § 21-2-132 (e), when read in conjunction with OCGA § 21-2-132.1 (b), require nomination petitions "in the form prescribed by Code Section 21-2-170" to be filed by an independent candidate for the office of President of the United States, by candidate(s) for the office of presidential elector, or by both?

2. In light of the General Assembly's amendments to OCGA § 21-2-132 and enactment of OCGA § 21-2-132.1 in 2017 and 2019, respectively, is the

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Joshua Roberts, Sherry Tanner, Bartholomew Scott, Jerome Marshall, Dara Ashworth, Jermon Bell, and Adam Inyang) in Case Nos. S25A0177, S25A0182, S25A0183, and S25X0184.

[2] Because this brief covers several appeals and a cross-appeal, the references to the record titled "[W. V1-__]" refer to the record in *West v. Wittenstein* and the references titled "[W.E. V-1-___]" refer to the record in *Al-Bari v. Pigg*.

injunction entered in *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340 (N.D. Ga. 2016), still effective?

3. In light of your answers to Questions 1 and 2, what is the consequence, if any, of the failure of any electors for an independent candidate for President of the United States to file a "nomination petition in the form prescribed in Code Section 21-2-170"? See OCGA § 21-2-132 (e). See also OCGA § 21-2-132.1.

4. Is the question of whether OCGA § 21-2-132 (as amended), OCGA § 21-2-132.1, or OCGA § 21-2-170 violates the United States Constitution as applied to independent candidate for the office of President of the United States Dr. Cornel West or Claudia De la Cruz properly before this Court?

IV. STATEMENT OF THE CASE

Georgia law requires candidates running as independent candidates for President of the United States to follow three primary steps: (1) file a slate of candidates for the office of presidential elector, O.C.G.A. § 21-2-132.1(a); (2) have the candidate and the individuals identified as candidates for the office of presidential elector qualify within the timeline, O.C.G.A. § 21-2-132.1(b); and (3) file a nominating petition containing at least 7,500 valid signatures, O.C.G.A. § 21-2-170, *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1373 (N.D. Ga. 2016). This case concerns the process by which Dr. West and electors supporting his candidacy sought to obtain ballot access and focuses on whether the nominating petition filed by Dr. West and accepted by the Secretary of State was properly in his name or should have been in the name of one or more of his electors.

Because the burden of proof is on candidates in eligibility challenges, *Haynes v. Wells*, 273 Ga. 106, 108–09 (2000), Appellants begin with a brief recap

of the salient facts in the record demonstrating that they carried this burden of proof, as the Secretary correctly found.

A. Filing slate of electors.

The Ballot Access Counsel for Dr. West's campaign, Mike McCorkle, was responsible for preparing the slate of Georgia electors for the campaign. [W.E. V2-309, V2-204–05]; [W. V2-232–33]. After preparing those documents, Mr. McCorkle sent them via FedEx, a recognized commercial overnight delivery vendor, tendering the package on June 17, 2024 to FedEx for overnight delivery to the address of the Georgia Secretary of State's Elections Division as noted on the Secretary's website. [W.E. V2-237, V2-311–12]. Mr. McCorkle followed up with FedEx and, according to their package tracking information, the documents were delivered on June 20, 2024. [W.E. V2-239, V2-312–13].

The ALJ and Secretary of State found the slate of electors was timely filed by the June 21, 2024 statutory deadline, which was supported by the FedEx delivery information, even though the document was later stamped with a June 24, 2024 stamp. [W.E. V2-57, ¶ 1; V2-64, ¶ 1].

B. Qualification of candidate and electors.

On June 27, 2024, Dr. West filed a notice of candidacy as an independent candidate for President of the United States with the Secretary of State of Georgia, seeking ballot access for the 2024 general election. [W.E. V2-206–11]; [W. V4-234–39, V3-191 ¶ 9]. The West Electors likewise timely filed their notices of candidacy as presidential electors. [W.E. V2-212–35; Ex. 3-339]; [W. V4-240–63].

C. Filing of nominating petition.

The nomination petition form from the Secretary of State's office for use by independent candidates only includes a single line for the name of the "candidate." [W.E. Ex. 3-343, V2-190 (Tr. 51:22–52:1), V2-189 (Tr. 48:15–24)]; [W. V4-31–32, V4-227–228]. None of the West Electors submitted a nomination petition in his or her own name. [W.E. V2-58, 61; Ex. 3-339 ¶ 1]; [W. V2-73 ¶ 3].

Dr. West timely submitted a nominating petition for his candidacy with more than 24,000 signatures to the Secretary of State within the required statutory timeline. [W. V4-276 (Tr. 43:11–22), V2-81 ¶ 6]; [W.E. V2-353–54, V2-60–61, Ex. 3-339 ¶ 9]. The Secretary of State and county election officials verified and accepted 8,075 signatures from Georgia electors in the Secretary's initial review of Respondent's petition. [W. V2-81 ¶ 5]; [W.E. V2-65–66; Ex. 3-339 ¶ 8].

