No. _____

In The

Supreme Court of the United States

ANDY SHUGART, *et al.*,

Petitioners,

v.

BETH CHAPMAN,
Alabama Secretary of State,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Independent candidates for elected offices have a First Amendment right to ballot access. Under the First Amendment, "severe" burdens on ballot access are subject to strict scrutiny. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). "'[R]easonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters," are generally valid if supported by "'the State's important regulatory interests.'" *Id.* (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983)). Discriminatory restrictions on ballot access, meanwhile, are subject to strict scrutiny under the Equal Protection Clause. *See Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Norman v. Reed*, 502 U.S. 279 (1992).

States typically require that independent candidates collect signatures in order to qualify for the ballot. *See, e.g., Jenness v. Fortson*, 403 U.S. 431 (1970). As a matter of First Amendment jurisprudence, this Court has concluded that the number of signatures required can extend as far as five percent "of the number of registered voters at the last general election for the office in question." *Id.* at 432. However, this Court has also concluded that the Equal Protection Clause prevents states from requiring more signatures from candidates seeking local offices than from those seeking statewide positions. *See Norman v. Reed*, 502 U.S. 279 (1992). Thus, even though a signature collection requirement for local office survives First Amendment scrutiny, it still

QUESTIONS PRESENTED – Continued

violates the Equal Protection Clause if it exceeds the number of signatures required for statewide office.

1. Whether Alabama's requirement that independent congressional candidates (who are selected by districts) collect more signatures than independent presidential candidates (who are elected statewide) in order to appear on the ballot violates the Equal Protection Clause.

2. Whether *Anderson v. Celebrezze* requires that presidential candidates be given preferred ballot-access treatment so that fewer signatures can be required of presidential, as opposed to local, candidates.

LIST OF PARTIES

The names of the Petitioners are:

Andy Shugart and Jonathan H. Gray.

The name of the Respondent is:

Beth Chapman, Alabama Secretary of State.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Andy Shugart and Jonathan Gray, petition the Court for a Writ of Certiorari to review a final judgment of the United States Court of Appeals for the Eleventh Circuit (entered February 10, 2010) affirming the District Court's dismissal of their Complaint.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Tjoflat, Carnes and Wilson, JJ.) is not reported and is included in the Appendix (App., *infra*, at 1). The final judgment of the United States District Court for the Middle District of Alabama (Fuller, C.J.) is not reported and is reproduced in the Appendix (App., *infra*, at 6).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 10, 2010. *See* App., *infra,* at 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. I:

> Congress shall make no law . . . abridging the freedom of speech,. . . .

U.S. Const., amend. XIV, § 1:

> No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Alabama Code § 17-9-3(a)(3):

> The following persons shall be entitled to have their names printed on the appropriate ballot for the general election, provided they are otherwise qualified for the office they seek: . . .
>
> Each candidate who has been requested to be an independent candidate for a specified office by written petition signed by electors qualified to vote in the election to fill the office. . . . The number of qualified electors signing the petition shall equal or exceed three percent of the qualified electors who cast ballots for the office of Governor in the last general election for the state, county, district, or other political subdivision in which the candidate seeks to qualify.

Alabama Code § 17-14-31(a):

> When presidential electors are to be chosen, the Secretary of State of Alabama shall certify to the judges of probate of the several

> counties the names of all candidates for President and Vice President who are nominated by any national convention or other like assembly of any political party or by written petition signed by at least 5,000 qualified voters of this state.

STATEMENT OF THE CASE

Petitioner, Andy Shugart, was an independent candidate for Alabama's Sixth Congressional District in 2008. Petitioner, Jonathan Gray, was a registered voter in Alabama's Sixth Congressional District who wished to vote for Shugart in that election. Because Alabama requires an inordinate number of signatures for independent candidates to run for Congress, Shugart was unable to gain ballot access during the 2008 election.

Alabama law requires that independent congressional candidates collect a number of signatures equal to three percent of the qualified electors who voted in the last gubernatorial election in that district. *See* Ala. Code § 17-9-3(a)(3). During the 2008 election cycle, § 17-9-3(a)(3)'s requirement translated into 6,155 signatures for independent congressional candidates in Alabama's Sixth Congressional District.

