

**RECORD NOS. 13-15214-AA**

---

**In The  
United States Court Of Appeals  
For The Eleventh Circuit**

---

**JAMES HALL,  
N.C. CLINT MOSER, JR.,**

*Plaintiffs – Appellants,*

**v.**

**SECRETARY, STATE OF ALABAMA,**

*Defendant – Appellee.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
MONTGOMERY**

---

**BRIEF OF APPELLANT**

---

**David I. Schoen  
DAVID I. SCHOEN,  
ATTORNEY AT LAW  
2800 Zelda Road  
Suite 100-6  
Montgomery, AL 36106  
(334) 395-6611**

***Counsel for Appellant***

---

U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT

Hall and Moser vs. Bennett, Alabama Sec. of State Appeal No. 13-15214-A

11th Cir. R. 26.1 (enclosed) requires that a Certificate of Interested Persons and Corporate Disclosure Statement must be filed by the appellant with this court within 14 days after the date the appeal is docketed in this court, and must be included within the principal brief filed by any party, and included within any petition, answer, motion or response filed by any party. **You may use this form to fulfill this requirement.** In alphabetical order, with one name per line, please list the trial judge(s), and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

*(please type or print legibly):*

Jim Bennett, Alabama Secretary of State

James W. Davis, Esq., Assistant Alabama Attorney General

Misty Shawn Fairbanks Messick, Assistant Alabama Attorney General

Judge Mark E. Fuller, U.S. District Judge for the Middle District of Alabama

James Hall

N.C. "Clint" Moser

David I. Schoen

Luther Strange, Esq., Alabama Attorney General

**STATEMENT REGARDING ORAL ARGUMENT**

Appellants Hall and Moser respectfully request oral argument in this case and, given the nature of this matter, would ask the Court to set oral argument at the earliest possible date.

At issue in the case are fundamentally important First and Fourteenth Amendment rights and an area of jurisprudence that is complicated on some of the relevant issues.

While every court that has considered a similar question - the constitutionality of applying to a severely truncated Special Election schedule the same ballot access signature requirement for independent candidates that is required in a regular election cycle - has concluded that an accommodation must be made in the Special Election setting, this is a very important issue with important consequences.

There would be a significant benefit to having oral argument in this case. The case is proceeding on an expedited track and oral argument will help to crystalize the issues for the Court and will enable the Court to ask and get answers immediately to any pressing questions of fact or law.

For all of these reasons, it is respectfully submitted that oral argument should be permitted.

**TABLE OF CONTENTS**

	<b><u>PAGE:</u></b>
STATEMENT REGARDING ORAL ARGUMENT .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iv
STATEMENT OF JURISDICTION .....	1
STATEMENT OF THE ISSUE .....	1
STATEMENT OF THE CASE .....	1
A. The Course of Proceedings .....	1
B. Statement of the Facts .....	6
C. Standard of Review .....	18
SUMMARY OF THE ARGUMENT .....	18
ARGUMENT .....	21
The Lower Court’s Refusal to Grant the Requested Immediate Injunctive Relief Violated the Appellants’ Fundamentally Important Rights Under the First and Fourteenth Amendments to the United States Constitution .....	21
ANALYTIC FRAMEWORK IN BALLOT ACCESS CASES .....	21
LEGAL STANDARD FOR A T.R.O. OR PRELIMINARY INJUNCTION .....	28
Appellants Are Substantially Likely to Succeed on the Merits ....	29

Appellants Clearly Demonstrated a “Severe Burden” on their Rights .....	29
1. Mr. Hall’s Declarations .....	32
2. Mr. Moser’s Declaration .....	32
3. Declaration of Joshua Cassity .....	34
4. Richard Winger’s Expert Declarations .....	35
Special Elections Require Special Rules .....	40
Plaintiffs Will Suffer Irreparable Harm if Mr. Hall is Not Placed on the Ballot .....	47
A Balancing of the Equities Here Requires Granting the Injunction .....	48
Granting the Injunction Strongly Serves the Public Interest .....	56
The Lower Court Applied an Incorrect Legal Standard and Its Conclusion was Incorrect .....	57
CONCLUSION .....	62
ADDENDUM	
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF FILING AND SERVICE	

**TABLE OF AUTHORITIES**

**PAGE(S):**

**CASES:**

<i>Alabama v. U.S. Army Corps of Eng'rs</i> , 424 F.3d 1117 (11 <sup>th</sup> Cir. 2005) .....	28
<i>*Anderson v. Celebrezze</i> , 460 U.S. 780 (1983) .....	<i>passim</i>
<i>Bergland v. Harris</i> , 767 F.2d 1151 (11 <sup>th</sup> Cir. 1985) .....	31, 49, 58
<i>Blomquist v. Thomson</i> , 739 F.2d 525 (10 <sup>th</sup> Cir. 1984) .....	39, 42
<i>Burdick v. Takushi</i> , 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992) .....	21, 243
<i>California Democratic Party v. Jones</i> , 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000) .....	22
<i>Campbell v. Bennett</i> , 212 F. Supp. 2d 1329 (M.D. Ala. 2002) .....	28
<i>Citizens for a Better Environment v. City of Park Ridge</i> , 567 F.2d 689 (7 <sup>th</sup> Cir. 1975) .....	48
<i>*Citizens Party of Georgia v. Polythress</i> , 683 F.2d 418 (11 <sup>th</sup> Cir. 1982) .....	41, 42
<i>*Clingman v. Beaver</i> , 544 U.S. 581 (2005) .....	<i>passim</i>

<i>Eu v. San Francisco County Democratic Cent. Committee,</i> 489 U.S. 214, 109 S. Ct. 1013 (1989) .....	21, 286
<i>Fulani v. Krivanek,</i> 973 F.2d 1539, (11 <sup>th</sup> Cir. 1992) .....	51
<i>Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.,</i> 582 F.3d 721 (7 <sup>th</sup> Cir. 2009) .....	55
<i>Horton v. City of St. Augustine,</i> 272 F.3d 1318 (11 <sup>th</sup> Cir. 2001) .....	18
<i>Illinois State Board of Elections v. Socialist Workers Party,</i> 440 U.S. 173 (1979) .....	26
<i>Jenness v. Fortson,</i> 403 U.S. 431, 91 S. Ct. 1970, 29 L. Ed. 2d 554 (1971) .....	<i>passim</i>
<i>Johnson v. Cook County Officers Electoral Bd.,</i> 680 F. Supp. 1229 (N.D. Ill. 1988) .....	48
<i>*Jones v. McGuffage,</i> 921 F. Supp. 2d 888 (N.D. Ill. 2013) .....	<i>passim</i>
<i>Lee v. Keith,</i> 463 F.3d 763 (7 <sup>th</sup> Cir. 2006) .....	39
<i>Libertarian Party of Oklahoma v. Oklahoma State Election Board,</i> 593 F. Supp. 118 (W.D. OK 1984) .....	42
<i>Mandel v. Bradley,</i> 432 U.S. 173 (1977) .....	31, 37, 60
<i>Marion County Committee of Indiana Democratic Party v.</i> <i>Marion County election Bd.,</i> 2000 WL 1206740 *11 (S.D. Ind. Aug. 3, 2000) .....	48, 57

<i>McLain v. Meier</i> , 637 F.2d 1159 (8 <sup>th</sup> Cir. 1980) .....	60
<i>*Migala v. Martinez</i> , Case No. 89-40168-MMP (N.D. Fla., August 7, 1989) .....	41
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189, 107 S. Ct. 533 (1986) .....	<i>passim</i>
<i>Nader v. Keith</i> , 385 F.3d 729 (7 <sup>th</sup> Cir. 2004) .....	27
<i>New Alliance Party v. Hand</i> , 933 F.2d 1568 (11 <sup>th</sup> Cir. 1991) .....	38
<i>Norman v. Reed</i> , 502 U.S. 279 (1992) .....	53
<i>*Parker v. Barnes</i> , Case No. 1:02-cv-1883-BBM (N.D. Ga., July 30, 2002) .....	41, 59
<i>Party of Texas v. White</i> , 415, U.S. 767, 94 S. Ct. 1296 (1974) .....	28
<i>Pilcher v. Rains</i> , 853 F.2d 334 (5 <sup>th</sup> Cir. 1988) .....	27, 51
<i>Puerto Rican Legal Defense &amp; Education Fund, Inc. v. The City of New York</i> , CV-91-2026 (Oral Order of July 31, 1991, E.D.N.Y) .....	42
<i>Redford v. Gwinnett Co. Judicial Circuit</i> , 350 Fed. Appx. 341(11 <sup>th</sup> Cir., September 25, 2009) .....	1, 18
<i>Schiavo ex rel. Schindler v. Schiavo</i> , 403 F.3d 1223 (11 <sup>th</sup> Cir. 2005) .....	1, 18, 29



<i>Stewart v. Taylor</i> , 104 F.3d 967 (7 <sup>th</sup> Cir. 1997) .....	55
<i>Storer v. Brown</i> , 415 U.S. 724 (1974) .....	27, 31, 37, 39-40
<i>Swanson v. Bennett</i> , 219 F. Supp. 2d 1225 (M.D. Ala. 2002) .....	39, 47, 48, 56
<i>Swanson v. Worley</i> , 490 F.3d 894 (11 <sup>th</sup> Cir. 2007) .....	2, 45, 46, 52
<i>Tashjian v. Republican Party of Conn.</i> , 479 U.S. 208 (1986) .....	21
<i>Timmons v. Twin Cities Area New Party</i> , 520 U.S. 351, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997) .....	22, 23
<i>Tomasik v. Goins</i> , Civil Action No. 3:13-cv-0118 (M.D. TN, November 5, 2013) .....	42
<i>U.S. v. Alabama</i> , 443 Fed. Appx. 411(11 <sup>th</sup> Cir., October 14, 2011) .....	29
<i>Wesberry v. Sanders</i> , 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964) .....	21
<i>Williams v. Rhodes</i> , 393 U.S. 23, 89 S. Ct. 5 (1968) .....	25, 37

## **STATUTES:**

28 U.S.C. § 1291 .....	1
28 U.S.C. § 1292(a)(1) .....	1
28 U.S.C. § 1331 .....	1

42 U.S.C. § 1983 .....	1, 2
Alabama Admin. § 820-2-4.05 .....	11
Code of Alabama § 17-9-3 .....	2
Code of Alabama § 17-9-3(a)(3) .....	2, 8
Code of Alabama § 17-13-3 .....	2, 8

**CONSTITUTIONAL PROVISIONS:**

U.S. Const. amend I . . . . . *passim*

U.S. Const. amend XIV . . . . . *passim*

**RULES:**

11<sup>th</sup> Cir. R. 28-1(h)(i)(ii) . . . . . 6

Fed. R. App. 28(a)(7) . . . . . 6

### **STATEMENT OF JURISDICTION**

The lower court had jurisdiction in this 42 U.S.C. § 1983 ballot access civil action pursuant to 28 U.S.C. § 1331. This Court has jurisdiction to hear this appeal from the district court's of Hall and Moser's motion for a temporary restraining order or for a preliminary injunction pursuant to 28 U.S.C. §§ 1291 & 1292(a)(1). *See Redford v. Gwinnett Co. Judicial Circuit*, 350 Fed. Appx. 341, 345 (11<sup>th</sup> Cir., September 25, 2009), *citing*, *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225 (11<sup>th</sup> Cir. 2005).

### **STATEMENT OF THE ISSUE**

Did the Lower Court Err in Refusing to Enter a Temporary Restraining Order or a Preliminary Injunction Which Would Have Reduced the Number of Signatures Required or Extended the Signature Petition Filing Date (or both) Where Alabama's Ballot Access Law Requires the Same Number of Signatures (5,938) for an Independent Candidate Seeking Election to the United States Congress in a Special Election with a Severely Truncated Schedule as it Requires for an Independent Candidate for the Same Office in a Regular Election Cycle with an "Unlimited" Time for Gathering Signatures?

### **STATEMENT OF THE CASE**

#### **A. The Course of Proceedings**

On September 17, 2013, Plaintiffs/Appellants Hall and Moser filed a Complaint in the United States District Court for the Middle District of Alabama, seeking declaratory relief and preliminary and permanent injunctive relief under

42 U.S.C. § 1983, challenging the constitutionality of §§ 17-9-3(a)(3), *Code of Alabama* (1975)(as amended) in the context of a severely truncated schedule Special Election for a seat in the United States Congress from Alabama's First U.S. Congressional District.<sup>1</sup>

The Complaint was filed with a designation on the civil cover sheet that it should be treated as a "related case" to another case pending in the Middle District of Alabama, before the Honorable Myron Thompson, in which the U.S. government has sued Alabama for Alabama's noncompliance with federal obligations to overseas absentee ballot voters and had specifically sought a TRO

---

<sup>1</sup> Section 17-9-3 provides: "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 when the petition has been filed ... with the Secretary of State ... on or before 5:00 P.M. on the date of the first primary election as provided for in Section 17-13-3. 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 ... district in which the candidate seeks to qualify."

For the Special Election at issue, Alabama law requires any candidate other than a Democrat or Republican to obtain 5,938 signatures from qualified electors and file them with Alabama's Secretary of State fifty-seven (57) days after the dates for the Special Elections primaries and general election were announced. In a regular election cycle, such a candidate would have an "unlimited" time to gather the required signatures. *Swanson v. Worley*, 490 F.3d 894, 904 (11<sup>th</sup> Cir. 2007).

with respect to the Special Election at issue in the instant case. [See DE 14-1 and DE 14 generally]

Notwithstanding the “related case” designation, the case was assigned first to Magistrate Judge Terry F. Moorer, and then was reassigned to District Judge Mark E. Fuller. [DE 11]

On September 30, 2013, Bennett filed a Motion to Dismiss. [DE 9]

On October 17, 2013, following the rejection of Hall’s signature petitions, Hall and Moser filed a First Amended Complaint. [DE 12]

On October 18, 2013, Appellants filed a Motion to Consolidate the two cases, or to at least have the instant case transferred to Judge Thompson, given the common litigation over scheduling of this same Special Election, the direct relevance to the schedule of the filing date for independent candidate signature petitions, and the complete omission from such schedule of any consideration of the interests of any candidates other than Democratic or Republican Party candidates. [DE 14]

On October 22, 2013, Secretary Bennett filed his Response to the Motion to Consolidate, opposing consolidation and taking no position on transfer. [DE 15]

That same day, Hall and Moser filed their Reply in further support of consolidation or transfer. [DE 15]

On October 24, 2013, the district court denied Bennett's Motion to Dismiss and Appellants' Motion to Consolidate and request to transfer the case. [DE 17; 18]

On October 25, 2013, Hall and Moser filed a Motion to Expedite the proceedings in the lower court. [DE 19] Attached to that Motion were three unpublished decisions reflecting orders from courts within this Circuit (one on remand from this Court) granting immediate injunctive relief to remedy the impact of a truncated election schedule on candidates required to obtain and file signature petitions to gain ballot access. [DE 19-1, 19-2, 19-3]

On October 25, 2013, the district court entered an Order granting the Motion to Expedite and setting a scheduling conference. [DE 20; 21]

On October 28, 2013, the scheduling conference was held and a briefing schedule was set. [DE 22]

On October 28, 2013, Secretary Bennett filed a Motion to Dismiss for the Failure to State a Claim or for Summary Judgment. [DE 23]

On October 29, 2013, the lower court issued an Order memorializing the agreed upon schedule from the previous day's scheduling conference. [DE 24]

On October 23, 2013, Appellants filed their Motion for a Temporary Restraining Order or for a Preliminary Injunction. [DE 25]

On November 6, 2013, Appellants filed their Response in Opposition to the Motion to Dismiss or for Summary Judgment. [DE 26]

On November 8, 2013, the district court set oral argument on the parties' respective motions for November 13, 2013. [DE 27]

On November 8, 2013, Secretary Bennett filed his consolidated Response in Opposition to Hall and Moser's Motion for a TRO or Preliminary Injunction and Reply in further Support of his Motion to Dismiss or for Summary Judgment. [DE 28]

On November 12, 2013, Appellants filed their Reply to Secretary Bennett's Response in opposition to their Motion for a TRO or Preliminary Injunction and in further support of that Motion. [DE 29]

On November 13, 2013, oral argument on the outstanding motions was held in the district court and the court entered an Oral Order denying Secretary Bennett's Motion to Dismiss and Hall and Moser's Motion for TRO or Preliminary Injunction. [See DE 30 - Minute Entry & Transcript of 11/13/13 Hearing]

On November 14, 2013, Hall and Moser filed an Emergency Notice of Appeal. [DE 31]



On November 19, 2013, the Clerk of the Court certified that the record was complete.

