Nos. 21-13199 and 21-13367

In the
United States Court of Appeals
For the Eleventh Circuit

MARTIN COWEN et al.,

Plaintiffs – Appellees – Cross-Appellants

v.

GEORGIA SECRETARY OF STATE,

Defendant – Appellant – Cross-Appellee

Appeal from the United States District Court
For the Northern District of Georgia

APPELLEES–CROSS-APPELLANTS' BRIEF

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Certificate of Interested Persons
and
Corporate Disclosure Statement

Pursuant to Eleventh Circuit Rule 26.1, 26.1-2, and 26.1-3, counsel for the plaintiffs–appellees–cross-appellants certifies that the following persons and entities have or may have an interest in the outcome of this case:

Buckley, Allen

Carr, Christopher

Correia, Cristina

Cowen, Martin

Gilmer, Aaron

Heidt, Josiah B.

Libertarian Party of Georgia, Inc.

May, Leigh Martin

McGowan, Charlene S.

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Certificate of Interested Persons
and
Corporate Disclosure Statement
(continued)

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Statement Regarding Oral Argument

This is a constitutional challenge to Georgia's ballot-access restrictions on third-party candidates for U.S. Representative. Those restrictions are by far the most stringent in the nation, and—despite many attempts—no third-party candidate for U.S. Representative has appeared on the general-election ballot since the restrictions were first enacted in 1943.

Last year, this Court reversed the district court's grant of summary judgment for the Secretary of State and remanded the case with instructions for further proceedings. *Cowen v. Ga. Sec'y of State*, 960 F.3d 1339, 1347 (11th Cir. 2020). On remand, the district court applied the familiar balancing test set out in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and granted summary judgment in the plaintiffs' favor in a detailed 48-page ruling. Oral argument isn't necessary to affirm that portion of the district court's decision, which merely applies well-settled law to undisputed facts.

But the cross appeal raises issues worthy of oral argument. The second and third issues presented allow the Court to address

the remedial standards for ballot-access cases. Oral argument could be helpful on those issues because the district court's rulings did not address those standards in any detail.

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Statement of Jurisdiction

This is a consolidated appeal and cross-appeal from a final judgment of the district court entered on September 15, 2021. The Secretary of State filed a notice of appeal in the district court two days later. The plaintiffs filed their notice of a cross appeal ten days after that. This Court therefore has jurisdiction under 28 U.S.C. § 1291.

The district court had subject-matter jurisdiction because this case presents a federal question. 28 U.S.C. § 1331.

Statement of the Issues

The Secretary of State's appeal presents two issues.

The first is whether, on this record, the district court properly determined that the plaintiffs were entitled to summary judgment on their First and Fourteenth Amendment claim under the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

The second is whether the district court abused its discretion by making its remedial injunction applicable to all non-statewide offices.

The cross appeal presents three issues.

The first is whether, relying on *Jenness v. Fortson*, 403 U.S. 431 (1971), the district court properly declined to apply the Equal Protection standard set forth in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), as this Court instructed it to do.

The second is whether the district court's remedial order properly re-wrote Georgia law without first giving the Georgia General Assembly a chance to devise a remedy.

The third is whether the district court made sufficient findings to establish that its remedial injunction would cure the constitutional violation it found.

Statement of the Case

This is a constitutional challenge to Georgia's ballot-access restrictions on third-party candidates for U.S. Representative.

Those restrictions are by far the most stringent in the nation, and—despite many attempts—no such candidates have appeared on the general-election ballot since the restrictions were first enacted in 1943. Among other things, the laws at issue here require third-party candidates for U.S. Representative to gather thousands more signatures on a nominating petition than any such candidate has ever successfully gathered in the history of the United States. Georgia's ballot-access restrictions also produce the incongruous result that nominees of the Libertarian Party—whose candidates for statewide offices have won the support of millions of Georgia voters over the last ten years—must gather far more signatures to appear on the ballot in any one of Georgia's fourteen congressional districts than are required of Libertarian candidates for Governor, U.S. Senator, or even President.

The plaintiffs are the Libertarian Party of Georgia, prospective Libertarian candidates, and Libertarian voters. Together, they raise two claims. First, they allege that Georgia's ballot-access restrictions unconstitutionally burden their rights under the First and Fourteenth Amendments to the U.S.

Constitution. (I:1 at 37 ¶ 148.)[1] Second, they allege that Georgia's ballot-access restrictions violate the Equal Protection Clause of the Fourteenth Amendment. (*Id.* at 37 ¶ 149.)

I. Georgia's Ballot-Access Restrictions

The State of Georgia enacted its first ballot-access law in 1922. (V:159 at 2.) That law provided that an independent candidate, or the nominee of any party, could appear on the general-election ballot as a candidate for any office with no petition and no fee. (*Id.*) In 1943, the State added a five-percent petition requirement for access to the general-election ballot. (*Id.*) That provision allowed candidates of any political party that received at least five percent of the votes in the last general election for the office to appear on the general-election ballot without a petition or fee, but it required all other candidates to file a petition signed by at least five percent of the registered voters in the territory covered

[1] Throughout this brief, citations to the Secretary's Appendix will be in the form "Volume:Tab at Page" unless otherwise noted. Citations to the Appellees' Supplemental Appendix, which is only one volume, will be in the form "Appellees' Supp. App. Tab at Page" unless otherwise noted.

by the office. (*Id.*) Over the next few decades, the State tightened its ballot-access requirements through several incremental changes to the petition deadline, an added qualifying fee, and various other restrictions. (*Id.*)

In 1986, the State substantially loosened its ballot-access requirements—but only for statewide candidates. That year, the State dropped the petition requirement to one percent for statewide offices and created a way for third parties to have their candidates for statewide offices appear on the ballot without the need to submit a petition. Act of April 3, 1986, ch. 1517, §§ 3, 5, 1986 Ga. Laws 890, 892-94 (codified at O.C.G.A. §§ 21-2-170, -180). Under the latter provision, referred to here as "Section 21-2-180," a third party could become qualified to nominate statewide candidates without a petition if the party either (a) submitted a petition signed by at least one percent of the total number of registered voters at the last general election; or (b) had one of its statewide candidates in the last general election receive votes totaling at least one percent of the total number of registered voters in the election. O.C.G.A. § 21-2-180. The State left the five-percent petition

requirement for independent and third-party candidates for non-statewide offices, including U.S. Representative, unchanged.

Today, Georgia's ballot-access laws distinguish between three kinds of candidates for partisan public offices: (1) candidates nominated by a political party; (2) candidates nominated by a political body; and (3) independent candidates. (V:159 at 3.)