D. Prior proceedings in the West case (No. S25A0178).

Within the deadline for challenging qualifications, Appellees Wittenstein and Vogin challenged the qualifications of Dr. West under O.C.G.A. § 21-2-5 on two grounds. First, they asserted that Dr. West is not an "independent" candidate for purposes of Georgia law because he is affiliated with other political parties and organizations in other states. Second, they asserted that Dr. West failed to submit a nomination petition with a sufficient number of valid signatures by the statutory deadline. [W. V4-403]. As required by O.C.G.A. § 21-2-5(b), the Secretary referred the matter to the Office of State Administrative Hearings, which conducted a hearing. Following the hearing, the administrative law judge issued a non-binding initial decision for the Secretary's consideration. [W. V4-403–09]. The initial decision involving Dr. West as a candidate

determined that he is an independent candidate and that Appellees failed to demonstrate any of the signatures accepted by the Secretary were invalid. [W. V4-408]. The decision recommended that the Secretary find that Dr. West was qualified to be an independent presidential candidate. The Secretary adopted the findings of fact and conclusions of law of the ALJ in that case and issued his final decision. [W. V4-427–28].

On appeal to the Superior Court of Fulton County, Appellees abandoned their "independent candidate" argument and instead pursued their claim about the number of valid signatures on the nominating petition. [W. V4-52]. The superior court did not reach that issue, because it ultimately concluded that the appeal was moot after finding in favor of the Appellees in the West Elector appeal. [W. V5-6–21]. Appellees Wittenstein and Vogin have not sought to appeal that order.

E. Prior proceedings in the West Elector case (Nos. S25A0177, S25A0182, S25A0183, S25X0184).

Within the deadline for challenging qualifications, Appellees Pigg, Smith, and Waymer challenged the qualifications of the West Electors under O.C.G.A. § 21-2-5 on five grounds: (1) timeliness of the submission of the slate of electors for Dr. West to the Secretary's office; (2) that each presidential elector failed to submit a separate petition in his or her own name; (3) that Dr. West failed to submit a nomination petition with a sufficient number of valid signatures; (4) that each presidential elector had not paid a filing fee; and (5) that Dr. West could not obtain access to the ballot under the 20-state rule of O.C.G.A. § 21-2-172(g). [W.E. V2-57]. As required by O.C.G.A. § 21-2-5(b), the Secretary referred the matter to the Office of State Administrative Hearings, which

conducted a hearing.[3] At the hearing, Appellees abandoned their fourth and fifth grounds for disqualification and instead pursued only the first three. [W.E. V2-57 n.2]. Following the hearing, the ALJ issued a non-binding initial decision for the Secretary's consideration. [W.E. V2-56–61]. That initial decision determined that the slate of electors was submitted timely, but that the failure to submit nomination petitions in the name of each individual elector resulted in the West Electors lacking the necessary qualifications to serve as presidential electors. *Id*. The Secretary then issued a final decision, which adopted the ALJ's findings of fact regarding the submission of the slate of electors, but concluded the West Electors were qualified because (1) nomination petitions in the name of electors were not required, finding that such a requirement would be unconstitutional under the analysis set forth by a federal district court in *Green Party* and would violate an ongoing permanent injunction issued in that case; and (2) that Petitioners had not shown any signature accepted by the Secretary was invalid. [W.E. V2-63–67].

On appeal, Appellees again raised all three challenges. [W.E. V2-48–52]. The superior court found the slate of electors was timely submitted but found that electors were required to submit nominating petitions in their own names, not in the name of Dr. West, and thus reversed the Secretary's decision, requiring votes cast for Dr. West to not be counted. [W.E. V3-91–101]. On the evening of September 19, Appellees cross-appealed the decision.

F. Proceedings before this Court.

Appellants moved expeditiously to seek this Court's review. The day following the decisions of the superior court, Appellants filed applications for

[3] Appellees Pigg, Smith, and Waymer never provided evidence they were Georgia voters, but this issue was not considered by the ALJ or the Secretary.

discretionary appeals, motions to stay, and requests to expedite consideration. On September 15, 2024, this Court granted supersedeas and stayed the superior court orders pending the resolution of these appeals. This Court also accelerated the response time for Appellees and granted the applications on September 17, 2024. Appellants complied with the timeline for filing the notice of appeal and filed this brief on an expedited basis.

V. SUMMARY OF ARGUMENT

Only an independent presidential candidate—not his or her electors—must submit a nominating petition with at least 7,500 names to have his or her name placed on the general-election ballot in Georgia. The relevant statutory text demonstrates that "candidates" are treated differently from "presidential electors" in the notice-of-candidacy context. As a result, the nominating-petition requirements apply to independent presidential candidates only and not their electors. This approach to the statutes allows the logical application of the other requirements that independent presidential candidates submit a slate of electors only just before qualifying begins, which is well after nominating petitions can be circulated.