**B. Statement of the Facts**

The following is a summary of facts in the record below that are directly relevant to the issues in this appeal. Fed. R. App. 28(a)(7); 11<sup>th</sup> Cir. R. 28-1(h)(i)(ii). The facts are taken from the First Amended Complaint [DE 12] and the Motion for a Temporary Restraining Order or Preliminary Injunction [DE 25] and are uncontroverted in the record.

Plaintiff/Appellant James Hall (“Hall”) lives in Alabama’s First U.S. Congressional District, and has been at all times relevant to this lawsuit a qualified voter in the State of Alabama.

Hall is a United States Marine Corps veteran, with a wife and children who believes that he, his family, like-minded Americans and their interests have been excluded and ignored by the major political parties and he wishes to change that through his election to the United States Congress as an independent candidate, promoting true American family values for his constituents.

Plaintiff/Appellant N.C. “Clint” Moser, Jr. (“Moser”) lives in Alabama’s First U.S. Congressional District, and has been at all times relevant to this lawsuit

a qualified voter in the State of Alabama according to state and federal law. He wishes to support and vote for Hall's independent candidacy. [DE 25-2]

Secretary Jim Bennett ("Bennett") is the Secretary of State for the State of Alabama. He is charged with the general administration of the election laws and specific duties under such laws which are relevant to the issues in this lawsuit.

On July 29, 2013, the Governor of Alabama proclaimed and Bennett announced that a Special Election would be held to fill the vacancy to be created by the prospective (August 2013) retirement of the member of the United States Congress representing Alabama's First United States Congressional District prior to the completion of his term of office.

The Governor announced that in connection with the Special Election:

- A. The primary election for the Democratic and Republican parties would be held on September 24, 2013;
- B. Any primary runoff would be held on November 5, 2013; and
- C. The general election for the First U.S. Congressional District pursuant to this Special Election would be held on December 17, 2013.

Hall meets all of the eligibility requirements for election to office at issue and seeks election to that office through the Special Election presently set for December 17, 2013.

Each Appellant seeks to vote for Hall and to associate with others to support his candidacy.

Hall's candidacy as an independent candidate is the vehicle by through which both Appellants seek to exercise their rights to political participation, to advocate their agenda for political purposes, and to put forward their political beliefs and points of view, as well as those of Hall's constituents, and it is the vehicle by which he and other electors seek his access to the ballot in Alabama for the Special Election.

Under Alabama law, only the Democratic and Republican parties are permitted to hold primary elections for the position at issue at state expense and will be placed on the ballot automatically.

Under §§ 17-9-3(a)(3) and 17-13-3, *Code of Alabama*, (1975)(as amended), in order to be placed on the ballot for the Special Election, because he is an independent candidate, Hall was required to obtain and file with the Defendant, by no later than September 24, 2013, the date of the first primary for the Democratic and Republican parties, the signatures of 5,938 people who Secretary Bennett Defendant certifies to be qualified electors for the office at issue.

On September 24, 2013, Hall filed his ballot access signature petitions, consisting of some 316 pages with at least 2,835 signatures which he had gathered.

On September 25, 2013, Bennett's Director of Elections wrote to Hall acknowledging receipt of the 316 pages with 2,835 signatures, but advising him that he was 3,103 signatures short of the 5,938 signatures required for ballot access and that the Secretary would not even conduct a review to determine the number of valid signatures.

Bennett advised Hall that, based on the number of signatures he filed, his petition was insufficient for him to be placed on the ballot as an independent candidate for the office at issue and Bennett has refused to allow Hall to be placed on the ballot.

The seat at issue, is an elected position for a two year term, with a new general election scheduled to fill the position every two years on the first Tuesday of November of the election year in which the position is scheduled for election.

Under Alabama law, in a regular election cycle, independent candidates in Alabama who wish to seek the office at issue in this case, and electors who wish to promote the candidacy of an independent candidate for such office ordinarily have a virtually unlimited period of time to obtain and file with the Defendant, signatures from certifiably qualified electors, equal in number to three percent

(3%) of the qualified electors who cast ballots for the office of Governor in the last general election for the political subdivision in which Hall seeks to qualify. The number of signatures required for an independent candidate seeking the office at issue is 5,938 this year.

Mr. Hall at all relevant times used extraordinary due diligence to obtain the requisite number of certifiable signatures, as the lower court found.

On or about June 4, 2013, Hall contacted the Secretary of State's office to inquire as to what a ballot action petition needed to say, so that he could create one on his own and begin trying to obtain signatures.

At that time, Bennett had not prepared any ballot access petition for independent or minor party candidates to use to obtain signatures for the Special Election at issue.

By June 7, 2013, Hall had created his own ballot access signature petition for the Special Election at issue and submitted it to the Secretary's office for approval. Hall contacted the Secretary's office by email and by phone on many occasions in his efforts to gain ballot access as an independent candidate in this Special Election.

On June 11, 2013, the Secretary's office responded to Hall's proposed sample signature petition by making some changes to it. However, the Secretary did not provide Hall with the date of the general election for the Special Election.

Information provided through the Secretary of State's website advises that a ballot access signature petition for an independent candidate for elective office in Alabama **must** state on it the date of the election at issue. [DE 16-3; *See also* Alabama Admin. § 820-2-4.05 - petition only valid if it includes date of election].

On July 8, 2013, Bennett's office was advised of some of the insurmountable hardships imposed on independent and minor party candidates, given the number of signatures required and a truncated time frame. The Secretary's staff was asked how long the time period would be for such candidates to try to obtain signatures for their signature petitions.

The Secretary's Director of Elections responded on July 11, 2013, by forwarding a sample ballot access petition which the office had created in response to the July 8<sup>th</sup> inquiry, without any date stated for the election at issue, notwithstanding the requirement that such a ballot access signature petition set forth the date of the election at issue to be valid. [DE 16-2]

The Director of Elections advised that no date for the primary or the general election for the Special Election at issue could be provided until the Governor of Alabama issued a proclamation setting such dates. Such proclamation was scheduled to be issued on or around August 15, 2013, the date previously announced as the effective date of the resignation of the incumbent House member whose seat is at issue in this Special Election.

On July 12, 2013, the Secretary's office advised that they would notify the undersigned when a calendar for the Special Election was set; but the office never provided the undersigned with such notice.

Based on issues raised in the pending related case, *U.S. v. Alabama*, 2:12-cv-00179-MHT-WC (Middle District of Alabama), the announcement of the calendar for the Special Election at issue was moved up from August 15, 2013 to the end of July 2013 because of the concerns raised in that case by the United States about hardships the truncated schedule for this Special Election would cause for overseas absentee voters in this Special Election.

The first occasion on which a calendar for the primaries and general election for the Special Election at issue appeared in any public forum, was in an Order issued by Judge Thompson on July 26, 2013 in *U.S. v. Alabama*. However, Bennett provided no notice to the undersigned, or to Hall of such calendar at any

time and, upon information and belief, Bennett did not even announce or otherwise provide notice of such schedule on its website or any other public forum until on or about July 29, 2013.

Prior to the July 26, 2013 Order in the pending related case of *U.S. v. Alabama* (in which the Secretary was a defendant as well), Bennett was well aware of the hardships the signature requirement would cause for independent candidates because of the severely truncated schedule attending the Special Election and had express notice of such hardships and concerns on behalf of independent candidates; yet Bennett ignored such concerns and failed to bring the concerns of independent candidates and electors who wish to vote for independent candidates, or the impact of the combination of the truncated schedule and the signature requirement to the attention of the Court in that pending related case.

The Secretary was provided with authority from this Court, remanding a case in which the district court had refused to provide an accommodation for petitioning candidates whose time frame was truncated due to a Special Election schedule, as well as the district court decision on remand, extending the time frame for obtaining signatures. [DE 25-7]



Until after it became clear on or about September 24, 2013 that a primary runoff election would be required, the date of the general election for this Special Election could not be known or set, according to information provided by Bennett. After September 24, 2013, it became clear that there would be a primary runoff for this Special Election on November 5, 2013, with the general Special Election currently scheduled for December 17, 2013.

No ballot access petition which complied with the requirements set forth in the official materials published by the Defendant regarding the rules and regulations for independent candidates to gain access to the ballot access could be formulated until a date for the general election for this Special Election was established, given the requirement in Alabama that a valid access ballot signature petition **must** set forth such date on the petition itself.

Hall worked tirelessly in his efforts to obtain signatures, attending virtually every community event at which he believed there likely would be significant gatherings of qualified electors in order to maximize his efficiency in soliciting and obtaining signatures. These events have included charity runs, festivals, yard sales, concerts, sporting events, a gun show, and others. His efforts at some of the events were stymied by the sponsoring organizations which were not “politically friendly.” [DE 25-1]

Hall tried to obtain signatures through networking efforts with social contacts and work contacts, asking each friend and contact to provide as many names as possible for potential signatories and to help him gather signatures from the lists they developed for him.

Hall visited businesses within the voting district and provided signature petitions to those businesses who were willing to post them and facilitate his collection of signatures. Many places of business refused to help; but he persevered.

Hall and his wife independently went door to door to try to obtain signatures, with disappointing results, achieving approximately 1 signature per 12 houses visited, and encountering reticence among many to get involved with a stranger in a political matter. Mr. Hall also found the door to door process to be most inefficient time-wise in light of this truncated schedule. Hall and his wife visited approximately 5000 homes in their efforts to get signatures through this door to door method.

For the signatures Hall obtained, most took a good deal of time to obtain, because of obstacles that included: overcoming the potential signatory's reticence to discuss politics, concerns about the impact signing the petition would have on the person's freedom to vote for another candidate in a primary or in the Special

general election, concerns about a lack of privacy in providing personal information, the time it took to fill in the required information if the person agreed to sign, and the time the person requested to read all of the language on the petition.

Hall placed an advertisement to try to hire someone to help him solicit signatures; but he received only one response. This did not prove to be a successful manner of proceeding and ended up costing Hall about \$4.00 per signature and he is a person of limited financial means.

Hall and his wife worked tirelessly at all times during the relevant time frame to try everything reasonably possible within their means to obtain signatures and in the process they have sacrificed both family and work obligations. Hall missed his children's sports practices and games, family events and his work has suffered because of the time and effort he has had to devote to his Herculean effort at trying to obtain signatures to gain access to the ballot for this Special Election. His efforts continued.

Notwithstanding his best efforts and all due diligence, Hall was not able to obtain and file the requisite 5,938 signatures by September 24, 2013, in order to gain access to the ballot for the Special Election. His ability to obtain at least 2,835 signatures, filling 316 pages by September 24, 2013, was a major

accomplishment and is far in excess of any reasonable requirement that could pass constitutional muster in light of the State's interests and the vitally important constitutional rights at issue here.

In an accommodation to voters who wish to cast their votes in the Special Election for candidates representing the Democratic and Republican parties and in accommodation to candidates in this Special Election who represent those two parties, Defendant announced on July 29, 2013, special measures that would be provided for citizens voting from overseas, creating for them an "Instant Primary Ballot" "[d]ue to the short time frame for this election...." No such accommodation of any kind in recognition of the extraordinarily short time allotted for this Special Election has been made with respect to Hall or any candidates other than candidates representing the Democratic and Republican parties.

In a further accommodation exclusively to the Democratic Party, Bennett, without authorization, allowed the Democratic Party's candidates to be included in this Special Election, notwithstanding the Party's failure to certify its candidates by the established deadline for certification. [DE 25-1 at 15-17]

There have been eighteen (18) Special Elections for U.S. Congress in Alabama since 1893, the first year in which government printed ballots were used in Alabama. There has never been an independent candidate on the ballot in a single one. [DE 29-1] In contrast to the 5,938 signatures Alabama requires for an independent candidate in this Special Election, the number of signatures required by Georgia and Florida for such a Special Election is zero, Tennessee requires 25, and Mississippi requires 200. [DE 25-4 at 4-5]

### **C. Standard of Review**

This Court reviews a district court's denial of temporary injunctive relief for an abuse of discretion. *Redford v. Gwinnett Co. Judicial Circuit*, 350 Fed. Appx. at 345; *Horton v. City of St. Augustine*, 272 F.3d 1318, 1326 (11<sup>th</sup> Cir. 2001). "This scope of review will lead to a reversal only if the district court applies an incorrect legal standard, or applies improper procedures, or relies on clearly erroneous factfinding, or if it reaches a conclusion that is clearly unreasonable or incorrect." *Schiavo*, 403 F.3d at 1226.

### **SUMMARY OF THE ARGUMENT**

The lower court erred when it refused to grant immediate injunctive relief in this case either reducing the number of signatures required for independent candidates, extending the deadline by which such candidates had to file their

signature petitions, or both, in light of the severely truncated time frame for obtaining signatures for this Special Election.

Applying the same 3% signature requirement that applies to a regular election cycle in Alabama, which this Court has emphasized allows an “unlimited” time frame for obtaining signatures, to this severely truncated Special Election schedule, which provided for 57 days between the announcement of the schedule and the date by which independent candidates were required to file their signature petitions violates the Appellants’ First and Fourteenth Amendment rights.

