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

JILL STEIN, *et al.,*	)	
	)	
Plaintiffs,	)	
	)	Civil Action No.
v.	)	2:12-cv-00042-WKW-CSC
	)	
BETH CHAPMAN, Alabama Secretary of State, in her official capacity,	)	
	)	
Defendant.	)	

STATE DEFENDANT'S OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (docs. 81 & 82)

The Honorable Beth Chapman, Secretary of State, defendant in this action in her official capacity, respectfully opposes Plaintiffs' motion for summary judgment. Doc. 81 (motion); Doc. 82 (memorandum in support thereof). This opposition assumes familiarity with the Secretary's own summary judgment motion and supporting materials, docs. 95 & 96, and thus gets straight to the point.[1]

I. Plaintiffs' Renunciation of Relevant Facts, and the Court's General Briefing Order.

"[P]laintiffs concede that they did not make any effort to comply with the" March deadline which they challenge in this case. Doc. 82 at 1; *see also id.* at 3 ("no significant effort"). Hence, that fact, which favors the Secretary, can be taken as established.

The key fact that the Plaintiffs attempt to establish in their briefing is that they want their presidential nominees to appear on Alabama's General Election ballot with their respective political party labels. Doc. 82 at 3. In support thereof, they cite the Court to the affidavits of Jill

[1] Additionally, this opposition relies on some of the exhibits filed with the Secretary's motion, citing them with the format "Sec'y Ex. D, doc. 96-4." The single exhibit attached to this opposition is numbered.

Stein and Gary Johnson, which accompanied the motion, *id.* ("see Stein and Johnson affidavits"), and generally note that "[a]ll parties have submitted affidavits testifying to their preference," and are pressing this litigation, *id*. This is as specific as the Plaintiffs ever get in citing to the record. [2]

The Plaintiffs have not properly put any evidence in the record into play. This Court's General Briefing Order, doc. 74, requires that "Any discussion of evidence in a brief must include the specific reference, by name or document number and by page and line, to where the evidence can be found in the supporting evidentiary submission or in any document filed with the court." Doc. 74 at ¶ 7. "Failure to comply strictly with this Order for all future filings may result in the striking of the filing or other appropriate sanctions." *Id.* at ¶ 8. Plaintiffs have failed to comply with the General Briefing Order. *Compare* doc. 74 at ¶ 7 *with* doc. 82, generally. Accordingly, none of the statements introduced in the Stein and Johnson affidavits, docs. 81-1 and 81-2, or in any earlier introduced testimony should be available in support of Plaintiffs' motion, and the State Defendant does not expend effort addressing whether such testimony is admissible or in dispute. *Cf.* doc. 74 at ¶ 7; doc. 92 (denying State Defendant's motions to proactively strike or exclude testimony which was present in the record but had not yet been invoked by a party at the summary judgment stage). That said, the Secretary does not contest that the Plaintiffs want to have their presidential nominees appear on Alabama's General Election ballot with their respective political party labels.

The Secretary does take issue with the Plaintiffs' statement that "There is no genuine issue of material fact as to the existence of the Alabama state statutes that require the presidential nominees of unqualified political parties to file as independents in order to avoid the March

[2] For instance, Plaintiffs set out Alabama election history without citation, doc. 82 at 2, though the facts were stipulated, Sec'y Ex. A, doc. 96-1, at ¶¶ 3-5, 16, 24-26.

deadline for unqualified political parties to file their nominating petitions." Doc. 82 at 2-3. While Alabama's statutes speak for themselves, Plaintiffs' harsh characterization of them is not fact at all.

II. Summary Judgment Standard

Summary judgment is proper "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). "Under Rule 56, the moving party always bears the initial responsibility of informing the district court of the basis for its motion. The movant can meet this burden by presenting evidence showing there is no genuine issue of material fact, or by showing that the non-moving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof." *Zuffa, LLC v. Taapken*, 2012 WL 3980169 (M.D. Ala. Sept. 11, 2012) (internal citations and quotation marks omitted). Here, Plaintiffs have affirmatively declined to present facts necessary to establish their case, and they are not entitled to judgment as a matter of law.

