No. 09-14250

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANDY SHUGART et al.,

Plaintiffs-Appellants,

v.

BETH CHAPMAN, in her official capacity
as Alabama Secretary of State,

Defendant-Appellee.

On appeal from the United States District Court
for the Middle District of Alabama
Case No. 08-CV-1016-MEF

BRIEF OF APPELLEE BETH CHAPMAN, ALABAMA SECRETARY OF STATE

Troy King
Attorney General

Corey L. Maze
Solicitor General

James W. Davis*
William G. Parker, Jr.
Assistant Attorneys General

OFFICE OF THE ALABAMA ATTORNEY GENERAL
500 Dexter Avenue
Montgomery, AL 36130
(334) 353-1356*
(334) 353-8440 (fax)

December 4, 2009

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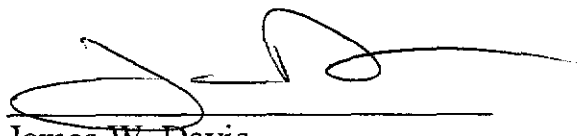
CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, I certify that to the best of my knowledge the certificate of interested persons contained in the appellants' principal brief is complete.



James W. Davis
Assistant Attorney General
Counsel for the Appellee

STATEMENT REGARDING ORAL ARGUMENT

This case involves the application of settled law regarding the constitutionality of Alabama's ballot access requirement for independent and third-party candidates. Because the law is settled, *see, e.g., Swanson v. Worley*, 490 F.3d 894, 905 n.12 (11th Cir. 2007), oral argument is not likely to help the Court decide the case. Secretary Chapman therefore joins with the appellants in not requesting oral argument.

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BRIEF OF APPELLEE BETH CHAPMAN, ALABAMA SECRETARY OF STATE

INTRODUCTION

An Alabama statute conditions ballot access for independent and third-party candidates seeking state or local offices on their submission of a petition containing signatures amounting to at least three percent of the qualified electors who voted in the last gubernatorial election. *See* Ala. Code § 17-9-3(a)(3). This appeal arises from a facial challenge to that statue under the United States and Alabama constitutions. In particular, the appellants seek reversal of an order from the district court dismissing their claim that the three-percent signature requirement violates their rights under the First and Fourteenth Amendments. Because this Court already has held that Alabama's three-percent signature requirement does *not* violate the First and Fourteenth Amendments, *see Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007), the district court's order is due to be affirmed.

JURISDICTIONAL STATEMENT

The district court had federal-question jurisdiction over the appellants' federal constitutional claim under 28 U.S.C. § 1331 and supplemental jurisdiction over the appellants' state constitutional claim under 28 U.S.C. §

1367. Appellate jurisdiction is proper under 28 U.S.C. § 1291 as an appeal from a final order.

Secretary Chapman does note, however, that there is a fair question here of whether this case presents an Article III "case or controversy." Plaintiff Andy Shugart did not run or attempt to run for office, but merely "considered running" for office. (Doc. 1, p. 4, ¶ 14). Likewise, plaintiff Jonathan Gray has not actually been denied the right to vote, but merely "would" vote for Shugart "should his name appear on the ballot." (*Id.* ¶ 15). Because there is law from other circuits suggesting that standing is present in these circumstances, *see Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004) ("There would be no question of [the candidate's] standing to seek [an injunction placing his name on the ballot] in advance of the submission or even collection of any petitions."), Secretary Chapman is satisfied that the district court properly decided this case on the merits.

STATEMENT OF THE ISSUE

The sole issue in this appeal is one this Court already decided in Alabama's favor in *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007): whether Alabama's statute governing ballot access for independent candidates for the United States House of Representatives, which establishes

a three-percent signature threshold, is constitutional, including when compared to the 5,000 signature requirement for independent candidates for President.

STATEMENT OF THE CASE

A. Summary of Proceedings and Disposition Below.

On August 1, 2008, Plaintiffs Andy Shugart and Jonathan Gray brought suit in the Northern District of Alabama, claiming that Alabama violated their constitutional rights by requiring more signatures to run as an independent candidate for the United States House of Representatives than as an independent candidate for President. (Doc. 1). Shugart and Gray (collectively "Shugart") brought a state-law challenge as well, claiming that the statutes governing signature requirements violated the Alabama Constitution. (Doc. 1, p. 2, ¶ 5(e)).

Defendant Beth Chapman, Alabama Secretary of State, filed an answer denying Shugart's allegations. (Doc. 2). She then moved the district court to dismiss the complaint or, in the alternative, to transfer venue. (Doc. 3). Venue was transferred to the Middle District of Alabama. (Doc. 8).