A "political party" is any political organization whose nominee received at least 20 percent of the vote in the last gubernatorial or presidential election. O.C.G.A. § 21-2-2(25). Political parties choose nominees in partisan primaries, and the candidate nominated by the party appears automatically on the general-election ballot for any statewide or non-statewide office. O.C.G.A. § 21-2-130(1). The only political parties that meet the current definition of "political party" under Georgia law are the Democratic Party of Georgia and the Georgia Republican Party. (V:159 at 3.)

A "political body" is any political organization other than a political party. O.C.G.A. § 21-2-2(23). Political bodies must nominate candidates for partisan offices by convention, O.C.G.A. § 21-2-170(g), and the nominees' access to the general-election

ballot depends on the office being sought (specifically whether the office is a statewide office, a non-statewide office, or the office of President of the United States) and whether the political body has qualified to nominate statewide candidates without a petition under Section 21-2-180. (V:159 at 3.)

Political-body candidates for *statewide offices* appear automatically on the general-election ballot, but only if the political body has qualified under Section 21-2-180. (*Id.* at 4.) All other political-body and independent candidates for statewide offices must petition. Candidates for President must submit: (1) a notice of candidacy and qualifying fee, O.C.G.A. § 21-2-132(d); and (2) a nomination petition signed by 7,500 registered voters eligible to vote for that office in the last general election. (III:97 at 20 ¶ 51-52.) Candidates for statewide offices other than President must submit: (1) a notice of candidacy and qualifying fee, O.C.G.A. § 21-2-132(d); and (2) a nomination petition signed by one percent of the number of registered voters eligible to vote for that office in the last general election, O.C.G.A. § 21-2-170(b).

Political-body and independent candidates for *non-statewide offices*, including the office of U.S. Representative, do not appear automatically on the general-election ballot. (V:159 at 4.) In order to appear on the general-election ballot, those candidates must submit: (1) a notice of candidacy and qualifying fee, O.C.G.A. § 21-2-132(d); and (2) a nomination petition signed by five percent of the number of registered voters eligible to vote for that office in the last election, O.C.G.A. § 21-2-170(b).

The qualifying fee for most partisan public offices in Georgia, including U.S. Representative, is three percent of the annual salary of the office.[2] O.C.G.A. § 21-2-131(a)(1)(A). Based on the current congressional salary, the qualifying fee for each candidate for U.S. Representative is $5,220. (V:159 at 5.)

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[2] Georgia law permits candidates to file a pauper's affidavit in lieu of paying an applicable qualifying fee. O.C.G.A. § 21-2-132(g). A pauper's affidavit requires the candidate to swear under oath that the candidate has neither the assets nor the income to pay the filing fee, and it requires the candidate to submit a personal financial statement. *Id*. In addition, a pauper's affidavit for a candidate for U.S. Representative must be accompanied by a petition signed by one percent of the number of registered voters eligible to vote for the office in the last election. O.C.G.A. § 21-2-132(h).

Qualifying fees for political-party candidates for U.S. Representative are paid directly to the state political party, which retains 75 percent and sends 25 percent to the Secretary of State. O.C.G.A. § 21-2-131(b)-(c). Qualifying fees for independent and political-body candidates for U.S. Representative are paid to the Secretary of State. O.C.G.A. § 21-2-131(b)(2). For independent candidates, the Secretary of State retains the entire fee. O.C.G.A. § 21-2-131(c)(4)(B). For political-body candidates, the Secretary of State retains 25 percent and sends 75 percent to the political body. O.C.G.A. § 21-2-131(c)(4)(A). While the statute requires the Secretary of State to distribute the funds "as soon as practicable," the Libertarian Party did not receive its share of the qualifying fees for the 2018 election until after the election was over, in mid-April 2019. (V:159 at 6.)

The upshot of Georgia's current ballot-access regime for the appellees is this. The Libertarian Party, which has been qualified under Section 21-2-180 since 1988, can have its nominees for a full slate of *statewide* offices—which include President, U.S. Senator, Governor, Lieutenant Governor, Secretary of State, Attorney

General, Commissioner of Agriculture, Commissioner of Insurance, and all five members of the Public Service Commission—appear on the general-election ballot without submitting any petition signatures. (V:159 at 3-4.) All the party has to do is pay the already-high qualifying fees. But to have a full slate of fourteen nominees for the office of U.S. Representative appear on the general-election ballot in 2020, the party would have had to pay $73,080 in qualifying fees and submit nominating petitions containing at least 321,713 valid signatures.[3] (*Id.* at 5.)

To put those numbers in some context, Georgia's qualifying fees are higher than any other state in the nation that requires a mandatory nominating petition for independent or third-party candidates. (*Id.* at 23.) Georgia also requires more signatures than any other state in the nation, both as a percentage of votes cast for President (which is a common denominator for comparison among the states) and as an absolute number of signatures. (*Id.* at 22.)

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[3] The Libertarian Party would need to submit at least 360,572 valid signatures—a 12.1 percent increase—to run a full slate of candidates for U.S. Representative in 2022. (Appellees' Supp. App. 154 at 2; Appellees' Supp. App. 155 at 1.)

Georgia's signature requirement is also higher, in absolute terms, than any signature requirement that an independent or third-party candidate for U.S. Representative has ever overcome in the history of the United States. (*Id.* at 23.)

II. Practical Difficulties of Petitioning

The record in this case contains extensive evidence of the practical difficulties of petitioning that go beyond the sheer numbers of signatures required. For instance:

- The Secretary of State's signature-validation process results in signatures being improperly rejected and signature-validation rates between two percent and forty percent. As a result, independent and political-body candidates must submit far more signatures than the number of valid signatures required. (V:159 at 24.)

- Gathering signatures is slow, onerous work. An experienced, paid petition circulator gathers an average of less than five signatures per hour over the course of a week—a pace that would yield fewer than 5,000 raw signatures working nine-hour days seven days a week over the entire 180-day petitioning window. As a result, it would be impossible to gather enough signatures to meet the requirements without making extensive use of paid, professional petition circulators. (*Id.* at 25.)

- The cost of using paid petition circulators to gather enough signatures to qualify a full slate of candidates for U.S. Representative would likely exceed $1 million. (*Id.* at 26.)

- Federal campaign-finance laws, which limit the amount that donors can contribute to political candidates, make it difficult to raise enough money to pay for enough petition circulators. The Libertarian Party cannot lawfully contribute more than $10,000 per election cycle to any candidate. (*Id.* at 26.) Individual donors can give only $5,600. (III:97 at 78 ¶ 167.)

- Georgia law prohibits petition-circulating within 150 feet of a polling place or on private property (without the permission of the owner), making it difficult for petition-circulators to access voters in places where large numbers of people congregate. (V:159 at 26-27.)

- The form of Georgia's nomination petition calls for a voter to provide a year of birth and residential address in addition to a signature and printed name. But potential signers frequently refuse to share such confidential information because of the possibility of identity theft. (*Id.* at 27.)