In contrast to § 17-9-3(a)(3), Alabama law requires that independent presidential candidates collect only 5,000 signatures in order to qualify for the ballot. *See* Ala. Code § 17-14-31(a). Today, only

Alabama and Arkansas, *contrast* Ark. Code Ann. § 7-7-103(b)(1)(A) (requiring that congressional (House) candidates collect 2000 signatures) *with* Ark. Code Ann. § 7-8-302(5)(B) (requiring that presidential candidates submit 1000 signatures), require that congressional (House) candidates collect more signatures than presidential candidates.

Petitioners filed suit against Respondent, Alabama's Secretary of State (in her official capacity), under 42 U.S.C. § 1983 (and the First and Fourteenth Amendments) seeking a declaration that Alabama's treating independent congressional candidates (who are elected in districts) more harshly than independent presidential candidates (who campaign statewide) violated the equality principle spelled out in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), and *Norman v. Reed*, 502 U.S. 279 (1992).

The District Court rejected Petitioners' constitutional claim and dismissed their complaint. *See* App., *infra,* at 6. It reasoned that while *Socialist Workers Party* controls differences "between requirements to be on a statewide ballot and those to be on a municipal ballot within that same state, this lawsuit challenges differences between requirements to be on the ballot to stand for election to a U.S. Congressional District and U.S. President." App., *infra,* at 9. Relying on Circuit precedent, *Swanson v. Worley,* 490 F.3d 894 (11th Cir. 2007), and *Wilson v. Firestone*, 623 F.2d 245 (5th Cir. 1980), the District Court concluded that states can constitutionally require more of

independent congressional candidates than independent presidential candidates. App., *infra,* at 10.

The Eleventh Circuit affirmed. *See* App., *infra*, at 1. It concluded that *Socialist Workers Party* did not control because "Alabama's interests in regulating an office elected entirely by Alabama voters (House District 6) are much greater than its interest in regulating an office elected only in small part by Alabama voters (the U.S. President)." App., *infra,* at 4. *Socialist Workers Party*'s searching scrutiny, according to the Eleventh Circuit, has no application to comparisons between local and presidential elections. For this reason, "Alabama's legislative choice to have a modest requirement for independent Presidential candidates does not defeat its decision to impose a higher requirement on independent candidates for offices elected only by Alabama voters." App., *infra*, at 5.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Conclusion Contradicts This Court's Holdings in *Socialist Workers Party* and *Norman v. Reed*.

This Court in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), held that the Equal Protection Clause limits the power of states to place disparate signature-collection demands on similarly situated candidates and offices. Specifically, the Court in *Socialist Workers Party*

invalidated an Illinois law that required candidates for local offices in Chicago to gather more signatures than candidates for statewide offices. Applying strict scrutiny, the Court ruled that the Equal Protection Clause requires that signature requirements prove necessary to a compelling state interest. Because Illinois's "signature requirements for independent candidates . . . seeking offices in Chicago are plainly not the least restrictive means of protecting the State's objectives," *id*. at 186, they could not survive this demanding analysis. "The Illinois Legislature has determined that its interest in avoiding over-loaded ballots in statewide elections is served by the 25,000-signature requirement. Yet [the state] has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago." *Id.*

The Court employed *Socialist Workers Party*'s comparative approach again in *Norman v. Reed*, 502 U.S. 279 (1992). *Norman* invalidated an Illinois requirement that more signatures be collected for certain offices in multidistrict subdivisions than for statewide offices. The Court in *Norman* observed that *Socialist Workers Party* stands for the proposition that states cannot require more signatures for local than statewide offices.

Together, *Socialist Workers Party* and *Norman* stand for the proposition that even though a state may, consistent with the First Amendment, demand a substantial number of signatures for gaining access to a local ballot, it cannot require more than it does of

candidates for statewide office. At bare minimum, this sort of disparity must satisfy strict scrutiny.