Following the transfer of venue, Secretary Chapman renewed her motion to dismiss. (Doc. 11). The parties filed briefs, replies, and sur-replies (Docs. 19, 20, 21, 24).

On July 23, 2009, the district court noted that Shugart's precise claim – that it was unconstitutional for Alabama to require more signatures to run for a state or local office than for President – has already been decided in Alabama's favor by this Court. (*See* Doc. 25, pp. 4-5 (citing *Swanson v. Worley*, 490 F.3d 894, 905 n.12 (11th Cir. 2007)). The district court therefore granted Secretary Chapman's motion to dismiss. (*Id.* at 5). The district court dismissed the claims based on federal law with prejudice, and, declining to exercise supplemental jurisdiction, dismissed Shugart's state-law claims without prejudice. (*Id.* at 6-7).

On August 21, 2009, Shugart filed his notice of appeal. (Doc. 27).

B. Statement of Facts

1. Plaintiff Shugart alleges that he "considered running" as an independent candidate for the United States House of Representatives, but does not allege that he made any effort to collect the signatures required for such a candidate to appear on the ballot as an independent candidate. (Doc. 1, p. 4, ¶ 14).

2. Plaintiff Gray alleges that he is a registered voter who would support Shugart in the election if Shugart's name appeared on the ballot. (Doc. 1, p. 4, ¶ 15.

3. To appear on the ballot in Alabama as an independent candidate for the U.S. House of Representatives, a person must file a petition containing signatures of qualified electors, the number of which "shall equal or exceed three percent of the qualified electors who cast ballots for the office of Governor in the last general election." Ala. Code § 17-9-3(a)(3). The parties agree that 6,155 signatures were required for purposes of the 2008 general election for U.S. House District 6. (Doc.1, p. 4, ¶ 14; Doc. 2, pp. 2-3, ¶14).

4. To appear on the ballot in Alabama as an independent candidate for the office of President of the United States, a person must submit a "written petition signed by at least 5,000 qualified voters of this state." Ala. Code § 17-14-31.

C. Standard of Review

This Court reviews *de novo* an order granting a motion to dismiss. *See Harris v. United Auto. Ins. Group, Inc.*, 579 F.3d 1227, 1230 (11th Cir. 2009) (citing *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1187 (11th Cir. 2004)).

SUMMARY OF THE ARGUMENT

Alabama's three-percent signature requirement for independent candidates for the House of Representatives is constitutional even though it requires more signatures (in at least one district) than independent candidates for President. This Court has already determined that there is no constitutional deficiency in requiring fewer signatures in Presidential elections than in state or local elections. *See Swanson v. Worley*, 490 F.3d 894, 905 n.12 (11th Cir. 2007); *Wilson v. Firestone*, 623 F.2d 345 (5th Cir. 1980).

Swanson cannot be distinguished from the facts of this case, and it was correctly decided. Because the States' interests differ with respect to House and Presidential elections, comparison of the candidacy requirements for the two offices is irrelevant, and the lower requirement for Presidential elections is justified. The fact that "only" 5,000 signatures are required to get on the ballot in Alabama as a presidential candidate does not make the higher requirement to run for a House seat constitutionally suspect: Alabama's signature requirement to run for President is modest compared to other states, and in fact, Presidential candidates must present more than 5,000 signatures because they must also qualify in other states.

The Supreme Court's decision in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), where the Court struck down an Illinois state law that required "substantially more" signatures to run as an independent for a Chicago city office than for a state-wide office, does not compel a different result. *Illinois State Board* compared two offices elected entirely within the state. This case, however, involves an office elected entirely by Alabama voters, and an office elected only in small part by Alabama voters. The State's interests are much lower in Presidential elections, making *Illinois State Board* inapplicable. *See Wilson*, 623 F.2d at 345.

For all these reasons, the district court's judgment should be affirmed.

ARGUMENT

1. Shugart's Claim Was Resolved By This Court's Decision In *Swanson v. Worley*.

Shugart contends that to require more signatures for House than for President violates his rights under the First and Fourteenth Amendments to the United States Constitution. This Court, however, has already decided otherwise.