The completely uncontroverted record evidence establishes that Alabama’s ballot access law for independent candidates in a truncated schedule Special Election such as that at issue here creates a severe burden on the rights of independent candidates and their supporters and there is no compelling state interest that supports requiring the same 5,938 signatures that would be required for a regularly scheduled election.

Hall and Moser clearly established on the uncontroverted record evidence of the facts and circumstances in this case that they have satisfied all four prongs for immediate injunctive relief.

The lower court abused its discretion in applying just the kind of “litmus test” analysis that the United States Supreme Court has prohibited in ballot access

cases, finding, on Appellee's urging, that because a 5% signature requirement in a 180 day period was upheld in a 1971 election in Georgia in *Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 29 L. Ed. 2d 554 (1971), the 3% requirement in a 57 or 58 day period here did not create a severe burden for Hall and Moser.<sup>2</sup>

Not only is such a "litmus test" approach expressly prohibited, in many cases since *Jenness* less onerous signature requirements than the ones upheld in *Jenness* have been struck down. Additionally, the lower court completely ignored all decisions, unpublished and published that clearly explain why, when an election schedule has been truncated, the regular election cycle signature requirements must be reduced and/or the deadline for filing signatures must be extended because of the greater burden the truncated schedule creates for a petitioning candidate and his or her supporters.

---

<sup>2</sup> It is undisputed that the deadline for independent candidates to file their signature petitions in this Special Election was 57 days from the date on which the Secretary announced the Special Election schedule. It also is undisputed that Alabama law and the Secretary's website provide that no signature petition is valid unless it sets out the date of the general Special Election. However, there is some dispute in this case as to whether a 106 day period, counting from the date on which Mr. Hall created his own petition and began soliciting signatures, at risk that his petitions would not be valid because they could not set out the date of the yet to be announced general Special Election, or the 57 day period should be the relevant time frame in this case. The district court held that whether the period was 56, 57, 58 or 106 days, its decision would be the same. [11/13/13 Tr. at 60-61].

The lower court otherwise abused its discretion in denying the immediate injunctive relief requested and Mr. Hall must be placed on the ballot for the general Special Election for the seat at issue in this case.

### **ARGUMENT**

#### **The Lower Court's Refusal to Grant the Requested Immediate Injunctive Relief Violated the Appellants' Fundamentally Important Rights Under the First and Fourteenth Amendments to the United States Constitution.**

#### **ANALYTIC FRAMEWORK IN BALLOT ACCESS CASES**

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live," *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964) ...” *Clingman v. Beaver*, 544 U.S. 581, 600 (O'Connor, concurring)

The constitutional rights at issue here, including the right to associate for political purposes, the right to be a political candidate, and the right to cast one's vote for a political candidate are fundamental rights guaranteed by the First and Fourteenth Amendments. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983).



The Supreme Court's most recent pronouncement in the area of ballot access - its decision in *Clingman v. Beaver*, 544 U.S. 581 (2005) - is important both for the analytical framework it reaffirms and the emphasis it places on vigilantly protecting the rights of non-major party candidates. Some principles from *Clingman* are worth noting:

The Court wrote the following in *Clingman*:

We have held that the First Amendment, among other things, protects the right of citizens "to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000). Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest. *Timmons*, 520 U.S., at 358, 117 S. Ct. 1364. However, when regulations impose lesser burdens, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. *Ibid.* (internal quotation marks omitted).

In analyzing a particular burden to First and Fourteenth Amendment rights in the ballot access context, "(the Court) should begin with the premise that there are significant associational interests at stake. From this starting point, we then ask to what extent and in what manner the State may justifiably restrict those interests.

Then under the framework expressly reaffirmed in *Clingman*, 544 U.S. at 603, the Court “has sought to balance the associational interests of parties and voters against the States’ regulatory interests through the flexible standard of review reaffirmed by the Court....” Under that standard, “the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.” *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

Regulations imposing severe burdens on associational rights must be narrowly tailored to advance a compelling government interest. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997).

Regulations imposing lesser burdens are subject to less intensive scrutiny, and reasonable, nondiscriminatory restrictions ordinarily will be sustained if they serve important regulatory interests. *Ibid.*

This regime reflects the limited but important role of courts in reviewing electoral regulation.

The Court also wrote: “Although the State has a legitimate—and indeed critical—role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape

the rules of the electoral game to their own benefit. Recognition of that basic reality need not render suspect most electoral regulations.

Where the State imposes only reasonable and genuinely neutral restrictions on associational rights, there is no threat to the integrity of the electoral process and no apparent reason for judicial intervention. As such restrictions become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions.” *Clingman*, 544 U.S. at 603 (O’Connor, concurring)

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court considered the impact of early filing dates on small political parties and independent candidates. Commenting on election laws that disadvantage independents, it noted:

“By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo

have in time made their way into the political mainstream. In short, the primary values protected by the First Amendment—‘a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,’—are served when election campaigns are not monopolized by the existing political parties.” *Clingman*, 544 U.S. at 620-21, *quoting from Anderson*, *Id.*, at 794 (citations omitted).

Accordingly, “[r]estrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively, and may not survive scrutiny under the First and Fourteenth Amendments.” *Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 107 S. Ct. 533 (1986), *citing Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5, 10 (1968).

It is true, of course, that “States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office.” *Id.* Thus, courts must engage in a balancing test to weigh the rights of States to condition access to the general election ballot against the rights of citizens to form political parties that can vie for election, the right to associate with the independent candidate of choice, and the rights of citizens to cast votes effectively for their chosen candidate.

The Court’s “primary concern is with the tendency of ballot access restrictions ‘to limit the field of candidates from which voters might choose.’ Therefore, ‘[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters’” *Anderson*, 460 U.S. at 786. (Internal citation omitted.) Where “the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest.” *Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S. 214, 222, 109 S. Ct. 1013 (1989). (Internal citation omitted.) *See also, Clingman*, 544 U.S. at 596-87 (“Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest).

In the instant case, the burden is severe, [DE 25-1 thru DE25-4]. Strict scrutiny applies and so, in addition to demonstrating an articulated compelling interest to justify the regulation, states must “adopt the least drastic means to achieve their ends.” *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979).

In this case, it is the 3% signature requirement and the truncated schedule which reduces the time to collect signatures from an unlimited time frame to under

two months, in **combination** that creates the severe burden and any suggestion that either factor should be analyzed in isolation is simply contrary to the mandated analysis. *See Nader v. Keith*, 385 F.3d 729, 731 (7<sup>th</sup> Cir. 2004)(“Restrictions on candidacy must . . .be considered together rather than separately.”); *See also Williams*, 393 U.S. at 34 (ballot access laws should be viewed in their totality, not in isolation); *Pilcher v. Rains*, 853 F.2d 334, 336 (5<sup>th</sup> Cir. 1988)(facially valid provisions may operate in tandem to produce impermissible barriers to ballot access - for example, if a state had a 1% signature requirement, but imposed a single other unreasonable barrier, it would still effectively deny ballot access and would be unconstitutional, *citing Storer* and *Anderson*).<sup>3</sup>

“[W]hat is demanded (by the State) may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot. The Constitution requires that access to the

---

<sup>3</sup> A Court must examine the *cumulative* burdens imposed by the *overall* scheme of electoral regulations upon the rights of voters and parties to associate .... “A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition. Even if each part of a regulatory regime might be upheld if challenged separately, one or another of these parts might have to fall if the overall scheme unreasonably curtails associational freedoms.” *Clingman*, 544 U.S. at 607-08.

electorate be real, not ‘merely theoretical.’” *Party of Texas v. White*, 415, U.S. 767, 783, 94 S. Ct. 1296 (1974).

Ballot access requirements that raise the bar so high as to virtually prevent independent candidates from appearing should not survive strict scrutiny analysis. *Williams*, 393 U.S. at 31-32.

### **LEGAL STANDARD FOR A T.R.O. OR PRELIMINARY INJUNCTION**

The four factors for the Court to evaluate in considering whether a temporary restraining order or a preliminary injunction should issue are:

- (1) Whether there is a substantial likelihood of success on the merits;
- (2) Whether the movant will suffer irreparable harm unless the injunction is issued;
- (3) Whether the threatened injury to the movant outweighs whatever damage the proposed injunction might cause the opposing party; and
- (4) Whether granting the injunction is in the public interest.

*See Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1128 (11<sup>th</sup> Cir. 2005); *Campbell v. Bennett*, 212 F. Supp. 2d 1329, 1343 (M.D. Ala. 2002). Appellants easily meet all four factors and a preliminary injunction assuring that Hall is put on the ballot for this Special Election must be issued.

**Appellants Are Substantially Likely to Succeed on the Merits**<sup>4</sup>

**Appellants Clearly Demonstrated a “Severe Burden” on their Rights**

Appellants demonstrated through their submissions below that the cumulative effect of the 3% signature requirement and the truncated schedule for this Special Election create a “severe burden” on their First and Fourteenth Amendment rights and as such require proof by the State of narrowly tailored compelling interests, advanced by the regulations at issue. Appellants’ submissions demonstrating the severe burden have not been rebutted by even a shred of competence evidence or argument and the burden has not been justified by any compelling or even important state interest.

While it is difficult to define a “severe burden,” the one approach that the Supreme Court has said over and over again cannot be used to rebut First or Fourteenth Amendment claims in this context is the very approach taken by lower court at Bennett’s urging: Ignore the factual evidence of the actual burdens faced by the candidate and look instead to a case from a completely different context that has held a regular election 5% level of support requirement constitutional.

---

<sup>4</sup> A showing of a likelihood of success on the merits, for purposes of a preliminary injunction “requires only likely or probable, rather than certain success.” *U.S. v. Alabama*, 443 Fed. Appx. 411, 419 (11<sup>th</sup> Cir., October 14, 2011), *citing*, *Schiavo*, 403 F.3d at 1232. Hall and Moser more than meet that standard here.



This is the epitome of the “litmus test” that the Supreme Court consistently has said for at least 30 years must never be used; yet that is exactly the approach urged on the lower court and the approach it adopted in denying the injunction.

In striking down Ohio’s ballot access in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court set out the requisite analytical framework as follows:

Constitutional challenges to specific provisions of a State’s election laws therefore cannot be resolved by any ‘litmus-paper test’ that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. 460 U.S. at 789. (Internal citation omitted.)

The Court in *Anderson* rejected the use of any “litmus-paper” to “separate valid from invalid [ballot access] restrictions.” 460 U.S. at 789. Instead, a court determining whether a challenged ballot access restriction is unconstitutional must: 1) evaluate the character and magnitude of rights protected by the First and Fourteenth Amendments; 2) identify the State’s interests advanced as justifications for the burdens imposed by the ballot access restrictions; and 3) evaluate the

legitimacy and strength of each asserted state interest, and determine whether and to what extent those interests required burdening the plaintiffs' rights. *Id.*

*Bergland v. Harris*, 767 F.2d 1551, 1553-54 (11<sup>th</sup> Cir. 1985).

In order to permit the required evaluation of competing interests, “[t]he State must introduce evidence to justify both the interests the State asserts and the burdens the State imposes on those seeking ballot access.” *Bergland*, 767 F.2d at 1554. *See also, Mandel v. Bradley*, 432 U.S. 173, 178 (1977)(Court must sift through conflicting evidence and make findings of fact as to the difficulty of obtaining signatures in time to meet the deadline); *Storer v. Brown*, 415 U.S. 724 (1974)(a court is required to examine the facts and circumstances of each case individually and may not apply a “litmus test”).<sup>5</sup>

In contrast to the prohibited “litmus test” approach, Appellants submitted the following unrebutted evidence that focuses on the facts and circumstances of this case to demonstrate the severe burden the cumulative effect of the 3% signature requirement and the truncated schedule created for the exercise of their First and Fourteenth Amendment rights.

---

<sup>5</sup> The Court in *Storer* also makes clear that in analyzing a ballot access regulation, the reviewing court should look at past experience in qualifying to determine the severity of the obstacle and the Court also looked to other States for guidance. *See e.g Storer*, 415 U.S. 740, n.10 & 742.

1. **Mr. Hall's Declarations** [DE 25-1; 26-1]:

In his Declarations, Hall details the exhaustive efforts he went to, drawing on the discipline and tenacity he learned as a United States Marine, to get a ballot access petition drawn up when the Defendant had none to provide, and to try every possible avenue for getting signatures, working day and night, and sacrificing valuable family and work time in the process. He describes the actual obstacles he faced and explains why the truncated time frame placed such a heavy burden on him. [DE 25-1; 26-1]

There is no evidence at all submitted by Appellee that in any disputes Mr. Hall's account of things or indicates in any way that the restrictions imposed were anything other than severe. There is no evidentiary suggestion at all that the 3% requirement could have been met in the truncated time provided in this District.

The Secretary offered no competent evidence in rebuttal to Mr. Hall's Declaration regarding the facts on the ground or any other subject.

2. **Mr. Moser's Declaration** [DE 25-2]:

Moser's Declaration sets out his experience in organizing political campaigns and in running signature drives. He also has experience running as a candidate in a major party primary, garnering 74,147 votes in the 2010 Republican U.S. Senate race primary election (some 15.6% of the vote) and in running as an

independent. In the race at issue in this case, Mr. Moser enlisted the support of a seasoned ballot access petition gatherer who had been the Alabama coordinator for Presidential Candidate Ron Paul's signature drive in Alabama. They contacted over 100 experienced signature gatherers from around the State with whom they had worked in the past and most found the idea of raising 6000 signatures in such a short time frame too daunting to even try. He tried seeking signature support through a Facebook post, to no avail. At the end of the day, even with help, he was only able to gather 750 signatures (difficult to say this reflects an inability of this candidate to get even a modicum of support when over 74,000 voters actually cast a vote for him when he ran in a major party primary) and abandoned the effort.

Based on his experience, he declared that he fully believes that but for the combination of the 3% requirement and the truncated time frame, he would have been able to qualify and could have gathered sufficient signatures if given the time frame allotted in a regular election cycle. Mr. Moser also described the obstacle created by the lack of any schedule for the Special Election until less than two months before the signatures were due to be filed. [DE 25-2].

Defendant offered no competent rebuttal.

3. **Declaration of Joshua Cassity** [DE 25-3]:

Mr. Cassity's Declaration offers a great deal of insight into the severe burden the truncated schedule places on the candidate in combination with the 3% signature requirement that applies in a regular election cycle.

He is intimately familiar with the 1<sup>st</sup> District. As the leader of a minor political party in Alabama, He successfully assisted in mounting a 3% signature drive campaign in a regular election cycle for a candidate who successfully obtained ballot access to this exact same seat in 2010 and that candidate received 26,357 votes in that election. Mr. Cassity details how difficult and expensive it was to successfully obtain the 3% level of signatures, even in a regular election cycle with unlimited advance time, and with the necessary planning months ahead of the campaign. Even after paying a great deal of money for paid signature gatherers, they only obtained the requisite number at the last moment.