III. Plaintiffs have failed to present facts necessary to establish their alleged burden, and they are not entitled to judgment as a matter of law; hence, their motion for summary judgment is due to be denied.

a. The Analytical Framework.

"When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will

usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (internal citations and quotation marks omitted).

Here, we deal with "[l]esser burdens" and "less exacting review." *Timmons*, 520 U.S. at 358. "Because any . . . filing deadline is necessarily arbitrary and impossible to defend . . . as either compelled or least drastic, the test is not whether the regulations are necessary but whether they rationally serve important state interests." *Swanson v. Worley*, 490 F.3d 894, 912 (11th Cir. 2007) (internal citations and quotation marks omitted, second alteration by the Court).

b. Plaintiffs have failed to establish that the challenged statutes have precluded them from obtaining ballot access.

Plaintiffs concede that they did not make "any effort" or a "significant effort" to petition for ballot access by the March 2012 deadline. Doc. 82 at 1, 3. They argue that it was not necessary for them to do so because binding case law establishes their burden for them. *Id.* at 1, 4-8. Yet, this failure of effort makes it impossible for the Court to reach any conclusions about how, during Alabama's 2012 presidential election cycle, the challenged provisions impacted the Plaintiffs. It likewise leaves the Court without any basis for projecting how the challenged provisions might impact the Plaintiffs in the future, given that the 2012 presidential election has come to a close.[3]

In *American Party of Texas v. White*, the plaintiffs "presented absolutely no factual basis in support of their claims," which the Supreme Court described as "a failure of proof" which was sufficient to affirm the lower court's judgment. 415 U.S. 767, 790 (1974). It was this case that the Eleventh Circuit cited when it said "Plaintiffs failed to present factual evidence that they were precluded from obtaining ballot status by the challenged [laws]. Conclusory allegations

[3] By contrast, the Court does know that Americans Elect achieved statewide ballot access and five independent candidates achieved ballot access for local office, all by submitting petitions by the very deadline that the Plaintiffs challenge. Sec'y Ex. C, doc. 96-3, at ¶¶ 2-6, 14.

cannot prevail." *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 794 (11th Cir. 1983). Courts have expected "reasonabl[e] diligen[ce]" of those who seek ballot access, *Storer v. Brown*, 415 U.S. 724, 742 (1974), *Swanson*, 490 F.3d 894, 909 (11th Cir. 2007), which is only logical since they are trying to "determine whether the challenged laws 'freeze' the status quo by effectively barring all candidates other than those of the major parties" or whether they "provide a realistic means of ballot access." *Libertarian Party of Florida*, 710 F.2d at 793; *cf. Jenness v. Fortson*, 403 U.S. 431, 438, 439 (1971).

This Court recognized as much in its *Memorandum Opinion and Order* denying the Plaintiffs' motion for a preliminary injunction. Doc. 64 at 15-19. This Court explained that:

> The analysis in election deadline cases consists of initially determining the difficulty imposed by the challenged provision, in this case, the difficulty of meeting the early deadline, and then weighing the interests advanced by the State as justifications for any burden on those who seek ballot access against the burden involved. *Such a careful balancing requires a searching inquiry of present conditions that prevail in this jurisdiction during this election cycle.*

Id. at 15 (citations omitted; emphasis added). Thus, "it would be inappropriate to rely on the factual findings of the balance of burdens that prevailed in Ohio in 1980, when the challenged action in *Anderson* [*v. Celebrezze*, 460 U.S. 780 (1983),] occurred," *id.*, and *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568 (11th Cir. 1991), likewise does not "mandate[]" "the outcome . . . here," *id.* at 16. *See also id.* at 17 ("It would be inappropriate to rely on factual findings from a case involving a non-presidential election that occurred over twenty years ago, [*i.e., New Alliance*,] when the legal standards clearly establish a careful balancing of factors involving *current* conditions is required."). *Anderson* and *New Alliance* "turned on a careful balancing and analysis of the burden faced by the particular parties to get ballot access weighed against the state interest in the requirements." *Id.* at 16. This case must as well, and Plaintiffs have failed to prove their case.

c. *Anderson, Storer,* and *New Alliance* do not establish that the challenged statutes violate the First Amendment.