In *Swanson v. Worley*, a would-be independent candidate for United States Senator – represented by the same counsel who represents Shugart in this case – challenged Alabama's three-percent signature requirement (along with the filing deadline). 490 F.3d at 896. That same requirement applies to candidates for several offices, including independent candidates for House or the Senate. Ala. Code § 17-9-3(a)(3). This Court considered whether the signature requirement (a candidacy qualification) "unreasonably burdens" candidates and voters. *See Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983). That test requires only that the state point to a rational basis for any rule where the burden is moderate and reasonable: When a law imposes "reasonable, nondiscriminatory restrictions" on candidates, the important regulatory interests of the state "are generally sufficient to justify" the requirement. *Anderson*, 460 U.S. at 788. *Accord*, *Swanson v. Worley*, 490

F.3d at 902-04, 912 (applying rational basis test to signature requirement and early filing deadline for independent candidates).[1]

Applying the *Anderson v. Celebrezze* standard, this Court held that Alabama's three-percent signature requirement was reasonable and constitutional. *Id.* at 903 ("Based on our precedent, we conclude that Alabama's signature requirement by itself does not impose a severe burden on plaintiffs' rights but is a reasonable, nondiscriminatory restriction."); *see also id.* at 905 ("Alabama's three-percent signature requirement is a reasonable, nondiscriminatory regulation that does not impose a severe burden.").

In the process of approving Alabama's three-percent signature requirement, this Court used reasoning that resolves this case. The State argued in *Swanson* that valid state interests supported the signature requirements, including interests recognized by this Court.[2] In response, Swanson argued that the more stringent signature requirement is not

[1] Secretary Chapman disputes Shugart's suggestion that heightened scrutiny, or strict scrutiny, applies to the ballot access measures at issue here. That question was resolved by this Court in *Swanson*, when it appropriately applied the rational basis test.

[2] *See Swanson*, 490 F.3d at 903 (recognizing "compelling state interests in regulating the state's election process; in requiring a significant modicum of support before placing a candidate on a ballot; and in avoiding confusion, deception, and frustration of the democratic process.").

necessary to protect those interests when fewer signatures are required to run for President (the same argument made in this case).

This Court rejected Swanson's argument:

> In Presidential elections, independent candidates need to obtain only 5,000 signatures to appear on the general election ballot in Alabama. *See* Ala. Code § 17-19-2(a) (2005) (current version at Ala. Code § 17-14-31(a)). Plaintiffs contend that if a less restrictive signature requirement sufficiently satisfies the State's interests in Presidential elections, there is no justification for requiring more signatures through the three-percent signature requirement in statewide elections.
>
> However, Presidential elections call for a different balancing of interests than state-wide or local races. As the Supreme Court emphasized in *Anderson*, "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." [*Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983)]. Accordingly, we cannot say it is unreasonable for Alabama to apply more demanding regulations on statewide and local races than Presidential races.

490 F.3d at 905 n.12.[3]

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[3] *Swanson* is consistent with the former Fifth Circuit's holding in *Wilson v. Firestone*, 623 F.2d 345 (5th Cir. 1980). In that case, a plaintiff challenged Florida's signature requirement for statewide office when fewer signatures were required to run for President. The district court entered judgment for the defendant and the Fifth Circuit affirmed:

> There is a logical reason for Florida's requiring fewer signatures on the petition of an independent candidate for President of the United States than for an independent candidate for a statewide office. Plaintiff is not being discriminated against nor denied equal protection by this difference in classification.

623 F.2d at 345. The Fifth Circuit's decision in *Wilson* is binding on this Court under *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

This Court thus held in *Swanson* that (1) Alabama's three-percent requirement, which applies to both Senate and House races, is constitutional; and (2) the fact that fewer signatures are required to run for President does nothing to call that constitutionality into question. *Swanson* requires that the district court's judgment be affirmed.

2. *Swanson* Cannot Be Distinguished From The Facts Of This Case.

Shugart argues that *Swanson* is not binding precedent in this case because "[t]he Court in *Swanson* did not examine an independent Presidential candidate and an independent state U.S. House District candidate." Blue Br. at 15-16. Presumably Shugart means that the result should be different because *Swanson* concerned a Senate candidate and this case concerns a would-be House candidate. To the extent that is a distinction, it is one that does not affect the outcome.