In the wake of *Norman v. Reed*, the United States District Court for the Southern District of Iowa invalidated an Iowa law that, like Alabama's law, required more signatures of congressional candidates than of presidential candidates. *Oviatt v. Baxter,* No. 4-92-CV-10513 (S.D. Iowa, Aug. 10, 1992).[1] The court specifically enjoined enforcement of Iowa Code Ann. § 45.1.2, which required that congressional candidates collect a number of signatures equal to two percent of the total vote case for president or governor in the last election. *See* Iowa Code Ann. § 45.1.2 (Historical and Statutory Notes). Section 45.1.1 of the Iowa Code, meanwhile, required that presidential candidates had to collect only 1000 signatures. *Id.* Because the former exceeded the latter, it could not survive *Norman* and *Socialist Workers Party*. The court therefore instructed the state official to qualify independent congressional candidates if they collected 1000 signatures – which was the number required of independent presidential

[1] This opinion was not reported and is not included in an electronic database. It was made an Exhibit in the District Court below. *See Shugart v. Chapman,* No. 2:08-CV-1016 (M.D. Ala., 2009) (Plaintiffs' Reply Brief, filed Feb. 20, 2009, Exhibit 2) (Dkt. # 21).

candidates. *See* Iowa Code Ann. § 45.1.1 (Historical and Statutory Notes).[2]

Similarly, in *Ptak v. Meyer*, No. 94-N-2250 (D. Colo., Oct. 5, 1994), the United States District Court for the District of Colorado enjoined enforcement of a Colorado law that required independent candidates for the state general assembly to collect a number of signatures equal to "[t]he lesser of one thousand or twenty percent of the votes cast in the district in the most recent general election for the office," *see* Colo. Rev. Stat. § 1-4-802(1)(c) (1994) (quoted in 1995 Colo. Leg. Serv. H.B. 95-1022), even though congressional candidates (in larger districts) only had to gather 500 signatures. *Id.*[3] The court ordered the Secretary of State to require no more than 500 signatures from "any candidate for state senate or state house."[4]

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[2] Section 45.1 was amended in 1993 following the District Court's ruling. It now requires that presidential candidates gather 1,500 signatures, *see* Iowa Code Ann. § 45.1.1, while congressional (House) candidates may qualify by collecting signatures numbering "not less than . . . the number of signatures required [for president] divided by the number of congressional districts." *Id.* § 45.1.2.

[3] Following the District Court's injunction, § 1-4-802(1)(c) was amended in 1995 to require that state senate candidates collect 600 signatures, *see id.* § 1-4-802(1)(c)(IV), state house candidates collect 400 signatures, *see id.* § 1-4-802(1)(c)(V), and congressional (House) candidates gather 800 signatures. *Id.* § 1-4-802(1)(c)(III). *See* 1995 Colo. Leg. Serv. H.B. 95-1022.

[4] This opinion was not reported and is not included in an electronic database. It was made an Exhibit in the District Court below. *See Shugart v. Chapman,* No. 2:08-CV-1016 (M.D.

(Continued on following page)

The Eleventh Circuit's holding contradicts this Court's holdings in *Socialist Workers Party* and *Norman v. Reed*, as illustrated by the holdings in these two Districts. Certiorari is accordingly proper.

II. The Circuits Are Split Over Whether Presidential Candidates Are Entitled to Preferential Treatment.

The Eleventh Circuit relied on *Anderson v. Celebrezze*, 460 U.S. 780 (1983), for the proposition that presidential candidates occupy a constitutionally preferred position in America's electoral machinery. *See* App., *infra*, at 3. Because of this, they can be given preferential treatment. *Id.* at 4. Fewer signatures can be required without violating Equal Protection. *Id.*

Anderson invalidated a March filing deadline in Ohio for independent presidential candidates. In the course of explaining its judgment, the Supreme Court noted that states have "a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined beyond the State's boundaries." 460 U.S. at 795. The Eleventh Circuit relied on this language to conclude that presidential candidates are entitled to more "modest" signature collection

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Ala., 2009) (Plaintiffs' Reply Brief, filed Feb. 20, 2009, Exhibit 1) (Dkt. # 21).

requirements than other candidates – be they statewide or even local.