III. The Impact of Georgia's Ballot-Access Restrictions

Despite many attempts, no political-body candidate for U.S. Representative has *ever* satisfied the requirements to appear on Georgia's general-election ballot since the five-percent petition requirement was adopted in 1943. (V:159 at 6, 15-18.)

In 2002, for example, the Libertarian Party made a genuine effort to qualify three candidates for U.S. Representative: Wayne Parker in the Eleventh Congressional District, Carol Ann Rand in the Sixth Congressional District, and Chad Elwartowski in the

Ninth Congressional District. Because the 2002 redistricting process had reduced the time available for petitioning, a federal judge reduced the signature requirement by about half. The party raised about $40,000 for the effort and used 35 professional, paid petition circulators. The party ultimately decided to focus on Parker's campaign, and Parker submitted more than 20,000 raw signatures. But the Secretary of State's office rejected more than half of them, leaving Parker about 1,100 valid signatures shy of the court-adjusted requirement. (II:69-19 at 2-4; V:159 at 17.)

In 2010, independent candidate Jeff Anderson tried to get on the ballot in Georgia's Eleventh Congressional District. Anderson assembled a team of 24 volunteers who spent hundreds, if not thousands, of hours gathering signatures door to door. Anderson gathered somewhere between 11,000 and 12,000 raw signatures—well short of the approximately 21,000 valid signatures he needed—and therefore did not turn them in. (I:69-4 at 2-3; V:159 at 18.)

In 2016, Hien Dai Nguyen tried to get on the ballot as an independent candidate in Georgia's Fourth Congressional District.

His team of volunteer petition circulators gathered about 25,000 signatures across Dekalb, Gwinnett, and Rockdale counties, but the Secretary of State validated only 528 of those signatures—approximately two percent. As a result, Nguyen did not qualify for the ballot. (V:159 at 18-19.)

The record contains many other examples of failed or aborted attempts to qualify for Georgia's ballot. (*Id.* at 16-20.)

IV. Support for the Libertarian Party

The Libertarian Party was founded in 1971 and is organized in all 50 states plus the District of Columbia. (V:159 at 7.) It is currently the third-largest political party in the United States. (*Id.*) The party runs hundreds of candidates in every election cycle who seek positions ranging from city council to President. (*Id.*) The party runs many candidates for U.S. Representative and has had those candidates on the ballot in every state in the nation except Georgia. (*Id.*)

In the last ten years, Libertarian candidates have received tens of millions of votes. (III:97 at 91 ¶ 200.) The party's 2016

nominee for President, Gary Johnson, received 4,489,341 votes—the highest-ever vote total for a Libertarian candidate—which represented 3.28 percent of the popular vote and the third-highest vote total among the candidates. (*Id.* at 91-92 ¶ 201.) There are currently more than 180 elected officials affiliated with the party nationwide. (V:159 at 7.)

The Libertarian Party of Georgia was founded in 1972 and currently has members in each of Georgia's 14 congressional districts. (II:69-12 at 5 ¶ 20; III:97 at 4 ¶ 10.) The party wants to nominate a full slate of candidates for U.S. Representative and to have those nominees appear on the general-election ballot. (III:97 at 4-5 ¶ 11.)

In briefing before this Court, the Secretary has repeatedly described the Libertarian Party as a political body "with significant support" in Georgia. (*Id.* at 93-94 ¶ 209.)

In 1988, the party qualified under Section 21-2-180 to nominate candidates for statewide office by convention when it submitted a party-qualifying petition signed by at least one percent of the number of total number of registered voters at the preceding

general election. (V:159 at 8.) The party has retained that qualification under Georgia law in each election cycle since 1988 by nominating at least one candidate for statewide public office who received votes totaling at least one percent of the total number of registered voters who were registered and eligible to vote in that election. (*Id.*)

In the last ten years, Libertarian candidates for statewide offices in Georgia have received more than five million votes. (*Id.*) In 2016, for example, a Libertarian candidate for the Public Service Commission, Eric Hoskins, received 1,200,076 votes, which represents 33.4 percent of all votes cast in that contest and 22.0 percent of the total number of registered voters who were eligible to vote in that election. Hoskins carried Clayton and DeKalb counties. (III:97 at 93 ¶ 206.)

V. Procedural Background

The plaintiffs filed this action in November 2017. After an extended period of discovery, the parties filed cross-motions for summary judgment in June 2019. A few months later, the district

court granted summary judgment in the Secretary's favor. (V:159 at 8.)

The district court based its ruling on the Supreme Court's decision in *Jenness v. Fortson*, 403 U.S. 431 (1971), which upheld Georgia's ballot-access requirements as constitutional. Finding itself bound by *Jenness*, the district court summarily rejected the plaintiffs' claims under the First and Fourteenth Amendments and the Equal Protection Clause. (V:159 at 8.)

The plaintiffs appealed. This Court then vacated the district court's judgment and remanded the case for further proceedings. *Cowen v. Ga. Sec'y of State*, 960 F.3d 1339, 1347 (11th Cir. 2020). On the plaintiffs' First and Fourteenth Amendment claim, the Court held that the district court had erred in failing to apply the three-step balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). *Cowen*, 960 F.3d at 1345-46. On the plaintiffs' Equal Protection claim, the Court held that *Jenness* is not controlling because the Equal Protection claim here is sufficiently different from the claim presented in *Jenness*. *Id.* at 1347. The

Court remanded the case to the district court to reconsider both claims under the proper legal standards. *Id.*

On remand, the parties again filed cross motions for summary judgment. In a 48-page ruling issued in March 2021, the district court granted the plaintiffs' motion for summary judgment on their First and Fourteenth Amendment claim but granted the Secretary's motion for summary judgment on the plaintiffs' Equal Protection claim. (V:159 at 47.)

The district court analyzed the plaintiffs' First and Fourteenth Amendment claim using the three-step *Anderson* test.[4] (*Id.* at 11-44.) Reviewing the "robust record in this case," the court first concluded that Georgia's ballot-access restrictions impose a "severe" burden on the plaintiffs' associational rights. (*Id.* at 15.)

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[4] "First, a court must evaluate the character and magnitude of the asserted injury to rights protected by the First and Fourteenth Amendments. Second, it must identify the interests advanced by the State as justifications for the burdens imposed by the rules. Third, it must evaluate the legitimacy and strength of each asserted state interest and determine the extent to which those interests necessitate the burdening of the plaintiffs' rights." *Bergland v. Harris*, 767 F.2d 1551, 1553-54 (11th Cir. 1985) (paraphrasing *Anderson*, 460 U.S. at 789).