Properly considered, Shugart's claim is simply the same claim that was raised in *Swanson*, that the three-percent signature requirement is too high. Like the claimants in *Swanson*, Shugart points to the lower Presidential signature requirement as *evidence* that the other is too high. However, the constitutionality of the three-percent requirement (a settled matter) does not depend on what Presidential candidates must do. Whether Presidential candidates must present a dozen signatures or a million, the

issue under *Anderson v. Celebrezze* is the burden on House candidates, not candidates for any other office.[4]

In any event, the same three-percent requirement applies to candidates for both House and Senate, and it makes no difference in this case that elections for House are by district and elections for Senate are state-wide. The Supreme Court put "statewide *and local* races" in the same group for purposes of comparing the requirements to those in Presidential elections: "[T]he State has a less important interest in regulating Presidential elections than *statewide or local elections*, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson v. Celebrezze*, 460 U.S. at 795, quoted in *Swanson*, 490 F.3d at 905 n.12 (emphasis added). In one election (whether for Senate or House), all the voters are within Alabama, and Alabama has a stronger interest justifying a higher signature requirement. In the other election (for President), there will

[4] At times, Shugart couches his claim in equal protection language, arguing that the signature requirement for House elections is "discriminatory." *E.g.*, Bl. Br. at 1. That does not make this case different from *Swanson*. The issue in both cases is the constitutionality of Alabama's three-percent signature requirement. In both cases, the claimants point to the Presidential signature requirement as evidence that allegedly supports their claim. Both cases are resolved by application of the interest-balancing test set out in *Anderson v. Celebrezze*, 460 U.S. at 788, weighing the modest burden on candidates against the compelling state interests. However it is couched, circuit precedent resolves the claim: A candidate for state or local office "is not being discriminated against nor denied equal protection" when treated differently from Presidential candidates. *Wilson*, 623 F.2d at 345.

be more voters outside Alabama than within Alabama, and the State's interest is correspondingly lower.

There is therefore no legitimate way to distinguish *Swanson* from this case. *Swanson* held that different rules apply to Presidential elections than to elections decided solely by voters within the state, and that holding is dispositive here.

3. Even If The *Swanson* Court's Holding Concerning Presidential Ballot Requirements Is Not Binding, This Court Should Reach The Same Result.

As discussed above, the *Swanson* Court held that there is nothing wrong with Alabama requiring more signatures to run as an independent for President than for House. *Swanson* (and *Wilson v. Firestone*) is binding on that issue and resolves the case. Nonetheless, even if the argument comparing *House* and Presidential candidacy requirements is a matter of first impression, Alabama's requirement should be upheld.

The analysis still starts with *Swanson*, because that case surely resolved at least this point: Alabama's three-percent signature requirement, standing alone, is constitutional. 490 F.3d at 903 ("Based on our precedent, we conclude that Alabama's signature requirement by itself does not impose a severe burden on plaintiffs' rights but is a reasonable, nondiscriminatory restriction."). As this Court noted in *Swanson*, precedent from the Supreme

Court and this Court compels that result. *Id.* at 904 (citing *Storer v. Brown*, 415 U.S. 724, 738 (1974); *Am. Party of Tex. v. White*, 415 U.S. 767, 788-89 (1974); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002); *Libertarian Party of Fla. v. Florida*, 710 F.2d 790, 793 (11th Cir.1983)).

The soundness of this holding is not changed by the fact that in application, the three-percent rule requires (in at least one House district) more signatures than the 5,000 required to run for President. As stated above, the signature requirement for each office stands on its own and is either constitutional or not, irrespective of the requirements of other offices. (Shugart is not claiming any deficiency with Alabama's Presidential requirements, but simply re-litigating the three-percent requirement.) Nonetheless, the comparison argument fails for at least three additional reasons: (1) The States' interests differ with respect to House and Presidential elections, making any comparison meaningless; (2) the lower requirement for Presidential candidates does not show that Alabama's signature requirement to run for House is too high, but instead that Alabama's requirements to run for President are modest; and (3) in point of fact, Presidential candidates must present much more than 5,000 signatures

(and more than Alabama House candidates), because they must qualify in other states.

First, Alabama's interests in a House election are stronger than in the Presidential election. As the Supreme Court has noted, "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson v. Celebrezze*, 460 U.S. at 795, quoted in *Swanson*, 490 F.3d at 905 n.12. In one election (whether for Senate or House), all the voters are within Alabama, and Alabama has a stronger interest justifying a higher signature requirement; in the other election (for President), there will be more voters outside Alabama than within Alabama, and the State's interest is correspondingly lower. This justifies the lower signature requirement for independent Presidential candidates.

Second, the comparatively lower signature requirement for Presidential candidates does not necessarily prove that the three-percent requirement for House candidates is too high. In fact, Alabama's requirement for Presidential candidates is low in comparison to other states. For example, in Texas, one wishing to run as an independent for President in

2012 will have to present more than 80,000 signatures.[5] In Georgia, more than 50,000 signatures will be required.[6] West Virginia required more than 15,000 signatures in 2008. *Barr v. Ireland*, 575 F. Supp. 2d 747, 749 (S.D.W.Va. 2008) (approving requirement). Alabama's requirement for independent Presidential candidates seems modest by comparison. Alabama's legislative choice to have a lower requirement for Presidential candidates does not defeat its higher requirements for state and local offices.