Even if Plaintiffs could meet their burden by relying on the highly fact-based determinations of earlier cases, which they cannot, *Anderson*, *Storer*, and *New Alliance* would not establish a First Amendment violation.

Plaintiffs rely heavily on *Anderson* in an attempt to establish their burden, and they contend that "the case itself has a remarkably similar fact-pattern to this instant case." Doc. 82 at 4. Well, yes and no.

In *Anderson*, John Anderson competed in Republican primaries and then switched course and announced that he was an independent candidate for President. 460 U.S. at 782, 783 n.2. Under Ohio's ballot access laws, the deadline for declaring an independent candidacy and filing a nominating petition was March 20th that year, 75 days before the June primary. *Id.* at 782 & n.1. Since Anderson did not announce his switch until April, the deadline had already passed and he would not appear on the ballot absent judicial intervention. *Id.* at 782.

Similarly, Gary Johnson dropped out of the Republican race for President and chose an alternative path. Sec'y Ex. W, doc. 96-23, at 20:4-21; *id.* at 77:14-18. The difference, however, is that Alabama's ballot access laws did not deny Johnson access as an independent candidate. Indeed, he, Jill Stein, and Virgil Goode were all on the ballot as independent candidates despite the fact that no preliminary injunction was obtained in this case. Sec'y Ex. D, doc. 96-4, at 8 (Table 1); doc 64. Johnson and his co-Plaintiffs are suing not because they were denied ballot access, but because they appeared as independent candidates (which is all John Anderson wanted[4]) rather than with their party labels.

[4] That the *Anderson* Court was focused on independent candidates is emphasized by footnote 12, wherein the Court recognized, and distinguished, the fact that five minor party candidates had qualified for the Ohio ballot as independent candidates. *Anderson*, 460 U.S. at 791 n.12.

Hence, while Anderson would have been denied access to the nation's "sixth largest slate of electors," *Anderson*, 460 U.S. at 795 n. 19, Johnson, Stein, and Goode were eligible to receive votes in Alabama and, hence, theoretically win Alabama's electoral votes. In reality, each received less than 1% of the votes cast in Alabama and so was a long way from receiving any of the State's electoral votes. Sec'y Ex. D., doc. 96-4, at 6 (Since 1972, the lowest percentage of votes received in Alabama by the winner of her electoral votes was 47.65%, and the majority of the time "the winning presidential candidate has won a majority of the vote."). And Professor Hood's expert testimony supports the conclusion that party label is not what made the difference between winning and losing for these candidates. *Id.* at 4-5 (concluding that, on average, minor party candidates performed better without a party label than with one); *id.* at 5 (concluding that, during the last six presidential elections, Libertarian candidates performed the same, on average, irrespective of party label); *id.* at 6 (comparing the vote share of the winning candidates since 1972 with the average third-party candidate performance of less than 1% and concluding "it matters little in practical terms if a [minor-party] candidate runs with or without a label on the ballot.")

To support their argument that the lack of a party label is an established harm, the Plaintiffs additionally rely on *Storer*.[5] The key language in that case, for these purposes, is as follows:

> But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other. A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the

[5] While it is not relevant for purposes of resolving this case, it should be noted that, contrary to Plaintiffs' representation, doc. 82 at 7, the *Storer* Court did not find a First Amendment violation. In part I of the opinion, the Court affirmed the denial of relief from a requirement that independent candidates be disaffiliated with any political party for a year preceding the primary. 415 U.S. at 726, 728. In part II of the opinion, upon which Plaintiffs rely, the Court remanded for further proceedings. *Id.* at 738, 740, 745-46.

> machinery of state government by electing its candidates to public office. From the standpoint of a potential supporter, affiliation with the new party would mean giving up his ties with another party or sacrificing his own independent status, even though his possible interest in the new party centers around a particular candidate for a particular office. For the candidate himself, it would mean undertaking the serious responsibilities of qualified party status under California law, such as the conduct of a primary, holding party conventions, and the promulgation of party platforms. But more fundamentally, the candidate, who is by definition an independent and desires to remain one, must now consider himself a party man, surrendering his independent status. Must he necessarily choose the political party route if he wants to appear on the ballot in the general election? We think not.