But even if the text is not clear, the injunction in *Green Party* still applies and is clear. It relates directly to the qualification of presidential candidates, not electors, and it was sound for the Secretary to rely on that injunction in his final decision on ballot access. Further, *Green Party* demonstrates that the purpose of nomination-petition requirements is to show a sufficient level of support for the presidential candidate among the public, not to show support for presidential electors that only carry out the task of casting the votes allocated to Georgia in the Electoral College.

Applying Appellees' single-elector approach, where only a single elector must submit a petition with 7,500 signatures for the independent candidate to obtain ballot access, carries severe consequences for all voters. Under this interpretation, not only are independent candidates required to trade votes in the Electoral College for ballot access at the 7,500-signature threshold, but the State of Georgia risks casting fewer than its 16 electoral votes. Appellees' single-elector approach prevents independent presidential candidates from submitting a full slate of electors eligible to vote in the Electoral College unless the independent presidential candidate and his or her electors amasses more than 120,000 valid signatures, which is unconstitutional.

This Court does not need to reach the constitutional issues raised in *Green Party* because it can uphold the Secretary's decision on the text and the injunction in *Green Party*. But to the extent this Court finds that the text and *Green Party* injunction do not support the Secretary's decision, it should still uphold that decision because requiring a candidate to submit more than 7,500 signatures is unconstitutional.

On the cross-appeal, the ALJ, Secretary, and superior court all properly found that the evidence of timely submission of the slate of electors overcame the presumption of the validity of the date stamp on the certification document. There is evidence to support that decision in the record and it is correct as a matter of law.

The Secretary properly found that Dr. West was entitled to ballot access for the 2024 Presidential election. The superior court erred in determining otherwise. This Court should uphold the Secretary's decision and return the choice of Presidential candidates to Georgia voters, where it belongs.

VI. ARGUMENT

A. Standard of review.

As an appellate body considering the Secretary's decision about a candidate's qualifications, this Court's review is "confined to the record" and the Court cannot "substitute its judgment for that of the Secretary of State as to the weight of the evidence on questions of fact." O.C.G.A. § 21-2-5(e). This Court's review:

> is a two-step process: because the court reviewing an administrative decision must accept the agency's findings of fact if there is any evidence to support the findings, the court must first [1] determine if there is evidence to support the factual findings; the court then [2] "is statutorily required to examine the soundness of the conclusions of law drawn from the findings of fact supported by any evidence."

Handel v. Powell, 284 Ga. 550, 552 (2008) (quoting *Pruitt Corp. v. Ga. Dept. of Community Health*, 284 Ga. 158, 160 (2008)); *accord* O.C.G.A. § 5-3-5.

This Court may only reverse or modify the decision of the Secretary in this case "if substantial rights of the appellant have been prejudiced because the findings, inferences, conclusions, or decisions" of the Secretary were:

> (1) In violation of the Constitution or laws of this state;
> (2) In excess of the statutory authority of the Secretary of State;
> (3) Made upon unlawful procedures;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

O.C.G.A. § 21-2-5(e).

B. The only factual issue relates to the cross-appeal filed by Appellees in the West Elector case.

The Secretary determined that Dr. West and his electors were qualified, so that Dr. West could appear on the November presidential election ballot. [W. V4-427–28]; [W.E. V2-63–67]. When the superior court reviewed that decision, it based its disqualification on legal issues only, upholding the Secretary's earlier decision regarding the timeliness of the filing of the slate of electors. [W.E. V3-91–101].

Given Appellees' cross-appeal in the *Al-Bari* case, this Court must first accept the Secretary's findings of fact if there is any evidence to support them. *Handel*, 284 Ga. at 552. There are clear facts in the record to support the decision of the Secretary regarding the timeliness of the slate of electors. The ALJ and Secretary both credited the testimony of Mr. McCorkle regarding the submission of the slate. [W.E. V2-57, ¶ 1; V2-64, ¶ 1]. The evidence demonstrated the slate was dispatched by FedEx several days before the deadline and a delivery receipt showed it was timely delivered. [W.E. V2-237, V2-239, V2-311–13]. Because this evidence supports the findings in the final decision, the first factor of the *Handel* test is met on this issue.

Regarding the nominating petitions that are the basis for Appellants' appeal of the superior court order, the first step of the *Handel* test is not applicable, because the sole relevant factual issue is undisputed—Dr. West filed a nominating petition in his own name and not in the name of any electors. [W.E. V2-58, 61; Ex. 3-339 ¶ 1]; [W. V2-73 ¶ 3].

With those issues addressed, this Court's review should proceed "to examine the soundness of the conclusions of law" in the Secretary's decision. *Handel*, 284 Ga. at 552. This brief first addresses the questions from the Court

on the nominating petition and then addresses the issue in the cross-appeal regarding the slate of electors.