Third, Shugart is mistaken to suggest that fewer signatures are required to run for President than for Congress. True, fewer signatures are required to get on the ballot *in Alabama* to run for President as an independent than for Congress, but Presidents are not elected just in Alabama. An independent candidate for President, such as Ralph Nader or Ross Perot or Bob Barr, must get on the ballot in multiple states to have even minimal success. Once the candidate presents signatures in Alabama

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[5] *See* Tex. Elec. Code § 192.032(d) ("The minimum number of signatures that must appear on the petition is one percent of the total vote received in the state by all candidates for president in the most recent Presidential general election."); U.S. Electoral College, 2008 Popular Vote Totals (showing 8,077,795 votes cast by Texans in the 2008 Presidential election), available at http://www.archives.gov/federal-register/electoral-college/2008/popular-vote.html (last viewed Oct. 5, 2009).

[6] *See* Ga. Code Ann. § 21-2-170(b) (requiring number equal to 1% of registered voters eligible to vote in the most recent election); Georgia Election Division, Voter Registration Statistics (showing 5,633,964 registered voters in Georgia as of Oct. 1, 2009), available at http://sos.georgia.gov/elections/voter_registration/vrgraphs.htm (last viewed Oct. 5, 2009).

and even one other state, he or she has presented in aggregate more than Shugart would have been required to present to run for House. To the extent any comparison is valid, the only legitimate comparison would be the *total* number of signatures presented by independent Presidential candidates in *all* states, to the significantly lower number of signatures that applies to Shugart.

In sum, Secretary Chapman disagrees with Shugart's argument that *Swanson* is distinguishable, but even if *Swanson* is not binding on the specific question raised here, the district court's order should be affirmed.

4. The Supreme Court's Decision in *Illinois State Board of Elections v. Socialist Workers Party* Does Not Require Reversal.

Shugart cites *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), where the Supreme Court struck down an Illinois state law that required "substantially more" signatures to run as an independent for a Chicago city office than for a state-wide office.[7] That case, however, was decided before *Anderson v. Celebrezze*, *supra*, and does nothing to call *Swanson* or *Wilson* into question. It dealt with two offices, both elected solely *within* the State. It would apply if Alabama required

[7] *See also Norman v. Reed*, 502 U.S. 279 (1992) (invalidating an Illinois petition requirement of obtaining 25,000 signatures for statewide office but only 50,000 for Cook County office).

more signatures to run for mayor of Montgomery than for Governor, but nothing like that is going on here. As discussed above, the challenged signature requirements apply to one office elected solely within the state, and an office that is only *partially* decided by Alabama voters. It is no comparison at all.

In any event, this Court has already dealt with *Illinois State Board* when considering Florida's election law, and held that *Illinois State Board* does not invalidate a state law requiring more signatures to run for an office within the state than for President:

> *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), does not control this case. The opinion in that case illustrates an anomaly that existed. A candidate for a statewide office in Illinois could have access to the ballot by obtaining 25,000 names in Chicago (or anywhere in the state), but could not have access to the ballot in a citywide race in Chicago unless he obtained 35,947 names. The concurring opinion of Mr. Justice Rehnquist points out how the fractured Illinois Election Law resulted in this incongruous result. There is no similarity between the Illinois Election Law, as circumscribed by two appellate court decisions, and the Florida Election Law which has been approved by the Supreme Court.

Wilson, 623 F.2d at 345. Thus, this Court has already recognized that *Illiniois State Board* is an anomaly that does not call Alabama's election statutes into question.

CONCLUSION

For the reasons stated by the district court and in this brief, this Court should affirm the judgment of the District Court.

Respectfully submitted,

Troy King (KIN047)
Attorney General

James W. Davis (DAV103)
William G. Parker, Jr. (PAR135)
Assistant Attorneys General

State of Alabama
Office of the Attorney General
500 Dexter Avenue
Montgomery, AL 36130
(334) 242-7300
(334) 353-8440 (fax)
jimdavis@ago.state.al.us
wparker@ago.state.al.us

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2009 I served a copy of this brief via United States Mail on the following attorney using the address listed below:

Arlene M. Richardson, Esq.
RICHARDSON LEGAL CENTER, LLC
P.O. Box 6
Highland Home, AL 36041

James W. Davis