Storer, 415 U.S. at 745-46.

It is clear on the face of this language that the Supreme Court was speaking to the difference between a party man and a true independent candidate. Indeed, in the next paragraph the Court explained that it would not be acceptable to force the independent candidate to *form* a political party to follow the apparently easier path to ballot access then available under California's laws. *Storer*, 415 U.S. at 746. It may seem incongruous that the Court was speaking about true independent candidates, since the relevant plaintiffs were members of the Communist Party, *id.* at 727-28, but the Court's clear language makes it apparent that this was their focus. And the Court had already noted that the plaintiffs had "apparently satisfied" the "one-year party disaffiliation condition" that had been at the heart of the beginning of the case. *Id.* at 738. Hence, for purposes of this discussion, the Court was discussing a true independent candidate.

That matters here. Nowhere in Alabama's election code can there be found a requirement that Johnson, Stein or Goode abandon their party relationships in order to qualify for ballot status as an independent. Instead, they had the opportunity to campaign in Alabama as party candidates. Stein's campaign had national television buys that identified her as the Green Party candidate. Sec'y Ex. T, doc. 96-20, at 17:17 - 18:1; *see also id.* at 31:18 - 32:11.

Johnson's yard signs identified him as the Libertarian Party candidate. Sec'y Ex. X, doc. 96-24, at 232:14 - 233:6. All they were denied was the party label on the official election ballot. And they were denied that because their parties failed to comply – or, indeed, make any effort to comply – with the petition requirements established to ensure that they have a "significant modicum of support"[6] before room is made on the ballot for their candidates.[7]

That Johnson, Stein, and Goode appeared on the ballot is also important because the *Anderson* Court was clear that its focus was on the voters, not the candidates, and its concern was with the voters having their choices limited. *Anderson*, 460 U.S. at 786 ("Our primary concern is with the tendency of ballot access restrictions to limit the field of candidates from which voters might choose.") (internal citations and quotation marks omitted). Such limits would impact not just the choice of candidates on Election Day, but the issues being debated in advance thereof. *Id.* at 787-88 ("The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens.") (footnote omitted); *see also id.* at 792 ("The Ohio system thus denies the disaffected not only a choice of leadership but a choice on the issues as well.") (internal citation and quotation marks

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[6] "There is surely an important state interest in requiring some preliminary showing of a *significant modicum of support* before printing the name of a political organization's candidate on the ballot-the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 461, 442 (1970) (emphasis added); *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) ("*Jenness* and *American Party* [*of Texas v. White*, 415 U.S. 767 (1974)] establish with unmistakable clarity that States have an undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot . . . . We reaffirm that principle today.") (internal citation and quotation marks omitted; alteration by the Court).

[7] Recall, by policy of the Secretary of State, if a political party qualifies for statewide General Election ballot access, it can field candidates for all of the offices voted on at a statewide level as well as for offices voted on at that election at a less than statewide level, *e.g.,* a State legislative seat, without meeting additional requirements. Opn. to Hon. Jim Bennett, A.G. No. 98-00070 (Jan. 13, 1998); Opn. to Hon. Jim Bennett, A.G. No. 99-00099 (Feb. 2, 1999); *see also* Sec'y Ex. H, doc. 96-8, at ¶ 18.

omitted); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) ("The party retains great latitude in its ability to communicate ideas to voters . . . through its participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate."). Here, Alabama law did not prevent, for example, Jill Stein from advancing the Green Party platform in the State. If the campaign chose to focus in States where it had party access, that was a choice the campaign made. Ex. 1 at 76:16 – 77:8; *id.* at 77:23 – 78:17.[8]

