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

CROSS-APPELLANTS' REPLY BRIEF

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Cowen v. Georgia Secretary of State
21-13199 and 21-13367

Certificate of Interested Persons
and
Corporate Disclosure Statement

I hereby certify under Eleventh Circuit Rules 26.1, 26.1-2, and 26.1-3 that these persons and entities have or may have an interest in the outcome of this case:

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Correia, Cristina

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Cowen v. Georgia Secretary of State
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Certificate of Interested Persons
and
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Argument

The Secretary of State's response brief hardly responds at all. Of the three issues in this cross-appeal, the Secretary's brief addresses only one. He offers a tepid defense of the district court's judgment on the plaintiffs' Equal Protection claim, merely repeating arguments that the prior panel rejected in the first appeal of this case. (Cross-Appellee's Br. 17-20.) But he says not a word about the second and third issues in this cross-appeal, and he agrees with the plaintiffs that the Court should vacate the district court's remedial order. (*Id.* at 22.)

I. The Secretary fails to justify the district court's noncompliance with the prior panel's mandate.

While he disagrees about what the correct test is,[1] the Secretary does not dispute that the district court failed to apply the

[1] Because the district court applied *no* test, this cross-appeal does not require the Court to say what the correct test is. The choice of a test also doesn't matter because the *Socialist Workers* test advanced by the plaintiffs is functionally almost identical to the *Anderson* test advocated by the Secretary. *Compare Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (the *Socialist Workers* test), *with Anderson v. Celebrezze*, 460 U.S. 780,

correct test on remand. Instead, he offers three arguments in defense of the district court's decision not to apply any test at all. But the prior panel already rejected those arguments, and none of them has any merit.

The Secretary's main argument is that the plaintiffs' Equal Protection claim fails as a matter of law because it depends on an inaccurate understanding of Georgia law. (Cross-Appellee's Br. 17-19.)He claims that it is "simply false" that Libertarian Party candidates for statewide office have automatic ballot access while Libertarian Party candidates U.S. Representative must petition. (*Id.* at 18.) It is false, he argues, because, in order to have automatic ballot access for its statewide candidates, "the Libertarian Party must still demonstrate significant support among the electorate by obtaining *votes* rather than *petition signatures*." (*Id.* at 18-19.)

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789 (1983) (the *Anderson* test).The Supreme Court has noted that, while *Anderson* did not overrule *Socialist Workers*, the analysis is interchangeable. *See Norman v. Reed,* 502 U.S. 279, 288 n.8 (1992); *Anderson,* 460 U.S. at 786-87 n.7.

That is exactly the point. Even though the Libertarian Party has repeatedly demonstrated by obtaining votes that it has significant support in Georgia, Georgia law treats Libertarian Party candidates for statewide offices differently than Libertarian Party candidates for U.S. Representative. In early 2022, for example, members of the Libertarian Party of Georgia will hold a convention to nominate a slate of candidates. The chair and the secretary of the Party will certify those candidates to the Secretary of State.[2] *See* O.C.G.A. § 21-2-172. But only the candidates for statewide offices will appear automatically on the general election ballot, while all others will have to petition. *See* O.C.G.A. § 21-2-130(2)(A)-(B). That is the distinction at the heart of the plaintiffs' Equal Protection claim.

The prior panel understood this. It described the plaintiffs' claim this way:

> The challenge here is not between political party and political body candidates for the same offices, but

[2] The Libertarian Party's candidate certifications between from 2008 through 2018 are in the record. (*See, e.g.*, ECF 75-17 (2018 certification).)

> between political body candidates for *different* offices. Under Georgia law, a Libertarian Party candidate for statewide office is automatically entitled to ballot access in 2020; this is because, in the 2018 general election, it "nominated a candidate for state-wide office and such candidate received a number of votes equal to 1 percent of the total number of registered voters who were registered and eligible to vote in such general election." O.C.G.A. § 21-2-180(2). However, pursuant to the different Georgia requirement for non-statewide offices, Libertarian congressional candidates are required to individually qualify for the ballot by submitting a nominating petition "signed by a number of voters equal to 5 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking." Id. § 21-2-170(b). Therefore, the Party argues, its statewide candidates need to gather zero signatures while a full slate of congressional candidates would need to gather 321,713 valid signatures.