C. First Issue: Whether nominating petitions must be filed by electors, independent presidential candidates, or both.

The relevant sections of the Georgia Code, when read together, demonstrate that nominating petitions need only be filed by an independent candidate for President, not individuals seeking to serve as presidential electors for an independent candidate.

1. Qualification provisions in O.C.G.A. § 21-2-132.

Candidates can qualify for the general election ballot in Georgia through at least five methods: (1) nomination in a political party primary,[4] (2) a notice of candidacy with a nominating petition, (3) a notice of candidacy without a nominating petition, (4) as presidential electors of a political party, and (5) a substitute nomination after a primary. O.C.G.A. § 21-2-130.

O.C.G.A. § 21-2-132 sets forth the process for nonpartisan, political body,[5] and independent[6] candidates seeking access to the general election ballot—that is, candidates not nominated in a political party primary or by a political party convention. This section specifically excludes any nominees of a political party for presidential elector, so those individuals are not required to file notices of candidacy. *Id.* at (a).

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[4] Qualifying for participation in a political party primary is separately governed by O.C.G.A. § 21-2-153.

[5] A political body candidate is the nominee of a political organization that is not a political party. O.C.G.A. § 21-2-2(23). Political parties in Georgia are only organizations which received more than 20 percent of the votes cast in a general election, or only the Republican and Democratic parties. *Id.* at (25).

[6] An independent candidate is "a person unaffiliated with any political party or body" in Georgia. O.C.G.A. § 21-2-2(10).

O.C.G.A. § 21-2-132(d) addresses the process for political body and independent candidates for various offices, including independent presidential candidate electors. For those individuals, (d)(1) specifies that *electors* "desiring to have the names of his or her candidates for President and Vice President" placed on the ballot must file notices of candidacy. This language differs from what is found in (d)(2), (d)(3), and (d)(4), each of which reference a *candidate* for various other offices. This provides an immediate textual basis to distinguish (d)(1) from the other provisions of subsection (d) because it specifically refers to an "elector" wishing to have the name of someone else—their preferred "candidate"—placed on the ballot, which can only be the presidential candidate, not the presidential elector.

Armed with that information, subsection (e) requires a "candidate" that files a notice of candidacy to file a nominating petition, with a handful of exceptions that are not relevant here. And the "candidate" referenced in that subsection refers most logically to the "candidate[] for President and Vice President" to be listed on the ballot from subsection (d)(1). This is because, while notices of candidacy are addressed in subsection (d), the only reference to a "candidate" regarding presidential electors is to the independent candidate for President, not the elector. *Id.* at (d)(1). Further, the notices of candidacy required by O.C.G.A. § 21-2-132 do not clearly apply in all respects to presidential electors. For example, in subsection (f)(1), candidates are required to include "the name as the candidate desires it to be listed on the ballot" in their notice. But all parties agree that the elector names are not listed on the ballot. Instead, the independent presidential candidate and vice-presidential candidate names are listed, so again the "candidate" can only be the presidential candidate, not the elector(s).

The list of exceptions in subsection (e) does not change this analysis. It specifically excludes nominees of political parties as presidential electors, but this is only what is already specified in subsection (a), so that limitation does not apply. None of the other exclusions are relevant to presidential electors.

2. Presidential elector slates in O.C.G.A. § 21-2-132.1.

O.C.G.A. § 21-2-132.1 reinforces the conclusion that the "candidate" who must submit a nominating petition under O.C.G.A. § 21-2-132(e) is the independent presidential candidate and not the presidential electors for that candidate. Because the proper interpretation of the requirements of O.C.G.A. § 21-2-132(e) relating to nominating petitions applies to the presidential candidate, the provisions of O.C.G.A. § 21-2-132.1(b) do not change that analysis. It only requires that the electors qualify in accordance with O.C.G.A. § 21-2-132, which does not impose a requirement of nominating petitions on those electors for the reasons discussed above.

Further, nominating petitions may only be circulated in the 180-day period immediately prior to the filing deadline. O.C.G.A. § 21-2-170(e). But an independent candidate for President is not required to identify his or her slate of electors until the Friday before the June deadline, which fell on June 21, 2024 this year. O.C.G.A. § 21-2-132.1(a). Nominating petitions are then due the second Tuesday in July, or July 9 in 2024. O.C.G.A. § 21-2-132(e). It makes no sense to require an elector who was part of a slate certified on June 21 to circulate and complete a nominating petition in his or her own name *in just 18 days.* Indeed, the absurdity of this outcome further reinforces that the law only requires that the petition should be in the name of the independent candidate for President. Further, as discussed below, O.C.G.A. § 21-2-132.1 was added in 2019, 2019 Ga. Laws 24 (HB 316), but it did not modify any provisions of

O.C.G.A. § 21-2-132 or § 21-2-170 regarding *elector* qualifications for office aside from requiring that they be identified as part of a slate by an independent presidential candidate.