Several Circuits have applied this logic to sustain restrictions on state and local ballots that could not be constitutionally applied, consistent with *Anderson*, to presidential contests. In *Lawrence v. Blackwell*, 430 F.3d 368 (6th Cir. 2005), for example, the Sixth Circuit sustained Ohio's March deadline for independent congressional candidates. The court refused to follow *Anderson*'s rejection of March deadlines because *Anderson* "involved a presidential election." *Id.* at 375. The Supreme Court in *Anderson*, the Sixth Circuit reasoned, "held that a state has less of an interest in regulating a national election than one which takes place solely within its borders . . . ." *Id.* Hence, even though a March deadline was invalid for independent presidential candidates, *see Anderson,* it survived for congressional candidates.

The Seventh Circuit in *Stevenson v. State Board of Elections,* 794 F.2d 1176 (7th Cir. 1986), used this same logic to sustain a December filing deadline for independent gubernatorial candidates – a deadline that clearly could not have been applied to presidential candidates. The District Court there, in an opinion "adopted" by the Seventh Circuit, distinguished *Anderson* because the candidate (John Anderson) "was running for President," *see id.* at 1177 (Easterbrook, J., concurring), "while Stevenson is running for Governor of Illinois." *Id.* Still, Judge Easterbrook observed the split this created in the Circuits: "several other courts have concluded that a

single inquiry should be used to assess procedures for becoming a candidate for either a state or a national office." *Id.*

Then-Judge Alito's opinion in *Council of Alternative Political Parties v. Hooks,* 179 F.3d 64, 72 (3d Cir. 1999) (*Hooks II*), which sustained New Jersey's June deadline for independents and alternative party candidates, distinguished *Anderson* in this same way: "the [*Anderson*] Court stressed that the Ohio statute regulated *presidential* elections and not *state or local* elections." (Emphasis in original).

The Tenth Circuit in *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board,* 844 F.2d 740, 746 n.9 (10th Cir. 1988), which upheld a May qualifying deadline, likewise distinguished *Anderson* as involving a "challenge [that] arose in the context of an independent candidacy for national office." Because the Oklahoma deadline in *Rainbow Coalition* did not deal with presidential contests, "[t]he state thus has a correspondingly greater interest in imposing restrictions to provide 'assurance that the particular party designation has some meaning.'" *Id.*

In contrast to these holdings, the Fourth Circuit in *Cromer v. State of South Carolina,* 917 F.2d 819 (4th Cir. 1990), struck down a March deadline for independent candidates based on *Anderson*. The court "accepted the general authority of *Anderson*" and "specifically reject[ed] the state's contention . . . that [*Anderson*] applies only to ballot access restrictions

upon candidates for national office." *Id.* at 822.[5] *Cf. Wood v. Meadows,* 117 F.3d 770 (4th Cir. 1997) (distinguishing *Cromer* and upholding Virginia's June qualifying deadline for independent candidates).

And in a precursor to then-Judge Alito's ultimate holding in *Hooks II*, the Third Circuit in *Council of Alternative Political Parties v. Hooks,* 121 F.3d 876, 882 (3d Cir. 1997) (*Hooks I*), enjoined New Jersey's April filing deadline on the basis of *Anderson*. The court rejected the claim that "*Anderson*'s applicability is limited to national elections and is not controlling where, as here, the challenge is to a provision governing state elections." The majority responded, "we perceive no reason why a challenge to an early filing deadline in the context of a state election should occasion a different mode of constitutional analysis." *Id*.[6] The Third Circuit reiterated this specific conclusion in *Belitskus v. Pizzingrilli*, 343 F.3d 632, 643 n.8 (3d Cir. 2003), where it noted that "although *Anderson* involved a national election, we have previously held that it is equally applicable in the context of state elections." (Citing *Hooks I*).

A Circuit split exists over the propriety of preferred treatment for presidential candidates. The

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[5] Judge Wilkinson dissented in *Cromer*: "South Carolina's law is strictly limited to state elections. This is a significant difference . . . ." *Id.* at 827 (Wilkinson, J., dissenting).