Cowen v. Ga. Sec'y of State, 960 F.3d 1339, 1346-47 (11th Cir. 2020) (footnote omitted). And the panel did so even though the Secretary had made the same argument in defense of the district court's first ruling that he makes here now.[3]

The prior panel's understanding of the plaintiffs' Equal Protection claim was correct and, more importantly, essential to its

[3] *See* Appellee's Br. 22-23, *Cowen v. Raffensperger*, No. 19-14065 (11th Cir. Dec. 13, 2019).

holding that *Jenness v. Fortson*, 403 U.S. 431 (1971), did not foreclose the plaintiffs' Equal Protection claim. *See Cowen,* 960 F.3d at 1347. ("*Jenness* does not control the Equal Protection issue presented by the Party in this case, because the Equal Protection claim presented here is sufficiently different from that presented in *Jenness*."). It was therefore binding on the district court under the mandate rule. *See Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 881 F.3d 835, 843 (11th Cir. 2018) (the mandate rule "ban[s] courts from revisiting matters decided expressly or by necessary implication in an earlier appeal of the same case"). It also forecloses the Secretary's main argument on this issue here under the prior panel rule and the law-of-the-case doctrine. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) ("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*").

The Secretary's second argument fares no better. He argues that states do not violate equal protection by providing "alternative paths to the ballot for differently-situated candidates" and that

Libertarian Party candidates for statewide offices and Libertarian Party candidates for U.S. Representative are differently situated. (Cross-Appellee's Br. 19-20.)

This argument echoes the Supreme Court's reasoning in *Jenness*. 403 U.S. at 440-42.. The plaintiffs there challenged Georgia's ballot-access distinction between new and established political parties as a violation of equal protection. The Supreme Court explained that "alternative routes" to the ballot are not necessarily unequal and that Georgia did not deny equal protection by "providing different routes to the … ballot" based on "obvious differences" between new and established parties. *Id.* Citing *Jenness,* the district court on remand adopted the same reasoning: "That Georgia provides an alternative way to access the general-election ballot through votes obtained in the prior election does not mean that they have created a distinction that violates Plaintiffs' right to equal protection." (V:159 at 45.)[4]

[4] Throughout this brief, citations to the Secretary's Appendix will be in the form "Volume:Tab at Page" unless otherwise noted.

One problem for the Secretary, however, is that he made this exact argument in the first appeal,[5] and the prior panel rejected it. After explaining the "alternative paths" rationale for the result in *Jenness*, the panel concluded that it does not control here because the plaintiffs' claim is "substantially different." *Cowen*, 960 F.3d at 1346. While *Jenness* considered a distinction between new and established-party candidates "for the same offices," the panel reasoned, this case is about one third-party's candidates "for *different* offices." *Id.* The prior panel's opinion means that the "alternative paths" rationale in *Jenness* does not control the outcome here and thus did not absolve the district court of the need to consider the plaintiffs' claim under the appropriate legal standard.

A second problem for the Secretary is that the "alternative paths" rationale does not override the legal standard in any event. As the Eleventh Circuit recently illustrated in *Independent Party of Florida v. Florida Secretary of State*, 967 F.3d 1277, 1284 (11th Cir.

[5] *See* Appellee's Br. 21, 24, *Cowen v. Raffensperger*, No. 19-14065 (11th Cir. Dec. 13, 2019).

2020) (William Pryor, C.J.), even where the "alternative paths" rationale *does* apply because a party is challenging a distinction between candidates for the same office, a state must still justify its decision to provide different paths to the ballot. There, two third parties challenged a Florida law that offered two ways to gain ballot access for presidential candidates: one way by petition and a second way by affiliating with a qualified national party. *Id.* at 1279. The unaffiliated third parties contended that the affiliation route denied them equal protection, but the Court held that Florida's asserted interest in accounting for the national interest in presidential elections adequately justified the provision. *Id.* at 1284. Unlike the district court here, the Court in *Independent Party* didn't skip the required analysis of the state's justification when it analyzed the alternative paths to Florida's ballot.