3. Nominating petition provisions of O.C.G.A. § 21-2-170.

Turning to O.C.G.A. § 21-2-170, several provisions also support the conclusion that the petition must be in the name of the independent candidate, not the elector. Subsection (a) requires candidates to use "the form prescribed by the officers with whom they are filed, and no forms other than the ones so prescribed shall be used for such purposes." O.C.G.A. § 21-2-170(a). The parties agreed in both cases that the form provided by the Secretary of State only contains a space for just one name for a candidate, not space for a list of electors. *See* [W.E. Ex. 3-343, V2-190 (Tr. 51:22–52:1), V2-189 (Tr. 48:15–24)]; [W. V4-31–32, V4-227–228].

The still-unamended subsection (b) sets the number of signatures required for "a candidate seeking an office which is voted upon state wide." When considering a challenge to the one percent signature requirement in that subsection, the *Green Party* court determined that it was unconstitutional "as applied to presidential *candidates*." 171 F. Supp. 3d at 1372 (emphasis added). Further, the section specifically limits the nominating petition to supporting only the "candidacy of a single candidate" with an exception for political body electors.[7] O.C.G.A. § 21-2-170(c).

[7] That exception exists so that candidates can be listed on the ballot as affiliated with a political body, not as a general exception. O.C.G.A. § 21-2-170(g).

4. Putting the pieces together in practice.

Reading these code sections together reveals a design that confirms the nominating petition must be in the name of the independent candidate, not the elector(s). And these statutes must be viewed together instead of in isolation because "[s]tatutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes." Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 539 (1947).

Following this approach, independent presidential candidates can begin circulating a nominating petition well before they identify their electors and must use the Secretary's form that has only a single line for the name of the presidential candidate. Those candidates then must identify and certify their slate of electors before the qualifying period for independent candidates opens. The electors and candidate then file their notices of candidacy, which includes information only relevant to the presidential candidate, like how he or she wishes to be listed on the ballot. Shortly thereafter, the completed nominating petition is due to the Secretary so that he and the relevant county officials can begin the detailed review process required by O.C.G.A. § 21-2-171. This is also the approach this Court endorsed in 2016, when it affirmed a decision rejecting a nomination petition with fewer than 7,500 signatures in the name of an independent presidential candidate. *De La Fuente v. Kemp*, 300 Ga. 79, 79–80 (2016).

In sharp contrast to the logic of presidential-candidate-only petitions, interpreting these provisions as requested by Appellees would destroy any effective ballot access for independent presidential candidates and, as noted by the Secretary in the final decision, would be unconstitutional under the analysis set forth in *Green Party*. Appellees would unfairly prejudice independent

presidential candidates by requiring them to correctly guess how many electors for which they would be able to successfully circulate nominating petitions months in advance. Whether that number was one, seven, or 16, the independent candidate would then have to circulate petitions in the name of each likely (but not yet certified) elector, requiring explanations to understandably confused voters that the name listed as "Candidate" on the nominating petition required by the Secretary is not in fact the candidate that would later appear on the ballot. Then the independent candidate would submit the (hopefully) successful electors as their certified list, those electors would file notices of candidacy, and then the electors would submit each of their nominating petitions for review (whether the candidate would also have to submit a petition is unclear under this approach). As discussed below, if two of the 16 electors obtained a sufficient number of signatures, the independent presidential candidate would obtain ballot access, but at the price of most of Georgia's Electoral College votes. Only if the independent presidential candidate correctly predicted the identity of 16 electors months in advance and successfully submitted more than 120,000 valid signatures would the independent presidential candidate obtain meaningful ballot access. Because only in that scenario would the votes cast in the Electoral College if the candidate was successful actually represent the selection of Georgia voters.

These added hurdles for independent candidates are not required by the text. Before even reaching *Green Party*'s language about presidential candidates, Georgia law is clear that only independent presidential candidates need to submit a nominating petition, not each individual elector.

D. Second Issue: Whether the *Green Party* injunction is still effective.

The enactment of changes to O.C.G.A. §§ 21-2-132 and 21-2-132.1 did not dissolve the permanent injunction in *Green Party*, and it remains operative today.

The injunction entered in the *Green Party* case permanently enjoined the Secretary from enforcing the provisions of O.C.G.A. § 21-2-170 "against presidential *candidates*." 171 F. Supp. 3d at 1372. It did not refer to presidential electors and the district court outlined a remedy that allowed "an independent *candidate* for President" to qualify "by submitting a nomination petition signed by 7,500 voters and which is otherwise in compliance with" O.C.G.A. § 21-2-170. 171 F. Supp. 3d at 1373 (emphasis added). The legislature has not modified that Code section since that decision and thus the injunction remains in effect because there has been no enactment of a "permanent provision" regarding independent presidential candidate ballot access. 171 F. Supp. 3d at 1373; *see also Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1356 (11th Cir. 2009) (injunction remained in effect until repeal of law at issue).