Mr. Cassity wanted his party to run a candidate in this Special Election, but ultimately concluded that, based on his experience, it would be impossible to meet the 3% signature requirement in the short time frame allotted. He also described the obstacles that were created by the Secretary of State's inability to provide a

schedule for the Special Election until less than two months before the petitions would be due.

Mr. Cassity had to turn his Party's attention instead to a local race instead of this U.S. Congressional race because the number of signatures required was so dramatically less for the local race. [DE 25-3]

Bennett provided no competent rebuttal to Mr. Cassity's Declaration.

4. **Richard Winger's Expert Declarations** [DE 25-4; 26-2; 29-1]

Ballot Access expert witness Richard Winger has provided Declarations on many of the subjects that are directly relevant here. Bennett provided no rebuttal witness or competent evidence of any sort to in any way rebut his instructive expert testimony.<sup>6</sup>

---

<sup>6</sup> Bennett resorted below to a combination of sarcasm and *ad hominem* attacks in his attempt to limit the impact of Mr. Winger's un rebutted testimony. For example, Defendant complains, but does not explain the relevance of the notion, that Mr. Winger "... reads cases and law in California ...." [DE 28 at 9], implying that that somehow is an obstacle to Mr. Winger having personal knowledge of the relevant dynamics of the 1<sup>st</sup> District. Mr. Winger has declared that all that is contained in his Declaration is based on his research and personal knowledge and that he knows the First District [See DE 29-1] and there is no basis for disputing this. Mr. Winger has been deemed qualified as an expert witness in the area of ballot access in the Middle District of Alabama and in courts around the country without exception. As noted, only one party ever even challenged his qualifications as an expert in this area and that challenge was rejected by both the district court and the Second Circuit. See e.g. DE 25-4 at 10.

It is significant to note that, not only has Mr. Winger been deemed qualified as an expert witness in a ballot access in the Middle District of Alabama (a case in which Alabama's Secretary of State also was a Defendant of course), but he also was the expert witness relied upon by the Court in the very recent published decision that quite thoroughly analyzes the issue presented here - what to do about the additional burden a truncated election scheduled places on an independent candidate facing the same level of support requirement that applies in a regular election cycle. *See Jones v. McGuffage*, 921 F. Supp. 2d 888, 893 (N.D. Ill. 2013)(citing Richard Winger as the expert witness on ballot access).

In addition to the two earlier Declarations submitted by Mr. Winger, Mr. Winger's Second Supplemental Declaration provided an important historic dimension. It reflects the history of Special Elections for U.S. Congress in Alabama since ballots were first printed by the State in 1893 and, as noted, it demonstrates that there has never been a single independent candidate who ever has appeared on the ballot for Congress in a Special Election. It also reflects the wide variance in what Alabama has deemed to be a necessary "modicum of support" for an independent candidate for such office over the years. [DE 29-1]

This is relevant because case after case has directed an analyzing court to look to past experience as a factor in determining the burden imposed. *See e.g.*,

*Mandel v. Bradley*, 432 U.S. 173, 177 (1977)(“Past experience will be a helpful, if not always unerring guide; it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not.”), *quoting from*, *Storer v. Brown*, 415 U.S. 724, 742 (1974).

Mr. Winger also testified to the dramatic difference in how Alabama’s neighboring states treat independent candidates, both in a regular election cycle and for elections with a truncated schedule, like the instant Special Election.

As he wrote, in contrast to Alabama’s requirement for 3% or approximately 6000 signatures for an independent in a U.S. House race for the 1<sup>st</sup> District seat, in Tennessee, only a total of 25 signatures are required for an independent candidate to get on the ballot for a U.S. House seat, in Mississippi, only 200 signatures, in Florida no signatures at all are required. In Georgia, significantly, while there still is a 5% level of support required in a regular election cycle, after *Citizens Party*, there is no signature requirement at all, in recognition of the burden the truncated time frame attending a Special Election creates. [DE 29-1] *See e.g. Jenness v. Fortson*, 403 U.S. 431, 439, notes 15-20 (1971)(Comparing other States’ provisions with respect to the ballot access at issue); *Williams v. Rhodes*, 393 U.S. 23, 47, n.10 (1968)(Harlan, J., concurring)(comparing “size” of “barriers” to third-party candidates for each State and comparing ballot history among the States for



third-party candidates); *New Alliance Party v. Hand*, 933 F.2d 1568, 1571-1572 (11<sup>th</sup> Cir. 1991)(Citing expert witness Allen J. Lichtman's testimony comparing other States' signature filing deadlines and number of signature requirements relative to Alabama's).

A very recent development in the State of Ohio is instructive as well. On November 6, Ohio's Governor signed a bill into law that recognizes the severe burden a truncated time frame creates for a petitioning candidate. It provides that where changes in signature requirements for independent candidates were made on short notice, for elections in the year 2014, only half the normal number of signatures would be required. [DE 29-2; 29-3].<sup>7</sup>

In regard to the severe burden created by the Alabama law in this Special Election, the Court should consider that, in any political campaign for public office, especially one covering a significant territory and number of voters, there is necessarily a "start-up" period that must pass before a candidate's campaign can even *begin* to mount a serious petition drive of this magnitude. Funds have to be raised. A campaign organization must be created and major responsibilities assigned to staff. Volunteers must be recruited to do the petitioning, or,

---

<sup>7</sup> The new Ohio bill also provides for dramatically reduced signature requirements for independents when there is a Special Election and the number declines based on how greatly truncated the signature gathering is before the Special Election. Sec. 3513.31.

alternatively, enough funds raised to hire paid petitioners. If the campaign must rely on volunteers, they have to be trained. And this is a far from exhaustive list of the myriad tasks that must be performed before a petition drive can really get off the ground. For an independent candidate, getting through this start-up period – and into the starting gate for a petition drive – is necessarily a more cumbersome and time-consuming process than it is for most candidates of the two established parties, who generally have far greater resources at their disposal. The truncated schedule here, with the high signature requirement within that truncated period, left no start-up or organizing time. [DE 25-4]

*See also Blomquist v. Thomson*, 739 F.2d 525 (10<sup>th</sup> Cir. 1984) (Where normal petitioning period was reduced to two months, signature requirement had to be reduced proportionately), *Swanson v. Bennett*, 219 F. Supp. 2d 1225 (M.D. Ala. 2002) (where deadline for filing petitions was changed abruptly, ordering two candidates on the ballot even though they hadn't gathered required number of signatures).

A court evaluating such issues as are presented here also should consider “ballot access history” as “an important factor in determining whether restrictions impermissibly burden the freedom of political association.” *Lee v. Keith*, 463 F.3d 763, 769 (7<sup>th</sup> Cir. 2006), *citing Storer v. Brown*, 415 U.S. 724, 742, 94 S. Ct. 1274

(1974). In the 18 Special Elections for Congress held throughout Alabama's history, there has never been a single independent candidate on the ballot. [DE 25-4]

The Secretary offered no competent rebuttal witness or evidence in response to Mr. Winger's Declarations.

### **Special Elections Require Special Rules**

While the record evidence demonstrating the "severe burden" is both compelling and uncontroverted, even if Appellants had fallen short of so establishing, each and every case cited below that has considered the impact of shortening the time frame from a regular election cycle for obtaining signatures has concluded that the increased burden, whether "severe" or something less than that, required either that the signature filing deadline be extended or that the number of signatures be reduced in proportion to the degree to which the petitioning period was shortened, or both.

Courts which have upheld such ballot access signature requirements as apply here (e.g. 3%) for independent or minor party candidates in a regular election cycle, consistently have held that the application of those same requirements to such candidates in a Special Election with a truncated schedule for gathering signatures violates the First and Fourteenth Amendments. Courts across

the board have held in such situations that the number of signatures to be required must be dramatically reduced or the deadline for gathering them must be extended or both. *See e.g., Jones v. McGuffage*, 921 F. Supp. 2d 888 (N.D. Ill. 2013); *Parker v. Barnes*, Case No. 1:02-cv-1883-BBM (N.D. Ga., July 30, 2002) (Unpublished)(Holding the application of the 5% regular election cycle signature requirement to a truncated Special Election schedule to be unconstitutional; reducing the signature requirement by 1/3 because the signature gathering period for Special Election was reduced from 180 days in regular election cycle to 120 days)(Martin, J.)[DE 25-5]; *Migala v. Martinez*, Case No. 89-40168-MMP (N.D. Fla., August 7, 1989)(Unpublished)[DE 25-6](Holding the application of regular election cycle signature requirement to truncated schedule Special Election unconstitutional; extending deadline for submitting signatures by 60 days and reducing signature requirement from 3% to 1%)[DE 25-1];<sup>8</sup> *Citizens Party of Georgia v. Polythress*, 683 F.2d 418 (11<sup>th</sup> Cir. 1982)(Table), Docket No. 82-8411 (11<sup>th</sup> Cir., July 14, 1982)(vacating district court decision that dismissed

---

<sup>8</sup> In *Migala*, the Court wrote: “If the period for gathering petition signatures is severely reduced, minor party (or independent) candidates effectively are denied access to the ballot in violation to (sic) the first and fourteenth amendments of (sic) the Constitution.” The *Migala* court cited *Citizens Party of Georgia v. Polythress*, 683 F.2d 418 (11<sup>th</sup> Cir. 1982)(Table),Docket No. 82-8411 (11<sup>th</sup> Cir., July 14, 1982) in support of its decision and characterized the reduction from 180 days to 50 days there as a “severe reduction.” )

constitutional claim over reduction of signature gathering period from 180 days in regular election cycle to 50 days in Special Election cycle); *Citizens Party of Georgia v. Polythress*, Case No. C82-1260A (N.D. Ga., July 26, 1982)(Unpublished)(On Remand from 11<sup>th</sup> Circuit, extending signature submission date by 30 days)[Collectively DE 25-7]; *Puerto Rican Legal Defense & Education Fund, Inc. v. The City of New York*, CV-91-2026 (Oral Order of July 31, 1991, E.D.N.Y)(Unpublished)[DE 25-8]; *Blomquist v. Thomson*, 739 F.2d 525 (10<sup>th</sup> Cir. 1984), a truncated time period led the Court to reduce the number of signatures. *Libertarian Party of Oklahoma v. Oklahoma State Election Board*, 593 F. Supp. 118 (W.D. OK 1984)(Accord).

In a case decided on November 1, 2013 (described DE 26-3 at 11-12), a court in the Middle District of Tennessee applied this same concept and ordered the candidate placed on the Special Election ballot under a party label which ordinarily carried a 2.5% signature requirement. Because of the truncated schedule for the Special Election, the court dramatically reduced the signature requirement. The court took this action even though the candidate secured access to the ballot as an independent with 25 signatures. *Tomasik v. Goins*, Civil Action No. 3:13-cv-0118 (M.D. TN, November 5, 2013). The oral order deciding the

case on November 1, 2013 is not yet available to the general public; *See* Order at DE 26-3.

The recent decision in *Jones v. McGuffage*, 921 F. Supp. 2d 888 (N.D. Ill. 2013) is particularly instructive. Many of the relevant facts in *Jones* are remarkably similar to the instant case; but the difference in the burden on the independent candidate in *Jones* between a regular election cycle and the special election cycle was far less than the burden present in the instant case.

In the *Jones* case, on November 21, 2012, Representative Jesse Jackson, Jr. resigned. A special primary was scheduled for February 26, 2013 and a general Special Election was scheduled for April 9, 2013. *Id.* at 891. In Illinois, independent candidates for ballot access must submit petitions with signatures of at least 5% of the voters in the last election. *Id.* The petitions were due to be filed by no later than February 4, 2013. *Id.* Ordinarily, petitioning candidates in Illinois have a limited window of just 90 days to gather signatures; under this truncated Special Election schedule, that figure was reduced to 62 days. *Id.* at 903.

In Alabama, of course, as court after court has emphasized, in a regular election cycle, there is no limitation on when a petitioning candidate can begin

gathering signatures and of course, the date of the regular election is known years ahead of time.

For the Special Election at issue in the instant case, especially with the requirement that all signature petitions must state the date of the general Special Election on them to be valid, no signature gathering could begin until the date of the general Special Election was announced. The effect here was that the maximum time Appellants had was 57 days (instead of the usual 2 years or “unlimited” period). That assumes somehow that they are attributed with knowing about the Governor’s announcement of the schedule on July 29, 2013.

The court in *Jones* entered an injunction dramatically reducing the number of signatures to be required, based on the truncated schedule set for the Special Election. The 5% signature requirement would have meant the petitioning candidates had to submit at least 15,682 signatures. They ordinarily would have had 90 days to gather and submit them, with some “ramp-up” time to organize a signature campaign, since the election date would have been known well ahead of time.

The Court reduced the 15,682 number to 5,000 as a matter of first course. That is the number of signatures that had been used in Illinois where there had been redistricting. The court found such uncertainty similar to the setting of a

Special Election date without much warning. To account for the difference between the truncated period for gathering signatures - 62 days instead of the usual 90 days - the Court reduced the signature requirement to 3,444, deriving that figure from the ratio of  $62/90 \times 5,000$ . *Id.* at 903.

In the instant case, this Court could look back historically to Alabama's ballot access laws to conclude that just a short time ago, the State found 1% to be a sufficient amount for the independent or minor party candidate to establish a "modicum of support" and apply that figure here as a matter of first course. DE 29-1] Then, as the Court did in *Jones*, this Court could take the ratio of almost 2 months (57 days) to 24 months between Congressional elections in a regular election cycle (or to the "unlimited" signature gathering time frame provided in Alabama in the regular election cycle) to come up with an appropriate dramatically reduced signature requirement to account for the injury from the truncated schedule.

In *Swanson v. Worley*, 490 F.3d 894, 904 (11<sup>th</sup> Cir. 2007), tellingly, this Court upheld Alabama's 3% signature requirement in a regular election cycle, persuaded in large part by purported "alleviating factors" that attend the signature requirement in a regular election cycle. The single "alleviating factor" that this



Court found most significant was “unlimited time” Alabama allows for a petitioning candidate “to conduct the petitioning effort” in a regular election cycle.

This Court explained that, based on this factor, “while there is a deadline for collecting signatures, there is no required start date or limited period for collecting signatures.” *Id.* The Court chose to add its own emphasis to this factor by italicizing it. *Id.* Obviously, this “alleviating factor” does not exist at all for a truncated schedule Special Election and, in fact, the converse applies. There is a severely limited time frame for collecting signatures and no advance start-up time to organize a signature drive.

This is critically significant here and places a more severe burden on Appellants in this context.

Bennett regularly has emphasized this “unlimited” time frame for petitioning in a regular cycle as a major “alleviating factor” in the burden otherwise created by Alabama’s ballot access legislative scheme. In the instant case, Bennett never mentioned it - not even to at least acknowledge the increased burden the very limited time frame attending a Special Election causes, in contrast to a regular election cycle.

The logical conclusion of the Secretary’s argument, in contradiction of every truncated election schedule case cited, is that it makes no constitutionally

cognizable difference if one is required to collect over 6,000 signatures in 2 years or in 2 months and while the legislature intended for there to be no start time, there need be no accommodation made when a start time is imposed severely limiting the collection period.

