No. _____

In the Supreme Court of the United States

MARTIN COWEN et al.,

Applicants/Petitioners

v.

GEORGIA SECRETARY OF STATE,

Respondent.

On Application for an Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPLICATION TO THE HONORABLE JUSTICE CLARENCE THOMAS AS CIRCUIT JUSTICE

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Corporate Disclosure Statement

Petitioner Libertarian Party of Georgia, Inc. states that it is a Georgia nonprofit corporation with no parent corporation and that no publicly held company owns more than 10 percent of its stock. All of the other petitioners are individual citizens of Georgia.

To the Honorable Justice Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Applicants Martin Cowen, Allen Buckley, Aaron Gilmer, John Monds, and the Libertarian Party of Georgia, Inc. respectfully request a 60-day extension of time to file a petition for a writ of certiorari up to and including August 28, 2022. The respondent, Georgia Secretary of State Brad Raffensperger, does not oppose this request.

Jurisdiction

The petitioners seek review of the Eleventh Circuit's judgment entered on January 5, 2022 (attached as Exhibit 1). That court denied rehearing en banc on March 31, 2022 (attached as Exhibit 2). Under Supreme Court Rules 13.1, 13.3, and 30.1, a petition for a writ of certiorari is currently due on June 29, 2022—more than ten days from now.

Upon the timely filing of a petition for a writ of certiorari, this Court would have jurisdiction over the Eleventh Circuit's judgment under 28 U.S.C. § 1254(1).

Background

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.

The Libertarian Party of Georgia, prospective Libertarian candidates, and Libertarian voters—collectively, the "Libertarian Party" or just "Party"—bring this case against the Georgia Secretary of State. They allege that Georgia's ballot-access restrictions unconstitutionally burden their associational rights under the First and Fourteenth Amendments to the U.S. Constitution. They also allege that Georgia's ballot-access restrictions violate the Equal Protection Clause by requiring Libertarian candidates for U.S. Representative to gather more

signatures for ballot access than Libertarian candidates for statewide offices.*

After an extended period of discovery, the parties cross-moved for summary judgment, and the district court granted summary judgment for the Secretary. The court based its ruling on the Supreme Court's decision in *Jenness v. Fortson*, 403 U.S. 431 (1971), which upheld an earlier version of Georgia's ballot-access requirements as constitutional. Finding itself bound by *Jenness*, the district court summarily rejected both of the Party's claims.

The Party appealed. A three-judge panel of the Eleventh Circuit vacated the judgment, holding that *Jenness* did not control either of the Party's claims, and it remanded the case to the district court to reconsider both claims under the proper legal standards. *Cowen v. Ga. Sec'y of State*, 960 F.3d 1339, 1347 (11th Cir. 2020) ("*Cowen I*").

On remand, the parties cross-moved for summary judgment again. In a lengthy opinion, the district court granted the

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* The Party also raises a discriminatory-purpose claim that is not at issue here.

Libertarian Party's motion for summary judgment on its First and Fourteenth Amendment claim but granted the Secretary's motion for summary judgment on the Party's Equal Protection claim.

Both sides appealed. After expedited briefing and argument, a second three-judge panel reversed the district's court's ruling on the Party's First and Fourteenth Amendment claim. *Cowen v. Sec'y of State*, 22 F.4th 1227, 1234 (11th Cir. 2022) ("*Cowen II*"). The panel concluded that, although *Jenness* did not automatically control the Party's claim here, the Party had identified no material distinction between this case and *Jenness* that would warrant a different result. *Id.* at 1232.

In reaching that conclusion, the panel acknowledged the undisputed fact that no third-party candidate for U.S. Representative has ever been able to satisfy Georgia's ballot-access requirements. *Id.* But it pointed to the fact that a single independent candidate for *district attorney* had "gathered enough signatures to exceed the 5% threshold" in 2020. *Id.* "This local candidate's success," the panel concluded, "shows that the 5% requirement still does not bar candidates from the ballot" as the

Supreme Court had found in *Jenness*. *Id.* Seeing no material distinction with *Jenness*, the panel found as a matter of law that the burden of Georgia's ballot-access restrictions on the Party's associational rights is not severe and can be justified by the State's asserted interests in preventing frivolous candidacies and avoiding crowded ballots. *Id.* at 1233-34.