Anderson does provide some insight in evaluating Alabama's interests in tying the deadline for petitioning parties to the primary.[9] As the Plaintiffs quote, doc. 82 at 4, one concern that the Court had was that the major political parties retained flexibility to adjust to changing circumstances while "for independents, the inflexibility imposed by the March filing deadline is a correlative disadvantage." *Anderson*, 460 U.S. at 791. That is, the Court was looking at how the deadline for Anderson, as an independent candidate, compared to the schedules for the Democrats and Republicans. For presidential candidates, Alabama allows both independents and candidates for the political parties until September, Ala. Code § 17-14-31(b), which allows for flexibility nearly until the voting is scheduled to begin (as discussed *infra*). Additionally, while Ohio tied the petition deadline to the party candidates' deadline for declaring their candidacies – which was 75 days in advance of the primary, *Anderson,* 460 U.S. at 783 n.1 – Alabama ties the petition deadline for political parties to the primary itself, Ala. Code § 17-6-22(a)(1) (political

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[8] Indeed, throughout her deposition, Dr. Stein emphasized the importance of building the party through ballot access as a goal of the campaign. *E.g.,* Ex. 1 at 33:14-16; 40:1-12; 126:1-4. Ultimately, it is a chicken-and-egg issue. While she wants to build the party through ballot access, the State has an interest in requiring that the party have "a significant modicum of support" before it makes room on the ballot. *Jenness v. Fortson*, 403 U.S. at 442.

[9] At the preliminary injunction stage, the Court did not find it necessary to reach the State's interests given the Plaintiffs' failure of proof. Doc. 64 at 19.

parties); Ala. Code § 17-9-3(a)(3) (non-presidential independent candidates). That is, 90 days after the Presidential candidates for the Democrats and Republicans were required to file their own declarations and petitions and pay any filing fee set by the Party chairman. Ala. Code § 17-13-102; Ala. Code § 17-13-103; Sec'y Ex. F, doc. 96-6, at § 8; Sec'y Ex. G, doc. 96-7, at § 10 and Exhibit D thereto.

Recognizing the distinction makes a difference, the Eleventh Circuit considered *Anderson* and determined "[i]n contrast, Alabama's statute does not discriminate against independent candidates relative to major party candidates when the filing deadline for independent candidates is set on Alabama's primary election date, which is sixty days[10] after major party candidates must declare their candidacies." *Swanson*, 490 F.3d at 908 (footnote omitted).

The *Swanson* Court similarly distinguished *New Alliance*, on which the Plaintiffs rely, because "major party candidates have the additional burden of declaring their candidacies sixty days[11] before independent and minor party candidates must file their signature petitions in June, and independent and major party candidates thus are in roughly comparable positions." *Swanson*, 490 F.3d at 909.

Accordingly, Alabama has a recognized and accepted interest in treating petitioning political parties in a manner that is fair and appropriate relative to the manner in which the political parties that secure ballot access based on prior electoral support are treated, *i.e.,* avoiding a "relative disadvantage," or, perhaps more to the point, not offering the petitioning

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[10] Candidates for any office other than President must declare their candidacies 60 days before the primary in order to compete in the primary election. Ala. Code § 17-3-5(a). As discussed in the text, for President, the deadline is 90 days before the primary election. Ala. Code § 17-13-102.

[11] *See* prior footnote.

political parties the relative advantage that would come with a later filing date. *See e.g., Swanson*, 490 F.3d at 908 ("Although the Constitution bars states from discriminating against independent and minor party candidates, it does not mandate that states give independent and minor party candidates preferential treatment over major party candidates."); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (". . . States need not remove all of the many hurdles third parties face in the American political arena today."); *Munro v. Socialist Workers Party*, 479 U.S. 189, 198 (1986) ("States are not burdened with a constitutional imperative to reduce voter apathy or to 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot.").