Without exception, each such case has recognized the differentiation between regular cycle and Special Election cycle burdens and has modified the requirements accordingly based on such differentiation.

**Plaintiffs Will Suffer Irreparable Harm if Mr. Hall is Not Placed on the Ballot**

Clearly, for an otherwise qualified candidate to be wrongfully denied an opportunity to appear on the ballot and to deny citizens who would have voted for him that opportunity constitutes irreparable harm. *Jones*, 921 F. Supp. 2d at 901; *Swanson v. Bennett*, 219 F. Supp. 2d 1225, 1233-34 (M.D. Ala. 2002)(Same and noting no adequate remedy at law for such a deprivation).

It is patently clear that the denial of a place on the ballot in an election that is imminent constitutes irreparable harm to the candidate, his party and his prospective voters. The moment of opportunity to campaign for and win election to this public office is transitory and cannot be recreated at a later date.

In a similar case involving a motion for preliminary injunctive relief filed by petitioners seeking to have their candidate placed on the ballot, this Court agreed,

noting that, “even the temporary deprivation of First Amendment rights constitutes irreparable harm in an injunction suit.” *Johnson v. Cook County Officers Electoral Bd.*, 680 F. Supp. 1229, 1232 (N.D. Ill. 1988), citing *Citizens for a Better Environment v. City of Park Ridge*, 567 F.2d 689, 691 (7<sup>th</sup> Cir. 1975). *Accord Marion County Committee of Indiana Democratic Party v. Marion County election Bd.*, 2000 WL 1206740 \*11 (S.D. Ind. Aug. 3, 2000)(Unpublished) (“Exclusion of an otherwise-qualified candidate from the ballot would amount to irreparable harm to plaintiff, its candidate, and its members.”)

The lower court found in favor of Hall and Moser on this prong. [11/13/13 Tr. at 59]

**A Balancing of the Equities Here Requires Granting the Injunction**

A balancing of the hardships indisputably favors expeditiously granting the requested preliminary injunction. Putting Mr. Hall on the ballot “will not create any arduous obligations for the State,” *Swanson v. Bennett*, 219 F. Supp. 2d at 1234. Hall has shown more than a modicum of support, filing almost 3,000 signatures in fraction of the time provided in a regular election cycle and he is a man who has served his country as a United States Marine. His inclusion creates no ballot overcrowding problem. He deserves to be given a chance to stand for this office and to effectively campaign for it and the voters deserve the opportunity

to vote for him. Bennett has had more than ample opportunity to verify Hall's signatures and, indeed, requiring less signatures would ease the verification burden.

Bennett offered nothing more than generalized interests below, which surely do not and cannot suffice to justify the severe burden imposed by the truncated schedule.

Bennet makes a most extraordinary assertion with respect to purported state interests in this case - an assertion which flies in the face of long settled authority from this Court and the Supreme Court. At DE 28, pages 5-6, he asserts that the State has no obligation to prove or justify any claimed interests supporting its ballot access restrictions - "The State is only required to articulate its interests, and the Secretary did so." He dismisses out of hand this Circuit's decision in *Bergland v. Harris*, 767 F.2d 1151 (11<sup>th</sup> Cir. 1985) and argues that the Supreme Court made clear what he claims to be the state of the law on this issue, just a year later in *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-96 (1986). [Doc. 28 at 6]

The Secretary's position seems to provide a true *raison d'être* for Justice O'Connor's admonition in *Clingman v. Beaver*, 544 U.S. 581, 603 (2005), that courts must be very leery of proffered interests and consider whether they are really offered to advance compelling/important State interests applicable to the

underlying situation and justifying the burden created or interests intended instead to serve the goals of the dominant political parties.<sup>9</sup>

While it is not clear what exactly the quote from *Munro* on which Defendant relies means, in light of authority from the Supreme Court and this Circuit both before and after *Munro*, it is absolutely clear that it does not give the Defendant the license he claims to have - to merely articulate whatever interests he likes, with no obligation to justify them, prove them, or show even how they are fostered by the restriction at issue. This is especially true in a case with a significant burden like that presented by this truncated schedule in combination with the signature requirement.

First of all, *Munro* itself does not purport to eliminate altogether the burden on a state to justify its ballot access restrictions. Instead, *Munro* merely restates *Anderson's* unobjectionable proposition that **reasonable** ballot access restrictions generally will be upheld. Both cases likewise indicate that restrictions that significantly impinge on protected rights are valid only if supported by significant

---

<sup>9</sup> “Although the State has a legitimate role - and indeed critical - role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefits.” *Clingman v. Beaver*, 544 U.S. at 603 (O’Connor, J., concurring).

justification. *See Munro*, 479 U.S. at 195-96; *Anderson*, 460 U.S. at 788-89 and 806.

Indeed, in a case citing *Munro*, the Fifth Circuit wrote, “It is clear that the Supreme Court has consistently required a showing of necessity for significant burdens on ballot access.” *Pilcher v. Rains*, 853 F.2d 334, 337 (5<sup>th</sup> Cir. 1988)(also requiring evidence on necessity). *Anderson* rejected the notion of complete deference to state legislatures, and made clear that any attempted justification of a significant burden will be strictly scrutinized. *Munro* in no way disturbs that.

Additionally, the idea that this Circuit has abandoned the principles for which *Bergland* has been cited, is directly belied by the later decision in *Fulani v. Krivanek*, 973 F.2d 1539, 1546 (11<sup>th</sup> Cir. 1992)(characterizing the second step in the Court’s analytical process to be to “‘identify **and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.**’ determining ‘**the legitimacy and strength of each of those interests.**’” (Emphasis added), *quoting from Anderson*, 460 U.S. at 789 (Emphasis added). The Court in *Fulani* lambasted the State for “plucking” its purported interests “from other cases without attempting to explain how they justify” the burden the underlying restrictions imposed. *Id.* at 1546.

The very case from this Circuit to which Bennett cites as supporting his thesis on this point and which does, indeed, include the quote from *Munro* that Defendant relies on in its opinion, *Swanson v. Worley*, 490 F.3d 894, 902-903 (11<sup>th</sup> Cir. 2007)[DE 28 at 6], also makes it abundantly clear when read *in toto* that the selected quote does not in any way give Bennett the license he claims to have.

The Court in *Swanson v. Worley* wrote that after considering the “character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the [candidate] seeks to vindicate,” “[the court] then must identify and **evaluate the precise interests put forward by the State as justification for the burden imposed by its rule.**” **“In making this evaluation, a court must ‘determine the legitimacy and strength of [the State’s] interests [and] consider the extent to which those interests make it necessary to burden the [candidate’s] rights.’**” “A court then must weigh all these factors to determine if the statute is constitutional.” *Swanson*, 490 F.3d at 902-903 (citations omitted)(Emphasis added).

The Court then goes further and expresses the well known principle that “if the state election scheme imposes “severe burdens” on the plaintiffs’ constitutional rights, it may survive only if it is “narrowly tailored and advance[s] a **compelling state interest.**” *Id.* at 903 (citations omitted). This is a far cry from

the Secretary's assertion that he need only "articulate" the State's interests and the inquiry ends there.

Suffice it to say that there are several ballot access decisions from the Supreme Court post-dating *Munro* that completely tear asunder Defendant's broad reading of its license with respect to its interests and its notion that any articulated interests, once articulated, are not to be subjected to scrutiny, or that the State cannot be made to justify them or prove some relationship to the restriction at issue. See e.g., *Norman v. Reed*, 502 U.S. 279 (1992)(Applying strict scrutiny to State's purported interests and requiring least restrictive means to advance any legitimate interests).

Again, the most recent decision from the Supreme Court in this area of the law makes clear that a court in no way is to merely be satisfied simply by the State's articulation of its purported interests and go no further. In *Clingman v. Beaver*, 544 U.S. 581, 603 (2005)(O'Connor, J., concurring), at least 5 Justices subscribe to the principle that as a ballot access restriction increases in the burden it imposes on the candidate or voter's constitutional rights, scrutiny of the purported state interests supporting the restriction are subjected to increasingly heightened scrutiny to insure "... that the State's asserted interests are not merely a pretext for exclusionary or anti-competitive restrictions."



At DE 28, Pages 6-7, Bennett argues that the equities favor denying placing Mr. Hall on the ballot because a set of UOCAVA ballots already has gone out without his name on them, and adding his name to a later round of ballots that would go out would put Defendant out of “perfect compliance” with the Act because it would render the first set that went out incomplete. With all due respect, this is complete nonsense and an utter fiction. It also should be waived as a purported interest, given Bennett’s opposition to Hall and Moser’s Motion to Consolidate, which was filed to try to avoid just such a problem.

As Bennett acknowledges, the first set of ballots it sent out on November 2, 2013, was not and could not have accurately reflected the candidates who are actually standing for election in the general Special Election to be held on December 17, 2013. That is because the Republican primary runoff which the Governor scheduled was not held until November 5, 2013. The State sent out UOCAVA ballots nevertheless in purported compliance with the 45 day rule. That ballot had at least one person on it - the loser in the Republican primary - who will not actually be a candidate in the general Special Election. This was, therefore, neither an accurate nor a “complete” ballot. It was a fictional compliance with the Act agreed upon by the parties and if it can serve as a “placeholder” for UOCAVA

compliance for the later ballots that accurately list the Democrat and Republican candidates, it can do so for an independent candidate as well.

In addition, Bennett has put on no evidence of the number of overseas absentee voters there are for this Special Election and Mr. Hall already has agreed to waive his inclusion on the UOCAVA ballot to meet any administrative concern if that is necessary, so long as he appears on the ballots that are used at the polls.

The “balance of equities” part of the test essentially means weighing “the irreparable harm the nonmovant will suffer if preliminary relief is granted, balanced against the irreparable harm to the movant if relief is denied,” *Stewart v. Taylor*, 104 F.3d 967, 968 (7<sup>th</sup> Cir. 1997); in other words, will the injunction “do more good than harm.” *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7<sup>th</sup> Cir. 2009). The balance of equities in the case at bar strongly favors Hall and Moser. As in Swanson and *Johnson, Supra.* the impact on Defendant would be virtually nothing.

In any event, neither its purported generalized interests, nor the statutory OACAVA demands justify imposing the severe burden the truncated schedule imposes on Appellants.

**Granting the Injunction Strongly Serves the Public Interest**

And finally, expeditiously putting Mr. Hall on the ballot would not be adverse to the public interest. “There is no public interest in preserving an exclusively two-party ballot or excluding qualified candidates” and there would be no burden in terms of overcrowding or otherwise from including this one independent candidate on the ballot. *Jones*, 921 F. Supp. 2d at 902. As in *Swanson v. Bennett*, 219 F. Supp. 2d at 1234, “[T]he constitutional violations described herein touch upon the public’s general right of political association and right to vote, and the preservation of such rights through injunctive relief is not contrary to the public’s interest.”

The interests of justice and fundamental fairness require granting an injunction to ensure that Mr. Hall is on the Special Election ballot and “justice delayed” would be “justice denied.”

Again following the reasoning of this Court in *Johnson*, “there would be no harm to the public interest of issuing the injunction and thereby compelling the Board to place [Plaintiff’s] name on the ballot.” *Id.* While the people of Alabama have an interest “in an orderly procedure by which qualified persons seeking public office may enter elections,” those interests are served by the instant challenge to the constitutionality of the Alabama law. *Id.* On the other hand, the

public does *not* have an interest in seeing qualified persons kept off the ballot. *Id.* “Thus, if this Court determines that plaintiffs’ constitutional rights may have been infringed, the public interest, if anything, supports granting the preliminary relief which plaintiffs’ now seek.” *Id. Accord Marion County* at \*11. (“if exclusion of a late-nominated candidate violated the Constitution, the public interest would favor an injunction adding such a candidate to the ballot.”).

**The Lower Court Applied an Incorrect Legal Standard  
and Its Conclusion was Incorrect**

At the conclusion of oral argument on Hall and Moser’s Motion for injunctive relief, the district court issued its oral order. The court advised that (1) Hall did not show a “substantial likelihood of success on the merits in showing that the time period he had for gaining signatures imposed a severe burden on his First and Fourteenth Amendment rights” [Tr. at 59]; (2) Hall will suffer irreparable harm absent the injunctive relief [*Id.*]; (3) Hall failed to show that the harm to him outweighed the harm to the state [Tr. at 59-60]; and (4) “granting the injunction is against the public interests” [Tr. at 60].

The oral order alone does not give a great deal of insight into the legal standard the court applied or the basis for his decision. One must read the entire,

relatively short transcript to recognize the errors in the legal standard the court applied and the incorrect analysis used to arrive at an incorrect conclusion.

The transcript read as a whole makes it clear that the district court based its decision on its finding that, notwithstanding all of the completely un rebutted factual evidence of the actual burden Appellants faced from the combination of the 3% regular election signature requirement and the severely truncated schedule, and notwithstanding its express recognition that the burden on an independent candidate in a Special Election is greater than in a regular election cycle (“unlimited time” vs. 56 or 106 days), because in the Supreme Court’s 1971 decision in *Jenness v. Fortson*, 403 U.S. 431 (1971) a signature requirement of 5% of eligible voters in 180 day period was upheld, the burden in the instant case cannot be “severe.”<sup>10</sup> This legal standard is absolutely incorrect for several reasons.

First, it is the epitome of the “litmus test” approach the Supreme Court expressly has prohibited. *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Bergland v. Harris*, 767 F.2d 1551 (11<sup>th</sup> Cir. 1985). *See also, Jones v. McGuffage*, 921 F.

---

<sup>10</sup> The only argument made by Bennett during the hearing on whether the burden was severe was that, while the burden in a Special Election admittedly is greater than in a regular election cycle, it is not “severe” because it purportedly is not as onerous as what was upheld in *Jenness*. [Tr. at 34, 35, 41]

Supp. 2d 888, 896-898 (N.D. Ill. 2013); *Parker v. Barnes*, No. 1:02-cv-1883-BBM at 9-10 (N.D. Ga., July 30, 2002). The court acknowledged that the actual uncontroverted evidence in the case showed the “incredible” lengths to which Hall went to try to obtain the signatures within the truncated time frame; [Tr. at 23, 31] but it ignored all of that evidence ultimately in favor of finding that the burden here could not be “severe” because it purportedly is less than in *Jenness*.

In addition to violating the prohibition against using a “litmus test,” and all of the reasons a court is not permitted to compare apples and oranges, but must look instead to the record facts and circumstances of the case at issue, the court erred in its understanding that a burden must be “severe” to support a finding of a First and Fourteenth Amendments violation, such that anything less than “severe” (a very imprecise term altogether) is constitutional - without regard even to the purported justifying state interests.<sup>11</sup>

---

<sup>11</sup> Hall insisted at the hearing that the court must consider a “sliding scale” analysis, such that, whether or not it finds the burden to be “severe,” it must still weigh the burden against the purported state interests, with a greater burden requiring a more important or substantial justifying state interest per the decision in *Clingman v. Beaver*, 544 U.S. 581, 592-93 (2005). Even Bennett acknowledged this in his submission, DE 28 at 2; but the court appears to have concluded that a burden has to be established as “severe” in order for the ballot access restriction to be unconstitutional, and “severe” is to be defined by something more onerous than the requirement in *Jenness* in Georgia in 1971.