[6] Judge Scirica dissented, arguing that the presidential nature of the election in *Anderson* was a "crucial" difference. *Id.* at 886 (Scirica, J., dissenting).

Eleventh Circuit, like the Third, Sixth, Seventh and Tenth before it, has concluded that *Anderson* supports lower hurdles for presidential candidates. The Third and Fourth Circuits, meanwhile, have concluded (over two dissents) that it does not. Certiorari is proper to resolve this split.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-14250
Non-Argument Calendar

D.C. Docket No. 08-01016-CV-F-N

ANDY SHUGART,
JONATHAN GRAY,

Plaintiffs-Appellants,

versus

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

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

(February 10, 2010)

Before TJOFLAT, CARNES and WILSON, Circuit Judges.

PER CURIAM:

Andy Shugart and Jonathan Gray appeal the district court's dismissal of their challenge to one of Alabama's ballot access restrictions under the First and Fourteenth Amendments of the United States Constitution. Alabama law requires a person seeking to appear on the ballot as an independent or third-party candidate for the U.S. House of Representatives to submit a petition containing the signatures of at least three percent of the qualified electors who voted in the last gubernatorial election for the district in which the person seeks to qualify. *See* Ala. Code § 17-9-3(a)(3). It is undisputed that 6,155 signatures were required for purposes of the 2008 general election for U.S. House of Representatives District 6. By contrast, Alabama law requires a person seeking to appear on the Alabama ballot as an independent candidate for President of the United States to submit a petition containing the signatures of at least 5,000 qualified Alabama voters. *See* Ala. Code. § 17-14-31(a). The appellants contend that the three-percent requirement is unconstitutional because of the disparity between the number of signatures needed to access the ballot for the House and the number of signatures needed to access the ballot for President.

Our prior precedent forecloses the appellants' claim. In *Swanson v. Worley,* 490 F.3d 894 (11th Cir. 2007), we held that Alabama's three-percent signature requirement does not violate the First or Fourteenth Amendments. *Id.* at 903-05 ("[W]e conclude that Alabama's signature requirement by itself does not

impose a severe burden on plaintiffs' rights but is a reasonable, nondiscriminatory restriction."). In so holding, we specifically addressed, and rejected, the argument made by the appellants in this case:

> 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 statewide 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, 103 S. Ct. 1564, 1573 (1983)]. Accordingly, we cannot say it is unreasonable for Alabama to apply more demanding regulations on statewide and local races than presidential races.

Id. at 905 n.12.

The Supreme Court's decision in *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S.

173, 99 S. Ct. 983 (1973), does not compel a contrary result. In that case the Court struck down an Illinois state law requiring "substantially more" signatures to run as an independent for a Chicago city office than for a statewide office. *See id.* at 177, 187, 99 S. Ct. at 986, 991. As the district court correctly recognized: "While *Illinois State Board* addressed the difference between requirements to be on a statewide ballot and those to be on a municipal ballot within that same state, this lawsuit challenges differences between requirements to be in the ballot to stand for election to a U.S. Congressional District and U.S. President." That distinction is critical because Alabama's interests in regulating an office elected entirely by Alabama voters (House District 6) are much greater than its interests in regulating an office elected only in small part by Alabama voters (the U.S. President). *See Swanson,* 490 F.3d at 905 n.12 (citing *Anderson,* 460 U.S. at 795, 103 S. Ct. at 1573); *see also Wilson v. Firestone,* 623 F.2d 345, 346 (5th Cir. 1980) (distinguishing *Illinois State Board* and rejecting equal protection challenge to a Florida law requiring fewer signatures on the petition of an independent candidate for U.S. President than for an independent candidate for a statewide office).[1]

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[1] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

After carefully reviewing the record and the parties' briefs, we conclude that this case is materially indistinguishable from *Swanson* and *Wilson*. Alabama's legislative choice to have a modest requirement for independent Presidential candidates does not defeat its decision to impose a higher requirement on independent candidates for offices elected only by Alabama voters.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ANDY SHUGART and JONATHAN GRAY, PLAINTIFFS, v. BETH CHAPMAN in her official capacity as ALABAMA SECRETARY OF STATE, DEFENDANT.	CASE NO. 2:08-cv-1016-MEF (WO – Do Not Publish)