The court relied on undisputed facts showing that third-party and independent candidates have largely been excluded from Georgia's congressional ballots despite their reasonable diligence in trying to meet Georgia's ballot-access requirements (*id.* at 15-21); that Georgia holds third-party and independent candidates to a higher bar than any other state (*id.* at 21-23); and that the practical difficulties of petitioning, including the Secretary's low signature-validation rates, make it virtually impossible for third-party and independent candidates to meet Georgia's ballot-access requirements (*id.* at 23-27).

The district court also analyzed prior decisions upholding Georgia's ballot-access laws, including *Jenness*, and concluded that they did not compel a different result here. (*Id.* at 28-36.) The court found, for instance, that the qualifying fee was not at issue in *Jenness* but is an important part of the plaintiffs' case here. (*Id.* at 30.) The court found that Georgia law has changed in the 50 years since *Jenness*. (*Id.* at 30-31.) The court found that the factual record here is very different. (*Id.* at 31-32.) And the court found that federal law has evolved in the 50 years since *Jenness*. (*Id.* at 32-33.)

The district court then turned to the interests put forward by the State as justifications for the burden. (*Id.* at 36-38.) The Secretary had asserted two: "(1) ensuring that a candidate has substantial support before putting the candidate's name on ballots to screen out frivolous candidacies and avoid overcrowded ballots and (2) 'a generalized interest in the orderly administration of elections.'" (*Id.* at 36 (quoting the Secretary's summary-judgment briefs).) Reviewing applicable precedent, the court found the first to be a well-recognized, legitimate state interest. (*Id.* at 37.) The court determined that the second asserted interest, however, was merely a restatement of the first. (*Id.* at 37-38.)

In the third and final step of the *Anderson* test, the district court weighed the state's asserted interests against the burden on the plaintiffs' rights. *(Id.* at 38-44.) Because the court had found the burden to be severe, it applied heightened scrutiny and concluded that the Secretary had failed to establish that the Georgia's ballot-access restrictions were narrowly tailored to advance a compelling state interest. (*Id.* at 39-42.) The district court also noted that it would reach the same conclusion even under a more deferential

level of scrutiny because the Secretary "has failed to justify the requirement that congressional candidates must clear the 5% threshold when the General Assembly has determined that a 1% threshold is adequate on a statewide basis." (*Id.* at 42.)

The district court then turned to the plaintiffs' Equal Protection claim, and, in a portion of its opinion spanning barely more than a page, it summarily rejected the claim based solely on the Supreme Court's decision in *Jenness*. (*Id.* at 44-45.)

The district court ordered the plaintiffs to submit a remedial proposal and let the Secretary respond. (*Id.* at 45-46.) The plaintiffs urged the court to issue a permanent injunction against the unconstitutional provisions but to leave the task of re-writing Georgia's laws to the General Assembly. (Appellees' Supp. App. 160 at 1-5.) In the alternative, the plaintiffs proposed an interim remedy that would require independent or third-party candidates to submit *either* the statutory qualifying fee *or* a nomination petition containing 500 signatures. (*Id.* at 5-10.) In response, the Secretary argued that the court should impose no remedy at all because of *Jenness* and other cases upholding Georgia's ballot-

access laws. (Appellees' Supp. App. 163 at 2-7.) In the alternative, the Secretary asked the district court to impose something more restrictive than what the plaintiffs proposed. (*Id.* at 7-13.)

Five months later, the district court issued its own proposed remedy that rejected the proposals from both sides. (V:165 at 4.) The court's proposed remedy left the qualifying fee in place and lowered the signature requirement from five percent to one percent for all non-statewide candidates. (*Id.* at 4-7.) The court concluded that a remedy was appropriate but that both of the plaintiffs' proposed remedies did not adequately protect the State's legitimate interests. (*Id.*) The court also reasoned that a one-percent petition requirement was appropriate because "the General Assembly has already deemed a 1% petition signature requirement adequate to protect Georgia's interests in preventing frivolous candidacies and ballot crowding." (*Id.* at 6.) The court also noted—without citation to the record—"that with a 1% petition signature requirement, as opposed to a 5% requirement, several of the serious candidates for office addressed in Plaintiffs' Motion for Summary Judgment would have qualified." (*Id.*)

The district court directed the parties to file any objections to its proposed remedy within 10 days. (V:165 at 9.) Both parties objected (Appellees' Supp. App. 166, 167, 167-1, 167-2, 167-3), but the district court entered its proposed remedy over the parties' objections in a brief, three-page order issued on the next day. (V:168 at 2.)

These appeals followed.

Standards of Review

Cross-motions for Summary Judgment

This Court reviews a district court's disposition of cross-motions for summary judgment de novo, applying the same legal standards used by the district court. *Am. Bankers Ins. Grp. v. United States*, 408 F.3d 1328, 1331 (11th Cir. 2005).

Under Rule 56 of the Federal Rules of Civil Procedure, a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A fact is "material" if it is "a legal element of the claim under the applicable substantive law which might affect the outcome of the case." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). A dispute about a material fact is genuine if the evidence would allow a reasonable jury to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In determining whether to grant or deny summary judgment, the court's role is not to weigh the evidence or to determine the truth of the matter, but to determine only whether a genuine issue exists for trial. *Id.* at 249. In doing so, the court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Remedial Order

A district court's decision to grant an injunction, as well as the scope of the injunction, are subject to review for an abuse of discretion. *Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.*, 522 F.3d 1200, 1208 (11th Cir. 2008). "A district court abuses its discretion if it applies an incorrect legal standard, follows

improper procedures in making the determination, [] makes findings that are clearly erroneous," or applies the law in an unreasonable or incorrect manner. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004) (quotation omitted). "But, as its name implies, the abuse-of-discretion standard allows a range of choices for the district court, so long as any choice made by the court does not constitute a clear error of judgment." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016) (quotation omitted).

Summary of the Argument

The Court should affirm the district court's judgment on the plaintiffs' First and Fourteenth Amendment claim based on the district court's well-reasoned opinion. That opinion dutifully applies the *Anderson* test to the undisputed facts in the robust record, and it explains, at great length, why the record here warrants a different outcome than the result in *Jenness* and other cases that have upheld Georgia's ballot-access restrictions.

The Secretary's main argument is that *Jenness* controls the outcome of any challenge to Georgia's ballot-access laws. This is the same argument that he made four times on appeal in the *Green Party* case and once already on appeal in this case.[5] And this Court has rejected it each time. Not only does the Secretary's argument lack merit, but it is also foreclosed by the law-of-the-case doctrine and the prior-panel rule.

The Court should also reject the Secretary's argument that the district court's remedial order is unduly broad because it applies to candidates for all non-statewide offices. While the plaintiffs' challenge focused on the office of U.S. Representative, the Libertarian party runs candidates at every level of government, and there is evidence in the record—some of it introduced by the Secretary—to support the scope of the district court's injunction.