The panel also affirmed the district court's summary judgment for the Secretary on the Party's Equal Protection claim. *Id.* at 1235-36. The panel found, based solely on its ruling on the Party's First and Fourteenth Amendment claim, that the burden of requiring Libertarian candidates for U.S. Representative to gather more signatures than Libertarian candidates for statewide offices is not severe, and it found that the State's interest in ensuring that candidates have a significant modicum of support among the electorate sufficiently justifies the disparity. *Id.* In accepting that justification, the panel attempted to distinguish this Court's decision in *Norman v. Reed*, 502 U.S. 279, 293-94 (1992), which had expressly rejected a similar justification for an Illinois law that required candidates in a district or political subdivision to gather

more signatures for ballot access than statewide candidates. *Cowen II*, 22 F.4th at 1235 n.5.

The Party timely petitioned for en banc review, and the Eleventh Circuit denied the petition in a per curiam order.

Reasons for Granting an Extension of Time

The Court should grant an extension of time for 60 days for the following reasons:

1. The petitioners' sole counsel of record, Bryan L. Sells, is scheduled for trial in the matter of *Rose v. Raffensperger*, No. 1:20-cv-2921-SDG (N.D. Ga.), beginning on June 27, 2022—two days before the current due date in this matter—and the trial is expected to last at least one week. Mr. Sells is lead counsel in *Rose* and has many pre-trial and post-trial litigation deadlines in that case. Mr. Sells is also counsel in many other on-going voting cases with overlapping election-year commitments in the district courts and courts of appeals, including *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, No. 22-1395 (8th Cir.); *Greene v. Raffensperger*, No. 22-____ (11th Cir.); *In re Georgia Senate Bill 202*, No. 1:21-mi-55555-JPB (N.D. Ga.); *Meadors v. Erie County*

Board of Elections, No. 1:21-cv-982-JLS (W.D.N.Y); *Turtle Mountain Band of Chippewa Indians v. Jaeger*, No. 3:22-cv-22-PDW-ARS (D.N.D.); and *Walen v. Burgum*, No. 1:22-cv-31-PDW-RRE-DLH (D.N.D.). An extension will permit Mr. Sells to prepare a concise and helpful petition.

2. This case presents issues of exceptional importance because of the fundamental nature of the rights involved and their impact on millions of voters across the nation. This Court has repeatedly recognized the important role that third parties play in our political system. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) (discussing the importance of "political figures outside the two major parties"); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185-86 (1979) ("Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success."). Yet the panel opinion upholds a signature requirement that has effectively shut third parties out of the political process. No third-party candidate for U.S. Representative has ever been able to satisfy the requirement since Georgia enacted it in 1943, and the signature requirement is substantially higher than any

third-party candidate has ever been able to overcome in the history of the United States. Petitioners' counsel needs more time to ensure that these issues are fully and clearly presented to this Court.

3. A significant prospect exists that this Court will grant certiorari and reverse the Eleventh Circuit. The panel opinion decided important constitutional issues in a way that conflicts with this Court's decisions in *Norman v. Reed*, 502 U.S. 279 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); and *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). The panel's analysis of the burdens imposed by Georgia's ballot-access scheme also conflicts with the decisions of at least one other circuit. *See, e.g.*, *Lee v. Keith*, 463 F.3d 763, 769 (7th Cir. 2006) (finding a severe burden even though three candidates had qualified under the challenged restrictions). Review is therefore necessary to secure consistency in the application of the First and Fourteenth Amendments.

4. An extension will cause no prejudice to the respondent, who has confirmed that he does not oppose the requested extension.

Conclusion

For the foregoing reasons, the applicants respectfully request a 60-day extension of time to file a petition for a writ of certiorari up to and including August 28, 2022.

Respectfully submitted,

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