The recent decision in the factually very similar case of *Jones v. McGuffage*, 921 F. Supp. 2d 888 (N.D. Ill. 2013) makes it abundantly clear that a “litmus test” approach, rather than one which focuses on the particulars of the election at issue is not permitted. It also demonstrates clearly that one need not show a “severe” burden in order to obtain this kind of injunctive relief. In doing so, it simply reiterates what the Supreme Court has made clear for decades since *Jenness*. Indeed, an analysis of *Jenness* demonstrates that the *Jenness* Court itself did not and would not permit such a “litmus test” approach.

Moreover, the cases since *Jenness* that have struck down as unconstitutional signature requirements and time frames that are less onerous than the requirements in *Jenness* are legion, providing further proof that the legal standard used in the lower court is not permitted.

Indeed, in *McLain v. Meier*, 637 F.2d 1159, 1163 (8<sup>th</sup> Cir. 1980), the Court expressly considered and rejected the argument that it should find constitutional the ballot access restriction at issue (3.3%) was less onerous than the signature requirement upheld in *Jenness*. The Court rightly concluded that instead it had to engage in an analysis that focused on the facts and circumstances at issue for the specific election at issue at that time in that State. *Id.*, citing, *inter alia*, *Mandel v. Bradley*, 432 U.S. 173 (1977).

The uncontroverted record in the instant case unquestionably establishes that the burden imposed on an independent candidate and his/her supporters by applying the regular election 3% signature requirement on a severely truncated Special Election cycle, whether 56 or 106 days (vs. an “unlimited” period of time) is severe and, based on the record evidence, is virtually impossible. Even if it is something less than severe, however that term is defined, it is far greater than the regular election cycle burden. Hall’s Herculean efforts were acknowledged by the court as “incredible” [Tr. at 31] and an accommodation must be made, consistent with all of the truncated election schedule cases cited herein.

The lower court applied an incorrect and, indeed, prohibited legal standard, at the Secretary’s urging and arrived at an incorrect conclusion, which this Court must reverse.

The lower court’s additional conclusions on the last two prongs of the test for a preliminary injunction - that it is too late to issue the injunction because the election has started since an OACAVA ballot has gone out (with at least one candidate on it who is not even on the general election ballot) - and that that outweighs the harm to Hall and Moser or that the public interest and the interests of the Democratic and Republican candidates weigh against granting the



injunction at this point are just plain wrong for reasons, among others, addressed herein in the discussion under those prongs.

### **CONCLUSION**

Based on all of the foregoing and the record evidence in this case, it is respectfully submitted that lower court's decision must be reversed, immediate injunctive relief must be order, and the Secretary must be ordered to take all steps necessary to immediately place Mr. Hall on the general Special Election ballot for the seat at issue, based on the signatures Mr. Hall filed by September 24, 2013.

/s/ David I. Schoen  
Counsel for Appellants

David I. Schoen  
Attorney at Law  
2800 Zelda Road, Suite 100-6  
Montgomery, Alabama 36106  
(334) 395-6611  
[DSchoen593@aol.com](mailto:DSchoen593@aol.com)

# **ADDENDUM**

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
GAINESVILLE DIVISION

MARLON MIGALA, et al.,

Plaintiffs,

v.

CASE NO. 89-40168-MMP

BOB MARTINEZ, et al.,

Defendants.

---

O R D E R

This cause comes before the court upon plaintiffs' complaint (Doc. 3) and request for expedited ruling (Doc. 7). Plaintiffs' request for expedited ruling is GRANTED. This court conducted a hearing on August 4, 1989, in which the parties were allowed to present evidence and argument. This court finds that Florida's statute for minor party access to the ballot is unconstitutional as applied to these plaintiffs under the circumstances described below. Therefore, the relief requested in plaintiffs' complaint is GRANTED to the extent discussed below.

FILED

12/02/13  
OFFICE OF CLERK  
U. S. DISTRICT COURT  
NORTH, DIST. FLA.

#### THE FACTS

On May 30, 1989, Congressman Claude Pepper died, leaving Florida's 18th Congressional District without representation in Congress. On June 6, 1989, Governor Martinez announced that a special election would be held on August 29, 1989, to fill the vacant seat. Executive Order 89-113. Also on June 6, 1989, Florida's Secretary of State issued a memorandum setting 8 a.m. June 19, through noon June 20, 1989, as the qualifying dates for special election candidates.

On June 7, 1989, plaintiff Paula Zimmer, Chairperson of the Libertarian Party of Florida, telephoned the office of Secretary of State and was told that there would not be enough time for a candidate to qualify for the special election by petition. Later that day, another person from the Secretary of State's office, Barbara Robinson, telephoned Zimmer and stated that 5,525 valid signatures and a filing fee of \$2,685 would be required for candidates to qualify for the special election by petition. Zimmer Affidavit paragraphs 2-3.

On June 9, 1989, Robinson again telephoned Zimmer and stated that petition forms would be sent upon receipt of the signed oath required of candidates for office. Plaintiff Marlon Migala signed the oath which was sent Federal Express to the Secretary of State and received by that office on June 13, 1989. No petition forms were sent by the office of

the Secretary of State. Instead, an affidavit of undue burden was mailed by regular mail on June 15, arriving in Miami on June 21, 1989. Zimmer Affidavit paragraphs 4-6. The June 20 qualification deadline passed.

On June 21, plaintiffs created their own, unofficial petition forms. Plaintiffs collected a total of 547 signatures on June 23-24 and July 8-9. Zimmer Affidavit paragraphs 7-8. To this date, the Secretary of State still has not provided official petition forms to plaintiffs.

#### THE LAW

The right of a candidate to be placed on the ballot is protected by the Constitution. Hadnott v. Amos, 394 U.S. 358, 364 (1969). Florida's election laws provide an avenue through which minor party and independent candidates may be placed on the ballot for general elections. Fla. Stat. section 99.0955 (independent candidates); Fla. Stat. section 99.096 (minor party candidates). A minor political party may have the names of its candidates placed on the ballot for offices elected on a less than a statewide basis:

if such petition requesting that the party be assigned a position on the general election ballot is signed by 3 percent of the registered electors of the district, county, or other geographical entity represented by the office, as shown by the compilation by the Department of State for the last preceding general election.

Fla. Stat. section 99.096(1). The form of the petitions is prescribed by the Department of State, and petitions "shall



be provided by the Department of State." Fla. Stat. section 99.096(2) (emphasis added). Generally, minor parties have about 180 days in which to obtain signatures for petitions. See Fla. Stat. section 99.096(3).

If the period for gathering petition signatures is severely reduced, minor party candidates effectively are denied access to the ballot in violation to the first and fourteenth amendments of the Constitution. See Citizens Party of Georgia v. Poythress, Case No. 82-8411 (11th Cir. July 14, 1982) (time reduced from 180 days to 50); Turin v. State of Florida, Case No. 82-1819-Civ-SMA (S.D. Fla. Sept. 13, 1982) (no time to qualify before the deadline).

#### APPLICATION OF THE LAW

Under the unique circumstances of this case, access to the ballot has been completely denied to plaintiffs in violation of the first and fourteenth amendments of the United States Constitution. Plaintiffs were given only 14 days, instead of the normal 180, in which to qualify by petition. The inadequacy of this shortened qualifying period does not even take into account the fact that to this day, the Department of State has failed to provide petition forms as required by statute.

This case is distinguished from the one presented to the court in Coonan v. Smith, Case No. 89-1232-Civ-Nesbitt (S.D. Fla. June 16, 1989) (order denying preliminary injunction). Coonan was attempting to qualify as a major

party candidate (Democrat) in the special election to fill Claude Pepper's seat. Coonan could have paid \$4,475 or submitted petitions signed by 3,001 registered Democrats of the 18th District. Coonan asserted that the shortened filing time violated the first and fourteenth amendments and adversely affects serious candidates who are unable to pay the filing fee, but does not affect frivolous candidates who have money. The court found that Coonan's efforts to meet the statutory requirements for placement on the ballot were "somewhat less than energetic." Coonan at 5. Coonan's lack of energetic pursuit caused the court to give little weight to her asserted injury compared to the strength and legitimacy of the state's asserted interests. Id. at 3-5 (citing Bergland v. Harris, 767 F.2d 1551 (11th Cir. 1985) (requiring balancing test for ballot access restrictions)).

Plaintiffs in this case have pursued access to the ballot vigorously. Furthermore, they have only one avenue of access to the ballot -- petition -- unlike Coonan, who could pay a fee or petition. Also unlike Coonan, plaintiffs have never received official petition cards. Plaintiffs have a substantial likelihood of success on the merits. Every avenue of access was blocked despite their good faith efforts to get on the ballot.

Under these circumstances, plaintiffs' irreparable injury of being barred from the ballot outweighs the state's interest in orderly elections. Ballots cannot be printed

until after the second special primary scheduled for August 15, 1989. Allowing plaintiffs additional time and reducing the number of required signatures should not substantially delay printing of the ballots in time for the August 29th election. In addition, the integrity of the election can be preserved by requiring plaintiffs to submit a reduced number of signatures.

An injunction in this case would be in the best interest of the public. Therefore, it is ORDERED that a preliminary injunction is issued as follows:

1. The Florida Department of State shall provide petition cards to plaintiffs as soon as reasonably possible.

2. Plaintiffs shall have until noon August 16, 1989, to submit to the appropriate supervisor of elections the prescribed number of petition signatures for verification on an expedited basis, but otherwise in accord with Florida Statutes section 99.096.

3. The number of signatures required shall be reduced to one percent of the registered electors of the 18th Congressional District as shown by the compilation by the Department of State for the last preceding general election. The court recognizes that this number is not precise, but would indicate a sincere effort by a serious candidate.

4. Upon verification of the appropriate number of petition signatures and the candidate's meeting all other requirements by noon August 16, 1989, for placement on the



ballot, the name of the Libertarian Party's candidate shall appear on the special election ballot.

DONE AND ORDERED this 7TH day of August, 1989.

  
United States District Judge

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

FILED IN CLERK'S OFFICE  
U.S.D.C., Atlanta

JUL 30 2002

LUTHER D. THOMAS, Clerk  
By: *[Signature]* Deputy Clerk

WAYNE PARIER, HELMUT  
FORREN, DANIEL W. BROWN,  
DAVID CENTER, CHAD  
ELWARTOWSKI, JOHN L.  
HOUMAN, KERRI FULLER,  
WILLIAM W. GARDIN, GARY  
HOLDER, MERRELL L. MATLOCK,  
JR., CAROLE ANN RAND,  
WILLIAM D. PEPPER, LORENZO  
THOMSON, MARGARET  
THOMSON, JAMES W. HARRIS,  
PAMELA P. POTTER and THE  
LIBERTARIAN PARTY OF  
GEORGIA,

Plaintiffs,

v.

ROY BARNE: GOVERNOR OF THE  
STATE OF GEORGIA, and CATHY  
COX, SECRETARY OF STATE OF  
THE STATE OF GEORGIA,

Defendants.

CIVIL ACTION

NO. 1:02-CV-1883-BBM

ORDER

The plaintiffs have moved for a preliminary injunction [Doc. No. 4-1] requesting that the court order that the names of Libertarian Party candidates for the United States House of Representatives for the Third, Seventh, Eighth, Ninth and Eleventh Districts of Georgia (the "candidates") be printed on the ballots in

that the Secretary of State for the State of Georgia (the "Secretary") be ordered to have such name printed on the ballots if the candidates are able to provide the Secretary with a equitably reduced number of signatures on a petition for each such district.

### Factual and Procedural Background

As a result of the 2000 decennial census, Georgia's representation in the United States House of Representatives (the "House") was increased from 11 to 13 seats. Accordingly, on September 28, 2001, Georgia's General Assembly adopted legislation reapportioning its congressional districts, which legislation was signed into law by Governor Roy Barnes on October 1, 2001.

Because the State of Georgia (the "State") is covered by Section 5 of the Voting Rights Act of 1965, the reapportionment plan had to receive "preclearance" from the U.S. Department of Justice before it could take effect.<sup>1</sup> On October 10, 2001, the State filed an action in the U.S. District Court, District of Columbia, requesting a declaratory judgment that Georgia's reapportionment plan "[did] not have the purpose and [would] not have the effect of denying or abridging the right to vote on account of race or color." On April 5, 2002, the

---

<sup>1</sup> The historical purposes of and obligations imposed by Section 5 are amply explained in Georgia v. Ashcroft, 195 F. Supp.2d 25, 29-31 (D.D.C. 2002).



reapportionment plan which set forth the new House districts.

At some point prior to or while such proceedings were pending in Washington, the Libertarian Party of Georgia (the "Party") decided to field candidates for election to the new Third, Seventh, Eighth, Ninth and Eleventh districts. One of the plaintiffs, Dr. Helmut Forren, chairman of the Party ("Dr. Forren"), obtained detailed maps of the new congressional districts from Georgia's Legislative and Congressional Reapportionment Office (the "Reapportionment Office") and access to the Reapportionment Office's website, which provided interactive and demographic data showing the districts' boundaries overlaid with major roadways, bodies of water, zip codes, county boundaries and voting precincts. Dr. Forren also began to oversee efforts to obtain petition signatures in such districts in order to allow the Party's candidates to appear on the November ballots.

Thereafter, before preclearance was granted, but no later than February 2007, Dr. Forren began corresponding with Linda W. Beazley ("Ms. Beazley"), the Director of the State's Elections Division (a division in the office of the Secretary). In his correspondence, Dr. Forren requested "relief" from the number of signatures which would ordinarily be required of a third-party or

Ms. Beazley respectfully refused this request as well as a number of similar requests brought by Dr. Forren over the next several months, indicating lack of authority. In various letters over the ensuing months, however, Ms. Beazley did provide Dr. Forren and the Party's candidates with the number of signatures each would be required to produce with their petitions in order to be listed on the ballots in such districts.<sup>2</sup> During this time, Dr. Forren also repeatedly attempted, without success, to obtain firm voter registration data for the districts in which the Party's candidates were running.

The last correspondence between Ms. Beazley and Dr. Forren during this period is dated June 25, 2002. In this letter, Ms. Beazley provided the following data, based on information she obtained from the Reapportionment Office, regarding the total registered voters and the numbers of valid signatures that would be required as to each district in which the Party is fielding a candidate:

---

<sup>2</sup> At the time went by, the number to be required in at least one district, the Eleventh, changed three times: from 15,874 signatures to be required per a letter from Ms. Beazley dated March 11, 2002; to 19,410 signatures per a letter dated June 12, 2002; to 17,337 per another, later letter dated June 12, 2002; and finally, to 14,337 signatures, per Ms. Beazley's letter dated June 25, 2002, more fully described below.