The amendments to O.C.G.A. § 21-2-132 in 2017 did not alter the injunction in *Green Party*. Before those amendments, all political body and independent candidates for state and federal office were included in a single subsection with varying dates, some in June and some in March. *See* O.C.G.A. § 21-2-132(d)(1) (2016). Other subsections addressed county and municipal offices. *Id.* at (2), (3). The amendment in 2017 did not make substantive changes to requirements for presidential electors, who would have fallen under the "[e]ach candidate for federal office" provision in the prior language. *Id*. at (1). Instead, the amendment broke the March and June deadlines into two separate paragraphs and clarified that the June deadlines related to electors, not to other

federal offices. HB 268, § 3. None of those changes involved anything addressed by the *Green Party* injunction nor did it change any requirement for the qualification of presidential electors.

The addition of O.C.G.A. § 21-2-132.1 in 2019 also did not change the status of the *Green Party* injunction. That section did not change petition requirements or even reference petitions, but instead set specific methods for certifying a slate of electors and for those electors to submit qualification paperwork. *Id*. Adding those deadlines did not implicate any portion of the *Green Party* injunction.

At least one federal court also agreed that *Green Party* remains in effect because it found in a decision issued after the 2019 amendments that "[p]olitical body *candidates for President* must submit a nominating petition containing at least 7,500 signatures." *Cooper v. Raffensperger*, 472 F. Supp. 3d 1282, 1288 (N.D. Ga. 2020) (citing *Green Party*, 171 F. Supp. 3d at 1372) (emphasis added).

Because neither of the changes in 2017 or 2019 were a "permanent measure" regarding the signature requirement for presidential candidates, *Green Party*, 171 F. Supp. 3d at 1374, the injunction remains in full force and effect.[8] This is also why the "otherwise complies with Georgia law" language at the end of *Green Party* does not change this analysis. *Id*. The 2017 and 2019 changes did not affect any part of Georgia law related to the qualification of presidential electors. Thus, the reference to Georgia law in *Green Party* refers to the same processes currently in effect and relates to the other requirements of nominating petitions.

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[8] The General Assembly has in other instances referenced specific federal cases when amending statutes to address the actions of courts. *See*, *e.g.*, O.C.G.A. § 46-2-1.1 (referencing federal court decision in statutory language). It has not done so with the *Green Party* injunction.

E. Third Issue: What consequences an elector faces if he or she does not file a nominating petition.

Because, as explained in Issues One and Two, electors are not required to file nominating petitions, there are no consequences for an elector not filing a nominating petition. But finding that electors must file their own nominating petitions would cause serious constitutional and practical consequences.

1. Requiring electors to file petitions undermines the constitutional reason for nominating petitions.

There is a heavy burden on the right to vote if only major-party candidates appear on the ballot, and excluding independent candidates burdens voters' freedom of association. *Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983). But states must also be able to regulate elections to ensure order and avoid chaos. *Storer v. Brown*, 415 U.S. 724, 730 (1974). And "[t]here is surely an important state 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." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *see also American Party of Texas v. White*, 415 U.S. 767, 789 (1974) (same); *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) (finding that ballot access for "independent candidate" can be conditioned "upon a showing of a modicum of support among the potential voters for the office").

This tension between the freedom of association, the right to vote, and the state interest in regulating elections is why Georgia is constitutionally permitted to "require prospective third-party or independent candidates to demonstrate that they enjoy some public support." *Green Party*, 171 F. Supp. 3d at 1353. But that public support through a petition is necessary only for the *candidate* to show, not that candidate's electors. *Id.* Concluding that presidential *electors* must submit nominating petitions does nothing to advance the State's interest in

requiring a showing of some threshold level of support for the candidate actually running for office and appearing on the ballot. It also raises weighty constitutional questions about whether requiring *electors* to show support is related in any way to a state interest addressing a severe burden on the right to vote. If the petition process has nothing to do with showing support for the independent presidential *candidate* among the electorate, then it cannot be a state interest sufficient to justify the burden on the right to vote imposed by keeping third parties off the general election ballot and is unconstitutional. *Green Party*, 171 F. Supp. 3d at 1367.