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[5] *See* Appellee's Br. 10-14, *Cowen v. Raffensperger*, No. 19-14065 (11th Cir. Dec. 13, 2019); Appellant's Br. 25-27, *Green Party of Ga. v. Kemp*, No. 16-11689 (11th Cir. June 6, 2016); Appellant's Pet. Reh'g 8-9, *Green Party of Ga. v. Kemp*, No. 16-11689 (11th Cir. Feb. 22, 2017); Appellee's Br. 3-11, *Green Party of Ga. v. Georgia*, No. 13-11816 (11th Cir. Sept. 16, 2013); Appellee's Pet. Reh'g 10-11, *Green Party of Ga. v. Georgia*, No. 13-11816 (11th Cir. Jan. 27, 2014).

On the plaintiffs' Equal Protection claim, the district court inexplicably failed to follow this Court's instructions to apply the test set out in *Socialist Workers*. The Court should therefore reverse and remand again for further proceedings or grant summary judgment in the plaintiffs' favor on this rather straightforward claim.

The Court should also vacate the district court's remedial order because it failed to follow the appropriate procedures for court-ordered remedies in election cases. Specifically, the court re-wrote Georgia law without first giving the Georgia General Assembly a chance to devise a legislative remedy—even though there was (and still is) time to do so. The court also failed to make adequate findings to support its chosen remedy. The bare-bones remedial order does not give this Court a sufficient basis from which to determine that the court-ordered remedy will completely and with certitude cure the constitutional violation established here.

Argument

I. Georgia's ballot-access restrictions violate the First and Fourteenth Amendments.

To determine whether Georgia's ballot-access restrictions violate the First and Fourteenth Amendments, this Court must apply the balancing test set forth in *Anderson v. Celebrezze*:

> First, a court must evaluate the character and magnitude of the asserted injury to rights protected by the First and Fourteenth Amendments. Second, it must identify the interests advanced by the State as justifications for the burdens imposed by the rules. Third, it must evaluate the legitimacy and strength of each asserted state interest and determine the extent to which those interests necessitate the burdening of the plaintiffs' rights.

Bergland v. Harris, 767 F.2d 1551, 1553-54 (11th Cir. 1985) (paraphrasing *Anderson*, 460 U.S. at 789); *accord Cowen v. Ga. Sec'y of State,* 960 F.3d 1339, 1342 (11th Cir. 2020); *Green Party of Ga. v. Georgia*, 551 F. App'x 982, 983 (11th Cir. 2014) (per curiam).

Under this test, the level of scrutiny varies on a sliding scale with the extent of the asserted injury. When, at the low end of the scale, the law "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of

voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788, 788-89 n.9). But when the law places "severe" burdens on the rights of political parties, candidates, or voters, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1982)).

The Eleventh Circuit has observed that a ballot-access law imposes a severe burden if it "'freeze[s] the status quo' by effectively barring all candidates other than those of the major parties" and does not "provide a realistic means of ballot access." *Libertarian Party of Fla. v. Florida*, 710 F.2d 790, 793 (11th Cir. 1983) (quoting *Jenness v. Fortson*, 403 U.S. 431, 439 (1971), and *Am. Party of Tex. v. White*, 415 U.S. 767, 783 (1974)). "The focal point of this inquiry is whether a 'reasonably diligent [ ] candidate [can] be expected to satisfy'" the ballot-access requirements. *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 742 (1974)).

The plaintiff bears the burden of proof on the first step in the *Anderson* test, and the defendant bears the burden on the second

and third. *Fulani v. Krivanek,* 973 F.2d 1539, 1544 (11th Cir. 1992); *Bergland*, 767 F.2d at 1554. In this analysis, "the burden is on the state to 'put forward' the 'precise interests … [that are] justifications for the burden imposed by its rules,'" and to "explain the relationship between these interests" and the challenged provisions. *Fulani*, 973 F.2d at 1544 (quoting *Anderson*, 460 U.S. at 789). "The State must introduce evidence to justify both the interests the State asserts and the burdens the State imposes on those seeking ballot access." *Bergland,* 767 F.2d at 1554.

A. *Jenness* does not control the outcome of this case.

The Secretary's main argument is that *Jenness* controls the outcome of this case. (Appellant's Br. 2, 12, 15, 17, 23-26.) This is the same argument that he made in the first appeal in this case,[6] and the panel expressly rejected it. *Cowen*, 960 F.3d at 1344-45. The argument is therefore foreclosed by the law-of-the-case doctrine, which bars relitigation of issues resolved explicitly or by

[6] *See* Appellee's Br. 10-14, *Cowen v. Raffensperger*, No. 19-14065 (11th Cir. Dec. 13, 2019).

necessary implication in an earlier appeal. *CSX Corp. v. United States*, ___ F.4th ___, 2021 WL 5229096 at *3 (11th Cir. Nov. 10, 2021).

The Secretary's argument is also foreclosed by the prior-panel rule, under which "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). As this Court recognized in *Cowen*, the prior panel decision in *Bergland*, 676 F.2d at 1553, squarely addressed the argument that *Jenness* controls and therefore binds this subsequent panel on that issue. *Cowen*, 960 F.3d at 1344-45. The Secretary also raised the argument four times in the *Green Party* case,[7] and this Court rejected it twice by implication in two unpublished opinions. *See Green Party of Ga. v. Kemp*, 674 F. App'x

[7] *See* Appellant's Br. 25-27, *Green Party of Ga. v. Kemp*, No. 16-11689 (11th Cir. June 6, 2016); Appellant's Pet. Reh'g 8-9, *Green Party of Ga. v. Kemp*, No. 16-11689 (11th Cir. Feb. 22, 2017); Appellee's Br. 3-11, *Green Party of Ga. v. Georgia*, No. 13-11816 (11th Cir. Sept. 16, 2013); Appellee's Pet. Reh'g 10-11, *Green Party of Ga. v. Georgia*, No. 13-11816 (11th Cir. Jan. 27, 2014).

974 (11th Cir. 2017) (per curiam); *Green Party of Ga. v. Georgia*, 551 F. App'x. at 984.

The Secretary nonetheless argues that the district court erred in its analysis of *Jenness* (Appellant's Br. 23-26), but his arguments have no merit.

First, he argues that "the Libertarian Party's claims are no different than those raised in prior constitutional challenges." (*Id.* at 23.) Not so. This Court has already concluded that "[t]he Equal Protection challenge presented by the Party in this case is substantially different from that presented in *Jenness*." *Cowen*, 960 F.3d at 1346. And, as Judge Jordan noted in his concurrence, *Jenness* did not involve a challenge to Georgia's candidate qualifying fee, but this case does. *Id.* at 1347-48 (Jordan, J., concurring).