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendant Beth Chapman, Secretary of State's Renewed Motion to Dismiss (Doc. # 11). The Court has carefully considered the arguments in support of and in opposition to the motion and finds that it is due to be GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

Andy Shugart ("Shugart") alleges that he considered running as an independent candidate for the United States House of Representatives as a representative of Alabama's Sixth Congressional District. Jonathan Gray ("Gray") alleges that he is a registered voter and that he would support Shugart in the election if Shugart's name appeared on the ballot. Shugart and Gray contend that the portion of Alabama law

setting the required number of signatures in support of an independent candidate for House of Representatives violates rights guaranteed by the First and Fourteenth Amendments of the United States Constitution as well as the Constitution of Alabama. They seek a declaratory judgment to that effect.

Alabama law requires that a person who wishes to appear on the ballot as an independent candidate for the U.S. House of Representatives must file a petition containing signatures of qualified electors, the number of which "shall be 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 House District 6. In contrast, Alabama law requires a person seeking to appear on the Alabama ballot as an independent candidate for the office of President of the United States to submit a "written petition signed by at least 5,000 qualified voters of this state." Ala. Code § 17-14-31(a).

JURISDICTION AND VENUE

This court has subject matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1367. Additionally, Defendant has not argued that the Court does not have personal jurisdiction over her. Pursuant to 28 U.S.C. § 1391(b), venue is appropriate in this district.

LEGAL STANDARD

A Rule 12(b)(6) motion tests the legal sufficiency of the complaint. Prior to the Supreme Court's recent decision in *Bell Atl. Corp. v. Twombly,* 127 S. Ct. 1955 (2007), a motion to dismiss could only be granted if a plaintiff could prove "no set of facts . . . which would entitle him to relief." *See Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *see also Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984); *Wright v. Newsome,* 795 F.2d 964, 967 (11th Cir. 1986). Now, in order to survive a motion to dismiss for failure to state a claim, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly,* 127 S. Ct. at 1974. While the factual allegations of a complaint need not be detailed, a plaintiff must nevertheless "provide the 'grounds' of his 'entitlement to relief' and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1965. A plaintiff's "[f]actual allegations must be enough to raise a right to relief above a speculative level on the assumption that the allegations in the complaint are true." *Id.* It is not sufficient that the pleadings merely "le[ave] open the possibility that the plaintiff might later establish some set of undisclosed facts to support recovery." *Id.* at 1968 (internal quotation and alteration omitted). In considering a defendant's motion to dismiss, a district court will accept as true all well-pleaded factual allegations and view them in a light most favorable to the plaintiff. *See Am. United Life Ins. Co. v. Martinez,* 480 F.3d 1043, 1057 (11th Cir. 2007). *Accord, Nelson v. Campbell,* 541 U.S. 637, 640 (2004) (where a court

is considering dismissal of a complaint at the pleading stage, it must assume the allegations of the complaint are true).

DISCUSSION

A. Federal Law Claims

Relying on *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173 (1979), Plaintiffs contend that a state cannot require more petition signatures for a district office than it does for a statewide office. While Plaintiffs have not misstated the holding of *Illinois State Board,* they have overstated its applicability to the issue before this Court. While *Illinois State Board* addressed the difference between requirements to be on a statewide ballot and those to be on a municipal ballot within that same state, this lawsuit challenges differences between requirements to be on the ballot to stand for election to a U.S. Congressional District and U.S. President. Thus, contrary to Plaintiffs' assertion this case does not ask the same question as *Illinois State Board*.