2. The single-elector approach would have massive consequences in the Electoral College.

The second consequence of Appellees' approach is just as severe. If, as Appellees argue, an independent presidential candidate can obtain ballot access by having only a single elector submit a petition, then that presidential candidate and all Georgia voters would be at a severe disadvantage. Georgia and federal law require the election of electors at the November general election. O.C.G.A. § 21-2-10; 3 U.S.C. § 1. The electors chosen then assemble to cast votes in the Electoral College on the first Tuesday after the second Wednesday in December—but only those electors chosen at the November election. O.C.G.A. § 21-2-11; 3 U.S.C. § 7. Vacancies in the office of elector can be filled, but only for "any such presidential elector"—referring back to those electors who were actually elected at the November general election. O.C.G.A. § 21-2-12; *see also* 3 U.S.C. § 4 (vacancies can only be filled by state law provisions). Thus, the consequence of a presidential candidate who only has a single elector qualify for office but then wins the election would be widespread disenfranchisement and

result in the State of Georgia sending just a single vote in the Electoral College for President.

As a result, the consequence of interpreting Georgia law to require electors to submit their own nominating petitions places the State of Georgia in peril of wasting its allocated electoral votes in a consequential presidential election. In other words, this proposed interpretation not only disenfranchises all the voters that voted for a successful independent candidate, but the State of Georgia *itself* loses the opportunity to have the vote of its electors counted in the presidential election. Under Appellee's approach, the only way to ensure that (1) an independent presidential candidate could obtain ballot access and (2) a successful independent presidential candidate could have all 16 of Georgia's electoral votes cast in the Electoral College is by submitting nomination petitions with more than 120,000 valid signatures—exactly the eventuality Appellees claim their view avoids. If more than 50,000 signatures was unconstitutional in 2016, *Green Party*, 171 F. Supp. 3d at 1347, requiring more than 120,000 signatures to obtain effective ballot access is certainly unconstitutional today.

3. The consequences of Appellees' approach demonstrates the soundness of the Secretary's decision.

All of this underscores why the Secretary's legal conclusion to accept the nominating petition in the name of Dr. West was sound, not affected by any error of law, and not clearly erroneous. O.C.G.A. § 21-2-5(e). The ALJ in this proceeding was precluded from reviewing constitutional issues. Ga. Comp. R. & Regs. r. 616-1-2-.22(3). Thus, the Secretary reasonably applied the existing injunction from *Green Party* to the situation before him in determining the type of petitions to accept. The Secretary did not act in violation of the Constitution or the laws of this state in making this conclusion, nor did he make an error of

law. O.C.G.A. § 21-2-5(e). The Secretary reasonably concluded that he was still bound by a court order regarding nominating petitions for independent candidates for President. This interpretation of the statutory structure for nominating petitions also avoids an interpretation that would result in the statute being unconstitutional. *Premier Health Care Invs., LLC v. UHS of Anchor, L.P.*, 310 Ga. 32, 48 (2020) (explaining canon of constitutional doubt).

The Secretary properly relied on a federal court case in determining separate nominating petitions from each elector were not required. The substantial rights of Appellees are not prejudiced as a result of the Secretary's decision about the nominating petition requirements for presidential electors and this Court should uphold that decision.

F. Fourth Issue: Whether the constitutionality of statutes related to independent candidates for President is before the Court.

Because of the standard of review, this Court sits in a relatively constrained posture. And because none of the six reasons for reversing the Secretary's final decision in O.C.G.A. § 21-2-5 are present here, this Court need not reach the question of the constitutionality of O.C.G.A. §§ 21-2-132 (as amended), 21-2-132.1, or 21-2-170. But if this Court concludes the superior court correctly reversed the final decision of the Secretary under the language in the relevant code sections, then at minimum the question of the constitutionality of O.C.G.A. § 21-2-170 as applied to independent candidates for President is properly before this Court.

This Court is clear that an issue must have been considered and ruled on at the trial court before it may be raised on appeal: "We will not rule on a constitutional question unless it clearly appears in the record that the trial court distinctly ruled on the point…" *Haynes*, 273 Ga. at 108. Here, while an ALJ

conducts an initial hearing on a challenged petition and lacks the authority to rule on constitutional questions, Ga. Comp. R. & Regs. r. 616-1-2-.22(3), it is the final decision of the Secretary that is the operative trial court decision. *See* O.C.G.A. §§ 50-13-41 ("As used in this subsection, the term "reviewing agency" shall mean the ultimate decision maker in a contested case that is… an elected constitutional officer in the executive branch of this state…"), 2-2-5(c) ("The Secretary of State shall determine if the candidate is qualified to seek and hold the public office for which such candidate is offering"). The ALJ only "report[s] his or her findings to the Secretary of State" for consideration. O.C.G.A § 21-2-5(b). And if there was any remaining doubt on the issue, it should be settled by the clearly defined statutory avenue of appeal through "filing a petition in the Superior Court of Fulton County within ten days after the entry of the *final decision* by the Secretary of State." *Id.* at (e) (emphasis added). So, while the ALJ's initial decision is part of the record, it is the Secretary who is "the ultimate decision maker in a contested case…" O.C.G.A. § 50-13-41.