Second, the Secretary argues that Georgia's ballot-access restrictions have not changed materially in the 50 years since *Jenness*. (Appellant's Br. at 25.) This is also not true. As this Court has recognized, *Cowen*, 960 F.3d at 1340-41, Georgia revamped its ballot-access laws substantially in 1986, dropping the petition

requirement for statewide candidates to one percent and creating a way for third parties to have their candidates for statewide offices appear on the ballot without the need to submit a petition. Act of April 3, 1986, ch. 1517, §§ 3, 5, 1986 Ga. Laws 890, 892-94 (codified at O.C.G.A. §§ 21-2-170, -180). Georgia law also now requires write-in candidates to file and publish a notice of candidacy before the election, O.C.G.A. § 21-2-133(a), and votes cast for a person who has not so qualified are not counted, Ga. Comp. R. & Regs. 183-1-15-.02(5). Georgia's restrictions on write-in voting were first adopted in 1978, *see* Ga. Election Code Amended, ch. 1031, § 17, 1978 Ga. Laws 1004, 1013 (codified at 1933 Ga. Code Ann. § 34-1017), and have been amended several times since then. Georgia also adopted a qualifying-fee provision after *Jenness* that now expressly discriminates between political-party candidates, political-body candidates, and independent candidates in a way that gives the political parties a clear advantage. O.C.G.A. § 21-2-131(b)-(c). And, finally, a federal court recently struck down Georgia's one-percent signature requirement for presidential candidates as unduly burdensome and set the requirement at only

7,500 signatures. *See Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1374 (N.D. Ga. 2016), *aff'd*, 674 F. App'x 974 (11th Cir. 2017) (per curiam). These changes add up to a very different ballot-access landscape than the Supreme Court faced in *Jenness*.

Finally, the Secretary argues that federal law has not evolved since *Jenness*. (Appellant's Br. 26.) This argument overlooks campaign-finance laws and minimizes the importance of the *Anderson* test. At the time of *Jenness*, federal campaign-finance laws did not limit donors' ability to fund petition drives as they do now. The district court relied on this change in distinguishing *Jenness* (V:159 at 32), but the Secretary says nothing about it.

The *Anderson* test was another significant evolution in federal law. As the district court noted, this change "was not simply academic." (*Id.*) The shift in *Anderson* to a factual, context-based balancing test represented a significant departure from the less-stringent analytical framework applied in some earlier ballot-access cases. *See Anderson*, 460 U.S. at 817 (Rehnquist, J., dissenting) (distinguishing the standard used in *Jenness* from the "narrowly tailored" standard applied in *Anderson*); *Graveline v.*

Johnson, 747 F. App'x 408, 414 (6th Cir. 2018) (recognizing that *Anderson* superseded *Jenness*).

The district court also distinguished *Jenness* based on the factual record in this case, which reveals a much longer record of exclusion than was available in *Jenness* and contains much more evidence on the practical difficulty of gathering petitions in today's Georgia. (V:159 at 31-32.) The Secretary does not dispute these facts and is silent on these distinctions.

B. The district court properly applied the *Anderson* test.

On remand, the district court properly applied the *Anderson* test to the undisputed facts in the record (V:159 at 11-44), and this Court should affirm on that basis. *See, e.g.*, *Green Party of Ga. v. Kemp*, 674 F. App'x at 975 (affirming the district court's grant of summary judgment to the plaintiffs based on the court's opinion). The Secretary identifies no disputes of fact that could have precluded summary judgment, and his criticism of the district court's application of *Anderson* is unfounded.

The Secretary argues, for example, that "the district court did not cite *any* authority to support its unprecedented holding that Georgia's 5% petition-signature requirement is severely burdensome." (Appellant's Br. 18.) Not so. In its analysis of the burden, the district court cited *Libertarian Party of Florida v. Florida*, 710 F.2d at 793; *Williams v. Rhodes*, 393 U.S. 23, 35 (1968) (Douglas, J., concurring); *Storer,* 415 U.S. at 742; *Cooper v. Raffensperger*, 472 F. Supp. 3d 1282 (N.D. Ga. 2020); *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d at 1363; *Anderson,* 460 U.S. at 786; and *Bullock v. Carter*, 405 U.S. 134, 143 (1972). (V:159 at 15-28.) More importantly (because the *Anderson* test depends on the facts), the district court cited extensively to the record in reaching its conclusion that Georgia's law imposes a severe burden on the plaintiffs' First and Fourteenth Amendment freedoms.

Second, the Secretary argues that the facts here do not support the district court's finding of a severe burden because "one candidate … came very close to satisfying the [petition] requirement." (Appellant's Br. 20.) That one candidate was Wayne Parker, who fell 12 percent short of a court-lowered petition

requirement in 2002. (II:69-19 at 2-3.) While the plaintiffs dispute the Secretary's characterization of Parker's result (IV:139-1 at 19 ¶¶ 55-56), Parker's failed candidacy does not undermine the district court's conclusion that the full history of exclusion suggests a heavy burden.

The Secretary also argues that the district court improperly relied on the fact that Georgia's signature requirement and qualifying fees are the highest in the nation. (Appellant's Br. 21.) While not dispositive here, such a comparison is routine in ballot-access cases and has been upheld by this Court. *See, e.g.*, *Jenness*, 403 U.S. at 438 (comparing Georgia's nonparty candidate nominating petitions to Ohio's); *Williams*, 393 U.S. at 33, n.9 (comparing Ohio's signature requirement for ballot access with those of 42 other states); *Green Party*, 171 F. Supp. 3d at 1362. It was not error for the district court to consider that evidence here.

Finally, the Secretary argues that the district court erred in its *Anderson* analysis because it should not have given any weight to the practical difficulties of gathering signatures. (Appellant's Br. 21-22.) He contends that those are merely "the ordinary burdens

candidates face when running for office" and therefore do not count when weighing the burden under *Anderson*. (*Id.* at 21.) But that is not the law. As the district court recognized, this kind of evidence "is key in the context of the *Anderson* analysis" (V:159 at 24 (citing *Anderson*, 460 U.S. at 786).) It has also been upheld by this Court. *See Green Party*, 171 F. Supp. 3d at 1350 (addressing the practical difficulties of petitioning in its *Anderson* analysis). The Secretary's assertion that these difficulties are ordinary also lacks factual support. According to undisputed evidence in the record, the vast majority of non-incumbent political-party candidates for U.S. Representative spend far less to appear on the general-election ballot than it would cost and independent or political-body candidate to obtain the signatures necessary to qualify. (Appellees' Supp. App. 106-1 at 2-5 ¶¶ 3-11.)

Ultimately, the Secretary argues that the district court should have found that the burdens associated with Georgia's ballot-access restrictions are not severe and that it should have therefore upheld those laws under a less exacting level of scrutiny. (Appellant's Br. 26-28.) But the district court held that it would

have reached the same conclusion even under a more deferential standard of review because the Secretary failed to justify even a smaller burden. (V:159 at 42-44.) The Secretary does not address that conclusion in his brief, and he therefore gives this Court no reason to disturb the district court's ruling.