Third	305,435	15,272
...		
Seventh	311,226	15,561
Eighth	328,983	16,449
Ninth	320,675	16,034
...		
Eleventh	286,730	14,337

In this letter, Ms. Beazley also instructed Dr. Forren to disregard earlier, conflicting information provided by her office.

On July 1, 2002, the plaintiffs—Party candidates for the above-referenced districts, voter loyal to the Party residing in such districts, and the Party itself (the “plaintiffs”)—filed the present action, seeking from this court the following relief: (1) an “inquiry” into ballot access for Party congressional candidates in Georgia in the 2002 election year; (2) a revised deadline for the payment of the \$4,353 fee required to be paid by any candidate who wishes to qualify to appear on the November 5, 2002 ballot (the “ballot”); (3) injunctive relief permitting Party candidates automatically to appear on the ballot upon payment of the \$4,353 qualifying fee on the deadline specified by the court; (4) any other relief



in the [plaintiff's] "Complaint"; (5) a declaration that Georgia's ballot access law is unconstitutional as applied to this year's election; (6) an award to the plaintiffs of "reasonable attorneys fees, expert witness fees and expenses and costs" of bringing the present action; and (7) "other and further declaratory and injunctive relief as may seem fit and proper to" the court. Concurrently with their complaint, the plaintiffs also filed an "Emergency Motion for Preliminary Injunction and Expedited Hearing." This hearing was held on July 26, 2002, permitting testimony and argument on the plaintiffs' motion for preliminary injunction. The court now considers this motion.

#### Discussion

The Libertarian Party of Georgia is, according to Georgia law, a "political body," which is to say, a third party which has not won a significant portion of the vote in the most recent presidential or gubernatorial elections. Ga. Code Ann. § 21-2-2 (23), (24) and (25). In order for its candidates to appear on a ballot for a congressional election, therefore, it must submit petitions in accordance with the following provisions:

[a] nomination petition of a candidate for [non-statewide] office shall be signed by a number of voters equal to 5 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking and the signers of such

petition and be registered and eligible to vote in the election at which such candidate seeks to be elected. However, in the case of a candidate seeking an office for which there has never been an election or seeking an office in a newly constituted constituency, the percentage figure shall be computed on the total number of registered voters in the constituency who would have been qualified to vote for such office had the election been held at the last general election and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected.

Ga. Code Ann. § 21-2-170(b). A voter who signs such a petition must, in addition, "declare therein that he or she is a duly qualified and registered elector of the state, county, or municipality entitled to vote in the next election for the filling of the office sought by the candidate supported by the petition." Ga. Code Ann. § 21-2-170(c). Signatures can only be collected during the 180-day period preceding the qualifying deadline. Ga. Code Ann. § 21-2-170(e). This year, this 180-day period began on February 6, 2002 and ends on August 5, 2002.

The plaintiffs object to these requirements due to circumstances presented in the current election year. The plaintiffs contend that they effectively lost the first 60 days of the 180-day period in which they were permitted by Georgia law to obtain petition signatures. This is true, they argue, because until the reapportionment plan was approved by the order of the court in Washington, there was no certainty regarding the districts' actual boundaries, and therefore no certainty regarding which voters were in fact qualified to sign any given



petition. The plaintiffs have therefore requested injunctive relief in one of the following form: (1) that they be excused entirely from complying with the petition requirements, needing instead only to pay the qualifying fee as to each candidate, or (2) that the number of required petition signatures be reduced proportionately to account for the first 60 days in the 180-day period during which time, according to the plaintiffs, their ability to collect signatures was curtailed by uncertainty surrounding the reapportionment plan.

"The chief function of a preliminary injunction is to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated." Northeastern Fla. Ch. of the Ass'n of Gen. Contractors of America v. City of Jacksonville, 896 F.2d 1283, 1284 (11th Cir. 1990) (citing American Radio Ass'n v. Mobil Steamship Ass'n, Inc., 483 F.2d 1, 4 (5th Cir. 1973)). The court may not issue a preliminary injunction unless the plaintiffs are able to establish the following four factors:

- (1) a substantial likelihood that plaintiff[s] will prevail on the merits,
- (2) a showing that plaintiff[s] will suffer irreparable injury if an injunction does not issue,
- (3) proof that the threatened injury to plaintiff[s] outweighs any harm that might result to the defendants, and

Id. at 1284 (citing Cunningham v. Adams, 808 F.2d 815, 819 (11th Cir. 1987)).

"The preliminary injunction is an extraordinary and drastic remedy not to be granted until the movant 'clearly carries the burden of persuasion' as to the four prerequisites. 'The burden of persuasion in all of the four requirements is at all times upon the plaintiff.'" Id. at 1285 (citing United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983)). "[P]reliminary injunctions of legislative enactments—because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits—must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts." Id.

Here, the plaintiffs have been able to meet their burden of persuading the court that all four factors necessary for a preliminary injunction to issue are indeed present.

First, the court finds that there is a "substantial likelihood" that the plaintiffs will prevail on the merits of their case. Although the Supreme Court has upheld Georgia's ballot access law as constitutional, its ruling was based, at least in part, on a third-party candidate's ability to "seek, over a six months'



period, the signatures of 5% of the eligible electorate for the office in question." *Jennness v. Fortson*, 403 U.S. 431, 438 (1971). At least one subsequent decision of the Supreme Court failing to hold a ballot access provision constitutional did rely, at least in part, on a finding that the period of time in which a third-party or independent candidate was able to collect signatures was limited, given the number of signatures to be gathered. See *Storer v. Brown*, 415 U.S. 724 (1974). In the Eleventh Circuit, moreover, there is precedent which encouraged injunctive relief from the requirements of Ga. Code Ann. § 21-2-170 in an election year following a census, where the reapportionment plan was not approved until 130 days into the 180-day signature-gathering period. See *Citizens Party of Georgia v. Poythress*, No. 82-8411, slip op. at 2 (11th Cir. 1982), *table disposition published at* 683 F.2d 418 (11th Cir. 1982); see also *Libertarian Party of Ga. v. Harris*, 644 F. Supp. 602, 606 (N.D. Ga. 1986) (Hall, J.) (describing the district court's decision on remand of *Citizens Party* to extend the 180-day period by an additional 30 days since "plaintiff had not known which streets or houses to canvass" during the period before the reapportionment plan was precleared). The court finds that the facts before it today are sufficiently similar to those in *Citizens Party* that there exists a "substantial likelihood" that the plaintiffs will be able to prevail on the merits.

Second, the court finds that the plaintiffs have shown that they "will suffer  
Case: 13-15214 Date Filed: 12/02/2013 Page: 92 of 111

irreparable injury if an injunction does not issue." "An injury is 'irreparable' only if it cannot be undone through monetary remedies." Cunningham, 808 F.2d at 821 (citing Cate v. Oldham, 707 F.2d 1176, 1189 (11th Cir. 1983). No monetary remedies are available to the plaintiffs if they are ultimately able to prevail on the merits. Furthermore, no other remedy will be available to the plaintiffs after August 5 if they are not able to have their petitions evaluated at that time. If the plaintiff candidates' petitions are submitted after August 5, there may not be sufficient time for the Secretary to verify the signatures that they do have, or, thereafter, to have the candidates' names included on the ballots which will need to be sent ahead of time to absentee voters.

Third, the plaintiffs have adequately shown that the injury which may result from their being prevented to submit a reduced number of petition signatures far outweighs the burdens to the State as a result thereof. The Supreme Court has held that

[t]here 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.



continuing justification for the State's ballot access laws. Since this court's order will require the plaintiffs to produce petition signatures equivalent to two-thirds that normally required, or approximately 3⅓% (instead of 5%) of the voters in each district who would be entitled to sign the petition, the only "harm" which might result to the defendants is that they be required to validate a *lesser* number of petition signatures, a number which nevertheless reflects a "significant modicum of support" for the Party's candidates.<sup>3</sup> Such harm to the State, however, does not outweigh the harm which the candidates have suffered by virtue of the uncertainty, however minimal, which prevailed over their signature canvassing efforts during the first 60 days of the signature collection period.

Finally, the court finds that the plaintiffs have shown "that the public interest will not be disserved by" the preliminary injunction the court intends to grant herein. The plaintiffs allege, and the defendants do not dispute, that no third party or independent candidate has ever successfully petitioned to be listed on the ballot for a congressional election in Georgia. The defendants claim, however, that Georgia's ballot access laws are necessary to prevent "confusion and frustration of the democratic process" by limiting the number of candidates

---

<sup>3</sup> Indeed, the State only requires candidates for statewide office to provide petitions signed by one percent of the electorate qualified to vote in an election. Ga. Code Ann. § 21-2-170(b).

the Party's candidates are successful in providing a sufficient number of valid signatures to the Secretary in order to have their names printed on the ballots, the voters will have to consider, at most, three candidates for any given congressional seat. The court fails to see how this choice would "confus[e] and frustrat[e] . . . the democratic process" or disserve the public interest.

Accordingly, the court will GRANT the plaintiffs' motion to the extent they have been harmed,<sup>4</sup> i.e., making allowance for the fact that there was no certainty regarding the boundaries of congressional districts until 60 days into the signature-collecting period called for by Georgia law. The court will

---

<sup>4</sup> At the hearing, the plaintiffs presented evidence that, from the point of view of Dr. Forren, the difficulty of collecting signatures in gerrymandered districts warranted an additional percentage reduction in the number of signatures to be collected for each district, since voters in or near districts which had been gerrymandered were more likely to be confused about where they were qualified to vote. The court is sympathetic to the Party's frustrations in this regard and recognizes that certain forms of gerrymandering have been found unconstitutional to the extent they have a retrogressive effect on the minority vote. See, e.g., Gomillion v. Lightfoot, 364 U.S. 339 (1960). However, the plaintiffs here do not claim an impact on the minority vote. Also, although the plaintiffs allege that the districts have been drawn to perpetuate what they allege to be Democratic control of the legislative process in Georgia, the Supreme Court has held that the intentional drawing of district boundaries for partisan ends and for no other reason does not violate the Equal Protection Clause. Davis v. Bandemer, 478 U.S. 109, 138-39 (1986). The court also heard testimony that it was not exactly common in any election year for a voter to know in which district he or she is registered to vote, much less the number of his or her voting precinct. The court therefore finds that such gerrymandering difficulties are inherent in the signature gathering process, no matter what the shape of the voting districts at issue, and irrespective of the amount of time the party has to collect signatures. Accordingly, the court has made no adjustment for this factor, as the court believes that the conclusions of Jenness are fully applicable to such difficulties. Jenness, 403 U.S. at 38-39 (noting that voters may sign multiple nominating petitions, and that their signatures need not be sworn).



therefore ORDER the Secretary to accept signatures in an amount corresponding to two-thirds (because the plaintiffs had only 120 days of the 180 days to which they would otherwise have been entitled) of the number of valid signatures, as to each district, specified in Ms. Beazley's letter dated June 23, 2002.

#### Summary

The plaintiffs' motion for a preliminary injunction [Doc. No. 4-1] is hereby GRANTED as set forth below. The court hereby ORDERS the Secretary of State for the State of Georgia to have printed the names of the Libertarian Party of Georgia candidates for the United States House of Representatives for the Third, Seventh, Eighth, Ninth and Eleventh Districts if such candidates provide petitions on or by August 5, 2002 containing numbers, respectively, equal to or greater than the following numbers of valid signatures:

Third District:	10,181 valid signatures
Seventh District:	10,374 valid signatures
Eighth District:	10,966 valid signatures
Ninth District:	10,689 valid signatures
Eleventh District:	9,558 valid signatures

  
BEVERLY B. MARTIN  
United States District Judge



No. 82-8411  
Non-Argument Calendar

CITIZENS PARTY OF GEORGIA,  
DANNY FEIG, BETSY HALL, and  
JIM COONAN,

Plaintiffs-Appellants

versus

DAVID POYTHRESS, Secretary of  
State of the State of Georgia,

Defendant-Appellee.

-----  
Appeal from the United States District Court  
for the Northern District of Georgia  
-----

(July 14, 1982)

Before GODBOLD, Chief Judge, MATCHETT and CLARK, Circuit Judges.

PER CURIAM:

The Citizens Party of Georgia and Danny Feig, its candidate for state senator from Senate District 36, filed suit in United States District Court seeking, under 42 U.S.C. Section 19 and the Voting Rights Act of 1965, an injunction against enforcement of provisions of the Georgia Election Law. Under this law Feig must file a petition by the second Wednesday in July containing signatures of 5% of the voters of District 36. All of the signatures must have been obtained within 180 days before the petition is filed. The Georgia legislature redrew the boundaries of District 36, and final preclearance by the Attorney General of the district, as redrawn, was not given until May 24, 1982, at which time of the 180 allowable days to obtain signatures approximately 130 days already had elapsed.

The plaintiffs contended that this petition requirement, as applied to them under these unique circumstances, violated the Voting Rights Act of 1965 and denied Feig access to the ballot in

MAI [Signature] Q. [Signature]

violation of the First Amendment, as incorporated into the Fourteenth Amendment. The district court denied injunctive relief. It dismissed the Voting Rights Act claim on the ground that the shortening of the time for obtaining signatures was not an act enacted or sought to be administered by the state. It dismissed the constitutional claim on the ground that the act alleged to be in violation of the Constitution was at most a "garden variety" election irregularity not warranting constitutional protection, citing Duncan v. Roythress, 657 F.2d 691 (5th Cir. 1981). Plaintiffs have moved in this court for an immediate hearing and judgment requiring that Feig's name be put on the ballot. The defendant has filed his brief in opposition.

Plaintiffs' claim cannot be read, in the light most favorable to them, to assert merely a "garden variety" election irregularity under Duncan. The irregularities held in Duncan not to merit constitutional oversight involved the miscounting of ballots. The right of a candidate to be placed on the ballot, on the other hand, is protected by the Constitution itself. Hadnott v. Amos, 394 U.S. 358, 364 (1969).

For this reason, the judgment of the district court must be vacated and the cause remanded to the district court for reconsideration of its denial of relief and its dismissal of the complaint. The court may wish to consider the Supreme Court's analysis of ballot access in Mandel v. Bradley, 432 U.S. 173 (1977) and Jenness v. Fortson, 403 U.S. 431 (1971).

VACATED and REMANDED.