The State also has an administrative interest in a deadline that provides sufficient time to verify the petitions, and the *Swanson* Court recognized such an interest as important. *Swanson*, 490 F.3d at 912 n. 18. The record demonstrates that it is time-consuming to verify petitions, particularly when the Secretary's staff conduct multiple searches in an attempt to count signatures, and that the Secretary operates with a lean staff. Sec'y Ex. H, doc. 96-8, at ¶ 27; Sec'y Ex. I, doc. 96-9, at ¶¶ 5, 8, 13-15; Sec'y Ex. J, doc. 96-10, at ¶¶ 4, 8; Sec'y Ex. L, doc. 96-12, at ¶¶ 4-5; Sec'y Ex. M, doc. 96-13, at ¶¶ 5-6, 8-9; Sec'y Ex. N, doc. 96-14, at ¶¶ 4, 8, 10; Sec'y Ex. O, doc. 96-15, at ¶¶ 3-8, 13; Sec'y Ex. P, doc. 96-16, at ¶¶ 5, 7-10; Sec'y Ex. Q, doc. 96-17, at ¶¶ 2, 6-10; 12-14; Sec'y Ex. R, doc. 96-18, at ¶¶ 2-3, 5-7. The Secretary has also acknowledged the existence of an administrative regulation that streamlines the process through random sampling. Sec'y Ex. C, doc. 96-3, at ¶ 13. When the three Plaintiff political parties submitted their petitions for independent candidate access for their Presidential candidates just before the close of business on the last possible day, Thursday, September 6, the Secretary's

Office implemented the random sampling method for the first time. *Id*.; Sec'y Ex. K, doc. 96-11, at ¶¶ 4, 7-8.

Though the General Election was not until November, voting began in September. Absentee ballots must be sent to UOCAVA voters[12] 45 days before the General Election if they have been timely requested. 42 U.S.C. § 1973ff-1(a)(8); *see also U.S. v. Alabama*, Case No. 2:12-cv-00179-MHT-WC (M.D. Ala. *pending*) (*on-going* UOCAVA litigation filed on Feb. 24, 2012). In 2012, 45 days before the election was Saturday, September 22, 2012, and so the printed and electronic ballots were supposed to be designed and ready to go by then. That necessarily required determining the content of the ballots and having the ballots prepared before then. It was in an attempt to comply with this federal law requirement that the random sampling method was used. Sec'y Ex. K, doc. 96-11, at ¶¶ 7-8. This requirement helps to define the State's important administrative interest in a deadline that provides sufficient time to verify the petitions; the petitions must be submitted in time for the Secretary's Office to have sufficient time to verify them and it must be recognized for these purposes that voting starts in September.

The Plaintiffs have asserted that the State's interests are defeated by the case law, doc. 82 at 6, 7-8, 9, without any consideration for the different facts and interests at work in this case (and discussed above). In addition to relying on *Anderson*, Plaintiffs emphasize that the *New Alliance* Court found that the State's then-April deadline was too early for non-Presidential candidates and so, they contend, a March deadline is too early for Presidential candidates, given the State's lesser interest in the national race. However it is only some State interests which are lessened in a national race. The March deadline is for statewide party access and thus opens the

[12] Voters protected by the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 42 U.S.C. §§ 1973ff *et seq.,* as amended by the Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009).

ballot not just to Presidential candidates but to State and local candidates as well. Opn. to Hon. Jim Bennett, A.G. No. 98-00070 (Jan. 13, 1998); Opn. to Hon. Jim Bennett, A.G. No. 99-00099 (Feb. 2, 1999); see also Sec'y Ex. H, doc. 96-8, at ¶ 18. Additionally, Alabama's later deadline for independent Presidential candidates alone, *compare* Ala. Code § 17-9-3(a)(c) (primary deadline for independent candidates) *with* Ala. Code § 17-14-31(b) (September 6th deadline for independent candidates for President), may be seen as a recognition of the national nature of the race and an appropriate accommodation.

And, the *New Alliance* district court also applied a higher level of scrutiny than subsequent cases have demonstrated is appropriate. *Compare New Alliance*, 933 F.2d at 1576 (opinion of the district court reprinted: "Although the Court finds that the deadlines in question do not freeze the political status quo and that they do not pose an insurmountable obstacle to ballot access for minor parties, the Court finds that they do pose a significant burden on plaintiffs in their attempts to access the Alabama ballot and do not serve any compelling state interest. Having found such a burden and also finding that the State could adopt less drastic deadlines . . . .") *with Swanson*, 490 F.3d at 912 ("Because any . . . filing deadline is necessarily arbitrary and impossible to defend . . . as either compelled or least drastic, the test is not whether the regulations are necessary but whether they rationally serve important state interests.") (internal citations and quotation marks omitted, second alteration by the Court).

IV. Conclusion.

For the foregoing reasons, the Plaintiffs' motion for summary should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of February 2013, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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