Of course, this Court has jurisdiction to decide cross motions for summary judgment without reference to the district court's analysis. *See Am. Bankers Ins. Grp. v. United* States, 408 F.3d 1328, 1331 (11th Cir. 2005) (cross-motions for summary judgment are subject to de novo review). If the Court chooses to do so, those motions have been fully and extensively briefed in the district court, and all of the relevant documents are either reproduced here in the appendices or available electronically through the district court's ECF system. Those papers cover hundreds of pages—the plaintiffs' statement of undisputed material facts alone covers more than 70 pages—and the facts and arguments they contain cannot be reproduced in full here.

Even so, the undisputed facts here are overwhelming. Georgia's ballot-access restrictions are by far the most stringent in

the nation, and—despite many attempts—no third-party candidate for U.S. Representative has *ever* appeared on the general-election ballot since they were enacted in 1943. They require Libertarian candidates for U.S. Representative to gather far more signatures than Libertarian candidates for U.S. Senator or even President—more signatures, in fact, than any independent or third-party candidate for U.S. Representative has ever successfully gathered in the history of the United States. They make it virtually impossible for Libertarian Party candidates for U.S. Representative to qualify for the ballot despite widespread support for the party nationwide and in Georgia. And Georgia's restrictions are not remotely necessary for the State to advance its legitimate interests.

These circumstances permit the trier of fact to reach only one conclusion, and this Court should therefore affirm the district court's grant of summary judgment in the plaintiffs' favor on their First and Fourteenth Amendment claim.

II. The district court did not abuse its discretion by including all non-statewide offices in its remedy.

The Secretary's final argument is that the district court's remedy is improper because it applies to candidates for all non-statewide offices and because the district court did not adequately explain why a one-percent petition requirement was necessary to cure the constitutional violation it found. (Appellant's Br. 28-31.) As explained in part V below, the plaintiffs agree with the Secretary that the district court did not adequately explain the basis for its chosen remedy. But the plaintiffs do not agree that extending the remedy to all non-statewide offices was an abuse of discretion.

The facts and the law in this case go beyond candidates for U.S. Representative. The five-percent petition requirement applies equally to candidates for all non-statewide offices. O.C.G.A. § 21-2-170(b). And, as the district court explained, the Secretary himself introduced evidence on the effect of the five-percent petition requirement on candidates for other offices. (IV:139-1 at 20-21 ¶¶ 60-62; Appellees' Supp. App. 187 at 4-5.) Some of the plaintiffs'

evidence also touched on non-statewide offices other than U.S. Representative, and the Libertarian Party has tried to run candidates for non-statewide offices other than U.S. Representative in Georgia. (Appellees' Supp. App. 69-12 at 2-3; Appellees' Supp. App. 69-22 at 2-3; Appellees' Supp. App. 72-8.)

Under these circumstances, the district court's decision to extend its remedy to all non-statewide offices was not an abuse of discretion. Even if this Court decides otherwise, however, vacatur is not the appropriate solution. This Court can merely modify the injunction as it considers necessary.

III. The district court erred when it declined to apply the *Socialist Workers* test to the plaintiffs' Equal Protection claim.

To determine whether a ballot-access restriction violates the Equal Protection Clause of the Fourteenth Amendment, a court "must examine the character of the classification in question, the importance of the individual interests at stake, and the state interests asserted in support of the classification." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979). To

the extent that ballot-access requirements draw a distinction, the "'State must establish that is classification is necessary to serve a compelling state interest.'" *Cowen*, 960 F.3d at 1346 (quoting *Socialist Workers*, 440 U.S. at 184.) This test is functionally almost identical to the *Anderson* test, and the Supreme Court has noted that the analysis is interchangeable. *Norman,* 502 U.S. at 288 n.8; *Anderson,* 460 U.S. at 786-87 n.7; *see also Fulani*, 973 F.2d at 1542-43.

Here, Georgia law creates a classification by treating Libertarian Party candidates for U.S. Representative differently from Libertarian Party candidates for statewide offices. The latter have automatic ballot access. The former must petition.

This Court recognized the nature of the plaintiffs' Equal Protection claim in the first appeal of this case. *Cowen,* 960 F.3d at 1346-47. The Court also held that the plaintiffs' claim here is different from the claim presented in *Jenness*. *Id.* The Court explained that *Socialist Workers* provides the applicable legal standard. *Id.* at 1346. And the Court remanded the case to the district court to apply the appropriate standard. *Id.* at 1347.

Without explanation, the district court did not comply. Instead, it found that the plaintiffs' Equal Protection claim is indistinguishable from the claim presented in *Jenness* and is therefore foreclosed by it. (V:159 at 44-45.) The court never mentioned this Court's ruling on the issue.

The district court's disposition of the plaintiffs' Equal Protection claim plainly violates this Court's mandate rule. "The mandate rule is a specific application of the 'law of the case' doctrine which provides that subsequent courts are bound by any findings of fact or conclusions of law made by the court of appeals in a prior appeal of the same case." *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 881 F.3d 835, 843 (11th Cir. 2018) (quoting *Friedman v. Mkt. St. Mortg. Corp.*, 520 F.3d 1289, 1294 (11th Cir. 2008)). "The law of the case doctrine and the mandate rule ban courts from revisiting matters decided expressly or by necessary implication in an earlier appeal of the same case." *Winn Dixie*, 881 F.3d at 843 (quoting *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 579 F.3d 1268, 1270–71 (11th Cir. 2009)). The mandate rule has its greatest force when a case is on remand to the

district court, and the district court is strictly bound to follow an appellate court's mandate.

Because this Court's mandate in *Cowen* required the district court to apply *Socialist Workers*, and because the district court failed to do that, this Court should vacate the district court's judgment on the plaintiffs' Equal Protection claim and remand once again for further proceedings.

Alternatively, the Court should reverse the district court's judgment and grant summary judgment for the plaintiffs based on the robust record and briefing below. (IV:134-1 at 53-55; V:140 at 23-30; V:148 at 17-20.) There are no facts in dispute on this rather straightforward claim. The Libertarian Party has repeatedly demonstrated that it has at least as much actual voter support as the State of Georgia believes is necessary for the party's *statewide* candidates to appear on the general-election ballot, but its *non-statewide* candidates have been totally shut out. The State has failed to justify this frankly absurd classification that impinges upon the fundamental rights of parties, candidates, and voters. This Court should therefore conclude that Georgia's ballot-access

restrictions violate the Equal Protection Clause when they treat Libertarian Party candidates for U.S. Representative differently from Libertarian Party candidates for statewide offices.

IV. The district court should have given the Georgia General Assembly a chance to devise a remedy before it imposed one of its own choosing.