Defendant argues that two binding cases decided by the Circuit Courts of Appeals after *Illinois State Board* provide a much clearly guidance for the Court in deciding the issue before it. Defendant would have this Court dismiss the action pursuant to *Swanson v. Worley,* 490 F.3d 894 (11th Cir. 2007) and *Wilson v. Firestone,* 623 F.2d 245 (5th Cir. Unit B July 22,

1980).[1] In *Wilson,* the Court of Appeals upheld a lower court ruling which distinguished *Illinois State Board* and which approved a Florida requirement that an independent candidate wishing to appear on the ballot in the Presidential race had to obtain fewer signatures than did an independent candidate wishing to be on the ballot for a statewide office. In *Swanson,* the Court of Appeals upheld the constitutionality of Alabama's requirement that independent candidates seeking ballot access must submit a petition with the signatures of at least three percent of qualified electors who cast ballots at the last election. In so holding, the court considered an argument identical to one made by Plaintiffs in this case: that Alabama's three-percent signature requirement is too high as compared to the 5,000 signature requirement for presidential candidates. This Court agrees that taken together these cases provide the answer to the questions presented by Plaintiffs' suit. The challenged statute is constitutional and works no violation of Plaintiff 's rights under the United States Constitution. Accordingly, the Motion to Dismiss is due to be GRANTED as Plaintiffs' complaint fails to state a claim for which relief can be granted.

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[1] In *Bonner v. City of Prichard, Ala.,* 661 F.2d 1206, 1209 (11th Cir. Nov. 3, 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

B. State Law Claims

In addition to Plaintiffs' claims pursuant to 42 U.S.C. § 1983 in which they contend that Alabama law violates rights guaranteed by the United States Constitution, Plaintiffs' bring a similar claim in which they contend that the challenged portion of Alabama law violates the Alabama Constitution. *See* Doc. # 1 at ¶ 5e. This claim is before this Court pursuant to its supplemental jurisdiction. *Id.* The statutory provision addressing supplemental jurisdiction provides that

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a). Thus, Section 1367(a) provides a basis for this Court to exercise jurisdiction over Plaintiffs' claims against the defendant in this action pursuant to Alabama law because it has jurisdiction over Plaintiffs' related claims against Defendant pursuant to 42 U.S.C. § 1983. However, the requirement contained in § 1367(a) that this Court exercise its supplemental jurisdiction over Plaintiffs' state law claim is subject to certain enumerated instances in which it is appropriate for a federal court to decline to exercise its supplemental jurisdiction over a case.

Those circumstances are set forth in Section 1367(c), which provides that

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). The Court finds that claim before this Court pursuant to § 1367(a) presents novel or complex issues of Alabama law. Additionally, the federal claims over which this Court had original jurisdiction have now been dismissed. Pursuant to 28 U.S.C. § 1367(c)(1) & (3), the Court declines to exercise supplemental jurisdiction over Plaintiffs' claim pursuant to Alabama law. All of Plaintiffs' claim pursuant to Alabama law will accordingly be DISMISSED WITHOUT PREJUDICE. This dismissal should not work to Plaintiffs' disadvantage should they elect to bring suit in state court because the period of limitations for any of these claims is tolled

during the pendency of this action. *See* 28 U.S.C. § 1367(d).

CONCLUSION

For the foregoing reasons, the Court finds that all federal claims remaining in Plaintiffs' Verified Complaint for Declaratory Judgment over which this Court has original subject matter jurisdiction, are due to be DISMISSED. Having disposed of these claims, the Court declines to exercise supplemental jurisdiction over Plaintiffs' remaining claim pursuant to Alabama law. Accordingly, it is hereby ORDERED as follows:

1. Defendant Beth Chapman, Secretary of State's Renewed Motion to Dismiss (Doc. # 11) is GRANTED.

2. All of Plaintiffs' claims pursuant to 42 U.S.C. § 1983 for declaratory relief against Chapman in her official capacity as Secretary of State are DISMISSED WITH PREJUDICE.

3. The Court declines to exercise supplemental jurisdiction over Plaintiffs' claim pursuant to Alabama law and such claim is DISMISSED WITHOUT PREJUDICE.

4. A separate final judgment will be entered consistent with this Memorandum Opinion and Order.

DONE this the 23rd day of July, 2009.

/s/ Mark E. Fuller
CHIEF UNITED STATES
DISTRICT JUDGE