The Secretary's third argument in defense of the district court's decision to skip the analysis is simply that the prior panel didn't instruct the district court to do any analysis. Rather, the Secretary argues, the prior panel only instructed the district court to consider the plaintiffs' Equal Protection claim separately from

the plaintiffs' First and Fourteenth Amendment claim. (Cross-Appellee's Br. 17 n.5.) But this is a distinction without a difference.

Considering a claim separately necessarily entails applying the appropriate legal standards to the relevant facts in the record. That could mean, of course, determining that a particular case dictates a certain outcome. But because the prior panel expressly held that *Jenness* does not control the outcome of the plaintiffs' Equal Protection claim here, the one thing that the district court clearly could not do within the scope of the mandate was to determine that *Jenness* controlled. *See Cox Enters., Inc. v. News-Journal Corp.*, 794 F.3d 1259, 1271-72 (11th Cir. 2015) (the scope of the mandate is determined by the issues considered in the prior appeal). And that is precisely what it did, citing only *Jenness* and relying only on its rationale without considering and weighing the state's justification for the challenged classification. (V:159 at 45.)

Ultimately, none of the Secretary's arguments justify the district court's inexplicable noncompliance with the prior panel's mandate. At a minimum, the court should have conducted the sort

of analysis that this Court had just illustrated in *Independent Party*. Its failure to do so was error.

II. The Secretary forfeits any response to the second and third issues presented in this cross-appeal.

The Secretary's brief does not address the second and third issues presented in this cross-appeal, both of which concern the appropriate standards for court-ordered remedies in election cases. Although the Secretary's silence does not mean that this Court *must* side with the cross-appellants on those issues, *see Martin v. United States*, 949 F.3d 662, 667 (11th Cir. 2020) (the court "can affirm on any basis supported by the record"), the Court should hold that the Secretary has through his silence waived or forfeited any response. *See, e.g.*, *Alvarez v. Lynch*, 828 F.3d 288, 295 (4th Cir. 2016) (observing that the government's failure to respond to an argument in its response brief ordinarily "result[s] in waiver"); *Cincinnati Ins. Co. v. E. Atl. Ins. Co.*, 260 F.3d 742, 747 (7th Cir. 2001) (an appellee's failure to respond to an appellant's non-frivolous argument "operates as a waiver").

There are several reasons for this common-sense rule. *See generally*, *W. Va. Coal Workers' Pneumoconiosis Fund v. Bell*, 781 F. App'x 214, 226-27 (4th Cir. 2019) (discussing the forfeiture rule).

The first is basic fairness. Appellants have an explicit obligation to present their issues in their opening brief, *see* Fed. R. App. P. 28(a)(5), and they waive any issues that they fail to raise. *See Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1306-07 (11th Cir. 2012) (collecting cases). If an appellant has met its obligation, "[i]t is not too much to ask" an appellee to respond. *Id.* at 1306.

The second is the adversarial process. Our system of justice depends on the adversarial process to produce just results, and the failure of one side to participate in that process increases the likelihood of error. *Cf. Strickland v. Washington*, 466 U.S. 668, 685-87 (1984). It also risks overburdening courts with the obligation to conduct a complete review of an appellant's argument without the benefit of an interested party's perspective. But without a forfeiture rule, appellees have less incentive to offer that perspective.

And, finally, an appellee's silence on an issue may reflect a conscious choice, and courts should not lightly wade into issues

that a party has chosen to concede. This reason has particular force when, as may be the case here, political forces constrain a party's willingness to make an explicit concession.

Here, the Secretary's silence on the second and third issues presented in the cross-appeal constitutes the sort of "outright failure to join in the adversarial process [that] would ordinarily result in [forfeiture]." *Alvarez,* 828 F.3d at 295. The Secretary agrees with the plaintiffs that the Court should vacate the district court's remedial order, but he offers no argument on whether the district court should have deferred to the General Assembly before re-writing Georgia's election law or whether the district court made adequate findings to support its chosen remedy. Under these circumstances, the Court should consider his silence as a waiver of any argument on those issues.

Dated: December 14, 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 2,206 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 14, 2021, I electronically filed the foregoing **Cross-Appellants' Reply Brief** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of this filing to these attorneys of record:

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