# UNITED STATES COURT OF APPEALS

Eleventh Circuit

## DECISIONS WITHOUT PUBLISHED OPINIONS

The following cases have been decided without formal opinion prepared for publication in the permanent law reports:

Title	Docket Number	Date of Decision	Disposition	Appeal from and Citation (if reported)
** Transport v. Goodyear	81-5118	6/29/82	AFFIRMED	S.D.Fla.
* Brown v. Wainwright	81-5999	6/29/82	AFFIRMED	S.D.Fla.
*/** McNeely v. Claytor	81-6088	6/29/82	AFFIRMED	S.D.Fla.
** Grove v. Shearson	81-5741	7/ 2/82	AFFIRMED	S.D.Fla.
** U. S. v. Johnson	81-7464	7/ 2/82	AFFIRMED	S.D.Ala.
** N.L.R.B. v. Jax Mold	81-7646	7/ 2/82	AFFIRMED	N.L.R.B.
** Abernathy v. Equifax	81-7771	7/ 2/82	AFFIRMED	N.D.Ga.
** Belcher Towing Co. v. N.L.R.B.	81-5666	7/ 6/82	REVERSED	N.L.R.B.
Maag v. U. S.	81-7145	7/ 6/82	AFFIRMED	N.D.Ga.
Warehouse v. N.L.R.B.	81-7487	7/ 6/82	AFFIRMED	N.L.R.B.
* Williams v. Wainwright	81-5808	7/ 7/82	AFFIRMED	S.D.Fla.
* U. S. v. Lewis	81-6220	7/ 7/82	AFFIRMED	N.D.Fla.
* Turton v. Jones	81-5605	7/ 9/82	AFFIRMED	S.D.Fla.
* Turton v. Turton	81-5683	7/ 9/82	AFFIRMED	S.D.Fla.
U. S. v. Mayes	80-7500	7/13/82	AFFIRMED	N.D.Ga.
Harrison v. Merrill Lynch	81-5386	7/13/82	REVERSED	S.D.Fla.
Clements v. Wainwright	81-5765	7/13/82	AFFIRMED	S.D.Fla.
*/** U. S. v. Vandever	81-5926	7/13/82	AFFIRMED	S.D.Fla.
* Campbell v. Wainwright	81-6016	7/13/82	VACATED	M.D.Fla.
* U. S. v. Law	81-7719	7/13/82	AFFIRMED	N.D.Ga.
Maryland Cas. v. Campbell Elec.	81-7785	7/13/82	REVERSED	M.D.Ga.
* U. S. v. Peterson	81-5954	7/14/82	AFFIRMED	M.D.Ga.
Astor v. White Electrical Co.	81-7653	7/14/82	AFFIRMED	N.D.Ga.
* Citizens Party of Ga. v. Poythress	82-8411	7/14/82	VACATED	N.D.Ga.
* Huff v. Massey	81-5444	7/15/82	AFFIRMED	S.D.Fla.
* Allen v. U. S.	81-7717	7/15/82	REVERSED	N.D.Ala.
Keishian v. Buckley	81-7787	7/16/82	AFFIRMED	N.D.Ga.
*/** U. S. v. Barfield	81-5729	7/19/82	AFFIRMED	S.D.Fla.
* Nemecek v. Lake Shore Hosp.	81-5842	7/19/82	AFFIRMED IN PART	M.D.Fla.
* Jackson v. Zlock	81-6023	7/19/82	DISMISSED	S.D.Fla.
*/** Brodie v. Alexander	81-7716	7/19/82	AFFIRMED	S.D.Ga.
* Roberts v. Blue Shield of CA	81-7805	7/19/82	AFFIRMED	N.D.Ala.
Crain v. Borman	81-5169	7/21/82	AFFIRMED	S.D.Fla.
** Lane v. C.I.R.	81-5834	7/21/82	AFFIRMED	U.S.T.C.
** Walker v. Hunt Bldg. Corp.	81-7698	7/21/82	AFFIRMED	S.D.Ga.

\* Fed.R.App. P. 34(a); 11th Cir. R. 23.

\*\* Local Rule: 25 case.

Title

\* A

\*\* S

U

\* N

\* Fed

\*\* Loc

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

FILED IN CLERK'S OFFICE  
U.S. DISTRICT COURT - ATLANTA

JUL 29 1982

BEN H. CARTER, Clerk

CITIZENS PARTY OF GEORGIA,  
DANNY FEIG, BETSY HALL  
and JIM COONAN,

Plaintiffs,

vs.

DAVID FOYTHRESS, Secretary  
of State of the State of  
Georgia,

Defendant.

CIVIL ACTION  
FILE NO. C82-1260A

O R D E R

IT IS HEREBY ORDERED that the time within which DANNY FEIG, the Citizens Party Candidate for State Senate District 36, may file his nominating petitions to obtain access to the November general election ballot be and hereby is extended by thirty (30) days; said petitions, which must contain 1993 valid signatures of persons duly registered to vote within new Senate District 36 to qualify FEIG for ballot access, shall be filed no later than 12 o'clock noon on Friday, August 13, 1982.

This matter having been resolved, the case is hereby dismissed, with prejudice.

SO ORDERED this 26 day of July, 1982.

Ben H. Carter  
U.S. DISTRICT COURT JUDGE  
Northern District of Georgia



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

FILED

IN CLERK'S OFFICE  
U.S. DISTRICT COURT ED. N.Y.

PUERTO RICAN LEGAL DEFENSE, : CV 91-2026  
& EDUCATION FUND, INC.

★ JUL 31 1991  
P.M. 7/31/91  
TIME A.M.

Plaintiff, :

v. :

United States Courthouse  
Brooklyn, New York

THE CITY OF NEW YORK, :

July 30, 1991  
10:30 a.m.

Defendant. :

TRANSCRIPT OF DECISION ON HEARING  
BEFORE THE HONORABLE GEORGE C. PRATT,  
UNITED STATES CIRCUIT JUDGE,  
MIRIAM GOLDMAN CEDARBAUM and REENA RAGGI,  
UNITED STATE DISTRICT COURT JUDGES

APPEARANCES:

For the Plaintiff: PUERTO RICAN LEGAL DEFENSE &  
EDUCATION FUND  
99 Hudson Street  
New York, N.Y. 10013  
By: ARTHUR A. BAER, ESQ.

For the Defendant: NEW YORK CITY DEPARTMENT OF LAW  
OFFICE OF CORPORATION COUNSEL  
100 Church Street  
New York, N.Y. 10007  
By: VICTOR KOVNER, ESQ.  
Corporation Counsel

Court Reporter: FREDERICK GUERINO  
225 Cadman Plaza East  
Brooklyn, New York 11201  
(718) 330-7687

Proceedings recorded by mechanical stenography, transcript  
produced by Computer-Assisted Transcription

Frederick R. Guerino, C.S.R.

Official Court Reporter

JUDGE PRATT: Our three-judge court has considered all of the matters that have been presented to us, both today and the last time we sat in June.

We are prepared to put on the record our decision. Before I do so, I would like to give some explanation of the reasoning, the thought process that brought us to the determination that we are making.

The Voting Rights Act, Section 5, provides that a change in election procedures, practices, and so forth may not be enforced until it has been approved either by a District Court sitting in the District of Columbia, or by the Attorney General. We interpreted that provision in the Voting Rights Act literally the last time we sat, when we denied an injunction against the petitioning process. We still have that view of the Act. Under that view, there were no Councilmanic districts in existence until I believe it is last Friday, when the Attorney General approved the modified plan.

What we are faced with today is that the new City Council, which has been proposed and worked upon by so many groups in the City, was interfered with, in effect, by federal law. Federal law is supreme under the Federal Constitution. So, there's no question that the Voting Rights Act's provisions must be applied. We view what we are doing today as essentially an operation in damage

1       The City is certainly entitled to a new Council.  
2  
3       All the processes leading in that direction seem to have  
4       been taken, and there are no problems in that regard before  
5       us.

6       We think it is extremely important that the  
7       election in November for the new Council take place as  
8       nearly as possible in compliance with state law as can be  
9       arranged, and toward that end we are making the following  
10      order:

11       This is adapted from the proposed order submitted  
12      to us by the City.

13       1. The Board of Elections is directed to process  
14      designating petitions in the primary and general elections  
15      for City Council districts in accordance with the terms of  
16      this order.

17       2. For purposes of this year's primary and  
18      general elections for City Council, a candidate otherwise  
19      qualified to be elected as a member of the City Council,  
20      may be elected from a district in which he or she does not  
21      reside so long as such candidate resides in the City of New  
22      York. A candidate may run in only one district, and shall  
23      designate the district in writing to the Board of Elections  
24      on or before August 7, 1991.

25       3. The last day for filing petitions with the



Case: 13-15214 Date Filed: 12/02/2013 Page: 104 of 111  
1 Board of Elections seeking designation as a candidate for  
2 party nomination for Council member is August 7, 1991.

3 A person seeking designation may file designating  
4 petitions on or before August 7, 1991, whether or not such  
5 candidate previously filed designating petitions, and a  
6 candidate who has previously filed designating petitions  
7 may submit new petitions to supplement his or her old  
8 petitions.

9 4. The minimum number of valid signatures required  
10 on designating petitions for party nomination shall be 180  
11 or one percent of the voters enrolled in the party in the  
12 Council district in which such designation is sought,  
13 whichever is less.

14 5. The minimum number of valid signatures required  
15 on independent nominating petitions shall be 540 or one  
16 percent of the registered voters in the Council district in  
17 which such nomination is sought, whichever is less.

18 6. For any designating petition, all witnesses and  
19 signatories must reside in the Council district in which  
20 the candidate is seeking to be designated as a candidate  
21



1 valid, even if such voter has before today signed another  
2 designating petition for the same office, in which event  
3 both signatures shall be counted notwithstanding the  
4 provisions of New York State Election Law, Section  
5 6-134(5).

6 8. The provisions of the New York State Election  
7 Law regarding the residency requirements of signatories on,  
8 and subscribing witnesses to, petitions for an opportunity  
9 to ballot and independent nominating petitions shall remain  
10 in full force and effect.

11 9. The last day to file objections to any  
12 designating petition for City Council member shall be  
13 August 9, 1991.

14 10. The last day to file specifications on the  
15 grounds of objection to any designating petition shall be  
16 August 14, 1991. If an objection is filed, but  
17 specifications in support of same are not filed, the  
18 objection shall be null and void.

19 11. The last day to file a certificate of  
20 declination or a certificate of acceptance of any  
21 designation shall be August 9, 1991.

22 12. The last day to file a Wilson-Pakula political  
23 party committee authorization of any designation by  
24 petition of a person not enrolled in such party shall be  
25 August 9, 1991.

1 13. The last day to file a certificate to fill a  
2 vacancy in any designation where the vacancy was caused by  
3 reason of declination shall be August 12, 1991.

4 14. The last day to file a Wilson-Pakuia party  
5 committee authorization of any designation contained in a  
6 certificate to fill a vacancy in a designation caused by  
7 declination shall be August 12, 1991.

8 15. A petition for an opportunity to ballot in any  
9 Council district shall be filed by August 7, 1991, and  
10 shall be signed by the same number of enrolled voters of  
11 the party as are required by this order, on a designating  
12 petition for the same party for the same district.

13 16. The last day to file objections and  
14 specifications of objections to a petition for an  
15 opportunity to ballot shall be the same as those provided  
16 herein respectively for objections and specifications of  
17 objections to designating petitions.

18 17. The last day to institute a proceeding in New  
19 York State Supreme Court with respect to any designating  
20 petition, petition for an opportunity to ballot, or  
21 certificate in relation to a designation (unless such a  
22 certificate is in connection with a death or  
23 disqualification) shall be August 16, 1991.

24 18. The hearings of the New York City Board of  
25 Elections on objections to designating petitions, petitions

1 for an opportunity to ballot and certificate filed in  
2 relation to a designation, shall commence on August 19,  
3 1991, at a time to be determined by the Board of  
4 Elections.

5 19. The last day for an order of the Supreme Court  
6 of the State of New York to be made in connection with a  
7 proceeding instituted regarding a designating petition,  
8 petition for an opportunity to ballot, or a certificate in  
9 relation to a designation (unless such a certificate is in  
10 connection with a death or disqualification) shall be  
11 August 23, 1991, if possible.

12 20. Objections to an independent nominating  
13 petition for City Council member shall be filed no later  
14 than August 22, 1991, and the last day to file  
15 specifications of the grounds of such objections shall be  
16 August 27, 1991.

17 21. The last day to file a certificate of  
18 acceptance or a certificate of declination of any  
19 independent nomination for City Council member shall be  
20 August 23, 1991. The last day to file a certificate to  
21 fill a vacancy in an independent nomination caused by  
22 declination shall be August 26, 1991.

23 22. Objections to any certificate of declination,  
24 certificate of acceptance, certificate of Wilson-Pakula  
25 party authorization, or certificate to fill a vacancy in a



Case: 13-15214 Date Filed: 12/02/2013 Page: 108 of 111

1 designation for party nomination or is an independent  
2 nomination for City Council member shall be filed within  
3 two days after the filing of the certificate to which  
4 objection is made, or within two days after the last day  
5 provided herein to file such certificates, if no such  
6 certificate is filed. When such an objection is filed,  
7 specifications in support of the objection shall be filed  
8 within two days after the filing of the objection; and if  
9 no such specifications are filed in support of the  
10 objection, then the objection shall be null and void.

11 23. The Board of Elections shall determine the  
12 candidates for all public offices appearing on the absentee  
13 and military ballots for the September 12, 1991, primary  
14 election on August 13, 1991, and shall mail all military  
15 ballots on August 26, 1991.

16 24. The provisions of the New York State Election  
17 Law shall remain in full force and effect for the 1991  
18 primary and general elections, except as otherwise provided  
19 herein.

20 25. If any modification to the foregoing schedule  
21 appears to be necessary, an application for relief may be  
22 made to the Honorable Reena Raggi, Judge of the Eastern  
23 District of New York, who may make such order, including a  
24 reconvening of this adjourned three-judge court, as in her  
25 discretion seems appropriate.

There were four applications to intervene. Two have been withdrawn. Those by Susan Alter and by Clark, Rainey, Ramos and Morris are granted. The plaintiffs' motion to reconsider our order of June 18, 1991 is denied.

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief does not comply with the type-volume limitation of Fed. R. App.

P. 32(a)(7)(B) because:

this brief contains 13,906 words, excluding the parts of the brief  
exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. This brief complies with the typeface requirements of Fed. R. App. P.  
32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared in a proportional-spaced typeface using  
Microsoft WordPerfect in 14 point Times New Roman.

/s/ David I. Schoen

David I. Schoen

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this 2nd day of December, 2013, I electronically filed the foregoing via the CM/ECF System, which will send notice of the same to the following registered users:

James W. Davis  
Misty S.F. Messick  
ATTORNEY GENERAL'S OFFICE  
501 Washington Ave  
PO Box 300152  
Montgomery, AL 36130-0152  
(334) 242-7300

*Counsel for Appellee*

I further certify that the original and six (6) copies of the forgoing will be filed with the CLERK'S OFFICE OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT via UNITED PARCEL SERVICE.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ Shelly N. Gannon  
Shelly N. Gannon  
GIBSON MOORE APPELLATE SERVICES, LLC  
421 East Franklin Street, Suite 230  
Richmond, VA 23219