The relevant question for appellate review is whether the final decision issued by the Secretary "considered and ruled" on the constitutionality of O.C.G.A. § 21-2-170. And it did. In fact, the Secretary explicitly looked to the federal district court decision in *Green Party,* citing with approval the court's finding that that "the 1% signature requirement for statewide office under Code Section 21-2-170 as applied to the office of President of the United States was unconstitutional under the First and Fourteenth Amendments." [W.E. V2-66]. The Secretary further noted that "[t]he *Green Party* decision was affirmed by the U.S. Court of Appeals for the Eleventh Circuit, see 674 F. App'x 974, and has not been overturned by courts or abrogated by an act of the Georgia General Assembly modifying the petition signature requirement for President." *Id.* Thus,

the Secretary correctly concluded as a matter of constitutional interpretation that he was "prohibited from requiring independent candidates for President to submit more than 7,500 signatures on a single petition in order to access the General Election ballot." *Id.* And that an interpretation requiring Dr. West's 16 electors to provide 7,500 signatures each "would impose a petition signature requirement far in excess of that permitted by the court's decision in Green Party." *Id.* at 5.

Because the final decision of the trial court "distinctly ruled" on constitutionality of O.C.G.A. § 21-2-170 as applied to independent candidates for President, the issue is properly before this Court. And while Appellants argued at the superior court that *Green Party* and its constitutional analysis prohibited a decision contrary to the final decision, [W.E. V2-288–90], the superior court disagreed. To the extent this Court is unable to resolve this case through statutory interpretation, it may consider the constitutionality of O.C.G.A. § 21-2-170 as interpreted by the superior court.

And to the extent this Court finds that resolving the constitutionality of the section is necessary, it should follow the analysis set forth by the district court in *Green Party* and find any interpretation that requires independent presidential candidates to do more than submit a nominating petition in his or her name with more than 7,500 signatures to be unconstitutional for all the reasons listed in the *Green Party* case and for those outlined in response to Issues Two and Three above.

G. The Secretary's decision regarding the timeliness of the slate of electors was sound.

In their cross-appeal, Appellees ask this Court to review the timeliness of the submission of the West slate of electors. The ALJ, the Secretary, and the

superior court all agreed that, while the slate was stamped with a date after the deadline, the West Electors had overcome the presumption by evidence. This Court should uphold that finding.

As discussed above, there is evidence to support the conclusion of timely filing. Thus, the only remaining question is whether the conclusions of each reviewing entity were sound. While there is a presumption that "the entry of filing by the clerk is correct," *Forsyth v. Hale*, 166 Ga. App. 340, 341 (1983), "this presumption is rebuttable by evidence showing another date of *delivery*." *Dannenfelser v. Squires*, 365 Ga. App. 819, 822 (2022) (emphasis added).

The ALJ, Secretary, and the superior court relied on the receipt of the document as the date of filing and that was correct because "[it] is the date of delivery to the clerk's office that constitutes the date of filing, even if the clerk erroneously stamps a later date as the filing date." *Reese v. City of Atlanta*, 247 Ga. App. 701, 701 (2001). And a FedEx receipt of delivery is sufficient to show the date of delivery, even if a document is stamped with a later date by the clerk. *Id*. at 702.

Although an analogy to a court filing process is not perfectly precise, the legal conclusion by the Secretary about when his own office received a document is sound and supported by evidence in the record. And it makes sense as a practical matter, too. A contrary conclusion would invite virtually any employee of the Secretary's office to hold documents and stamp them with a later date to possibly disadvantage candidates for personal or political reasons. The primary focus must be on the date of *delivery* to determine the date of *filing*, which Appellants have demonstrated was timely in this case. *See Reese*, 247 Ga. App. at 701. The substantial rights of the Appellees are not prejudiced as a result

of the Secretary's decision about the submission of the slate of electors and this Court should uphold that conclusion as well.

VII. CONCLUSION

Georgia voters should be entitled to vote for and have their votes counted for all properly qualified candidates for President. Dr. West is one of those candidates. This Court should uphold the Secretary's decision finding that Dr. West was a properly qualified candidate because it is based on evidence and sound legal conclusions. Georgia law requires nominating petitions to be submitted by independent candidates for President, not by their electors. And *Green Party* remains in effect and requires those petitions to be submitted by independent candidates for President as well. Finding otherwise would make Georgia's ballot access laws for President unconstitutional. This Court should reverse the superior court and uphold the decision of the Secretary.

Respectfully submitted this 20th day of September, 2024.

CERTIFICATION OF WORD COUNT

This submission does not exceed the word-count limit imposed by Rule 20.

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CERTIFICATE OF SERVICE

This is to certify that I have this day filed the foregoing **WEST APPELLANTS' BRIEF** with the Court's e-filing system which will provide service to all counsel of record and separately sent this document by email to counsel of record for all parties.

I further certify that there is a prior agreement with all parties to these appeals to allow documents in a PDF format sent via e-mail to suffice for service under Supreme Court Rule 14.

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