It is black-letter law that, "wherever practical," a federal court should give elected officials an opportunity to remedy an unlawful or unconstitutional election law. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). This rule is rooted in the political nature of election laws, a feature that is thought (in most cases) to render the elected branches preferable to the judiciary for purposes of devising a remedy. *See, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) ("[T]he apportionment task, dealing as it must with fundamental 'choices about the nature of representation' … is primarily a political and legislative process."). Federal courts therefore routinely give elected officials an opportunity to devise a remedy in election cases before imposing one, and the Supreme Court has reversed lower courts for failing to do so. *See Growe v. Emison*,

U.S. 25, 34 (1993); *see also, e.g.*, *Larios v. Cox*, 300 F. Supp. 2d 1320, 1356-57 (N.D. Ga.) (three-judge district court) (giving the Georgia General Assembly a chance to devise a remedy for unconstitutional legislative redistricting plans), *aff'd,* 542 U.S. 947 (2004).

The rule is not absolute, however, and not without exception, "such as when the timing of an upcoming election makes legislative action impractical." *Ga. State Conf. of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 996 F. Supp. 2d 1353, 1357 (N.D. Ga. 2014). Thus, a federal court must ordinarily give elected officials a first crack at devising a remedy, but it need not do so if timing or other circumstances make that impractical.

While the rule and its exceptions arose in the context of redistricting cases, courts have applied them in ballot-access cases, too. *See, e.g.*, *Thompson v. DeWine*, 976 F.3d 610, 620 (6th Cir. 2020) (reversing a mandatory preliminary injunction that re-wrote Ohio's election laws); *Esshaki v. Whitmer*, 813 F. App'x 170, 172 (6th Cir. 2020) (reversing a mandatory preliminary injunction that

re-wrote Michigan's ballot-access laws); *Green Party*, 171 F. Supp. 3d at 1373.

Here, the district court re-wrote Georgia's ballot-access laws without first giving the General Assembly the opportunity to do so and without making any sort of determination that deferring to the legislature would have been impractical. In fact, deference would not have been impractical. The district court took five months to propose its remedy. When the district court finally issued its remedial proposal, the General Assembly was due to meet soon in a special session for redistricting, and it could have addressed this issue then. Even now, the General Assembly is scheduled to meet in a regular session in just a few weeks and could address this issue well before the next election.

Under these circumstances, the district court's remedial order was an abuse of discretion, and this Court should vacate it and remand for further proceedings that give due deference to the state legislature's prerogatives.

V. The district court failed to make adequate findings to support its remedial order.

It is well settled in the Eleventh Circuit that court-ordered remedies in election cases must "completely" and "with certitude" cure the violation found. *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). Indeed, the function of any remedy is to cure the violation at issue. In election cases, as in other equitable cases, general principles of equity require a remedy that effectively cures any violation. *See Swann v. Charlotte–Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 439 (1968).

In this case, the district court devised its own remedy over the objections of the parties but did not make findings sufficient to enable this Court to determine that the court's chosen remedy will cure the violation. The district court justified its proposed one-percent petition requirement with just two sentences. (V:165 at 6.) First, the court noted that a one-percent petition was in line with

Georgia's ballot-access requirements for statewide candidates. (*Id.*) Second, the court asserted, without citation, that "several of the serious candidates for office addressed in Plaintiffs' Motion for Summary Judgment would have qualified" under a one-percent petition requirement. (*Id.*) Following the parties' objections to its proposed remedy, the district court added no other justification for the one-percent threshold. (V:168 at 2.)

The district court's bare-bones justification for its chosen remedy is inadequate here for at least three reasons.

First, the district court's assertion that several candidates would have satisfied a one-percent requirement is inaccurate. Record evidence shows that only one third-party candidate for U.S. Representative has ever submitted as many valid signatures as would be required under the district court's remedy. That candidate was Wayne Parker, who submitted 8,346 valid signatures in 2002. (V:159 at 17.) To the extent that the district court justified its remedy on evidence of several past petition efforts, then, its justification was based on clear error.

Second, other evidence in the record casts serious doubt on the viability of the court's chosen remedy. In the *Green Party* case, for example, the district court found that Georgia's one-percent petition requirement for independent and third-party presidential candidates was unduly burdensome, and it lowered that threshold from about 51,000 signatures to 7,500 signatures. *Green Party*, 171 F. Supp. 3d at 1365. Yet no presidential candidate has so far been able to satisfy that much-lowered requirement. (Appellees' Supp. App. 139-2 at 3 ¶ 8.) The record also shows that no non-presidential statewide candidate in Georgia's history has *ever* satisfied the state's one-percent petition requirement. (Appellees' Supp. App. 167-1 at 2 ¶ 8.) The district court did not address this evidence in its remedial order or elsewhere.

Third, the district court's two-sentence explanation simply does not give this Court a sufficient basis for appellate review. While a court need not write a book to justify every order, it must adequately "state the reasons" for its injunctions, Fed. R. Civ. P. 65(d)(1)(A), and make sufficient findings to permit meaningful appellate review, Fed. R. Civ. P. 52(a). *See FTC v. On Point Cap.*

Partners, LLC, ____ F.4th _____, 2021 WL 5115204 at *9 (11th Cir. Nov. 4, 2021). The district court's two sentences in this case do not permit this Court to determine that a one-percent petition requirement for independent and third-party candidates for non-statewide offices will completely and with certitude cure the constitutional violation established here.

The Court should therefore vacate the district court's remedial order and remand the case to the district court for further remedial proceedings.

Conclusion

The district court followed this Court's instruction to apply the *Anderson* test to the plaintiffs' First and Fourteenth Amendment claim. The district court's analysis is sound, and the Secretary's argument to the contrary not only lacks merit but is also foreclosed by the law-of-the-case doctrine and the prior-panel rule. This Court should therefore affirm the district court's judgment on the plaintiffs' First and Fourteenth Amendment claim for the reasons stated in the district court's opinion.

Unfortunately, and without explanation, the district court did not follow this Court's instruction to apply the *Socialist Workers* test to the plaintiffs' Equal Protection claim. The Court should therefore vacate and remand the district court's judgment on that issue and instruct it to try again.

The Court should also vacate the district court's remedial order with instructions to give the Georgia General Assembly an opportunity to devise a remedy and, if the legislature fails to do so, to make sufficient findings to support any court-ordered alternative.

Dated: December 3, 2021

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Rule 28.1(e)(2)(B)(i) of the Federal Rules of Appellate Procedure because, excluding parts of the brief exempted by Rule 32(f), it contains 9,517 words. This brief also complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook font using Microsoft Word for Mac.

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Certificate of Service

I hereby certify that on December 3, 2021, I electronically filed the foregoing **Appellees–Cross-Appellants' Brief** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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