

**No. 13-15556**

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

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**JILL STEIN, ALABAMA GREEN PARTY,  
ROBERT COLLINS, CONSTITUTION PARTY  
OF ALABAMA, JOSHUA CASSITY, STEVEN  
KNEUSSLE, LIBERTARIAN PARTY OF  
ALABAMA, MARK BODENHAUSEN, VICKI  
KIRKLAND and GARY JOHNSON,**

**Plaintiffs-Appellants,**

**v.**

**JIM BENNETT, Secretary of State for the  
State of Alabama,**

**Defendant-Appellee.**

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**On Appeal from the United States District Court  
For the Middle District of Alabama  
Northern Division**

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**BRIEF OF PLAINTIFFS-APPELLANTS**

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**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

**No. 13-15556-DD, Jill Stein, et al. v. Jim Bennett, Secretary of State**

Pursuant to F.R.A.P. 26.1 and 11<sup>th</sup> Cir. R. 26.1, plaintiffs-appellants submit the following list of persons and entities known to them to have an interest in the outcome of the case or appeal.

Alabama Green Party - plaintiff-appellant

Bennett, Jim - defendant-appellee (Alabama Secretary of State)

Bodenhausen, Mark - plaintiff-appellant

Brasher, Andrew Lynn - Alabama Assistant Attorney General

Cassity, Joshua - plaintiff-appellant

Collins, Robert - plaintiff-appellant

Constitution Party of Alabama - plaintiff-appellant

Davis, James W. - Alabama Assistant Attorney General

Johnson, Daniel E. - counsel for plaintiffs in the district court

Johnson, Gary - plaintiff-appellant

Kirkland, Vicki - plaintiff-appellant

Kneussle, Steven - plaintiff-appellant

Libertarian Party of Alabama - plaintiff-appellant

Messick, Misty Shawn Fairbanks - Alabama Assistant Attorney General

Stein, Jill - plaintiff-appellant

Strange, Luther J. III - Alabama Assistant Attorney General

Watkins, William Keith - district judge, Middle District of Alabama

Whitney, Richard J. - counsel for plaintiffs in the district court

s/ Gary Sinawski

**STATEMENT REGARDING ORAL ARGUMENT**

Plaintiffs-Appellants do not request oral argument.

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## **STATEMENT OF JURISDICTION**

The basis for this Court's jurisdiction is 28 U.S.C. § 1291. The basis for the district court's jurisdiction is 28 U.S.C. §§ 1331 and 1343.

The appeal is from the Final Judgment of the district court entered on September 5, 2013 denying plaintiffs' motion for summary judgment and granting defendants' motion for summary judgment (Doc 113); the Memorandum Opinion and Order entered on September 5, 2013 on which the Final Judgment was based (Doc 112); and the Order entered on November 4, 2013 denying plaintiffs' motion to reconsider (Doc 121). The notice of appeal was filed on December 3, 2013 (Doc 124).

## **STATEMENT OF THE ISSUES**

The issue presented for this Court's review is whether the district court erred in declining to rule that Alabama's March petition deadline for a minor political party to place its presidential candidate on the November general election ballot along with the party's name is unconstitutionally early.

## **STATEMENT OF THE CASE**

### **A. Course of Proceedings and Dispositions in the Court Below**

The plaintiffs-appellants (hereinafter, the "plaintiffs") commenced this action on January 13, 2012 by filing a complaint (Doc 1)<sup>1</sup> seeking declaratory and

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<sup>1</sup>Plaintiffs filed an amended complaint on September 18, 2012 (Doc 77).

injunctive relief from Alabama's requirement that a new or otherwise non-ballot-qualified political party file a petition on March 13 containing 44,828 signatures in order to place its presidential candidate and party name on the general election ballot in November. Plaintiffs moved for a preliminary injunction (Doc 22), which the district court denied on July 19, 2012 (Doc 64). Plaintiffs and defendant-appellee Secretary of State (hereinafter, "defendant") filed cross motions for summary judgment (Docs 81 and 95). On September 5, 2013 the district court (William Keith Watkins, C.J.) issued a memorandum opinion and order denying plaintiffs' motion and granting defendant's motion. By order entered on November 4, 2013 the district court denied plaintiffs' Rule 59(e) motion to reconsider.

## **B. Statement of Facts**

The plaintiffs are three minor political parties which were not qualified to appear on the Alabama general election ballot in November 2012 (the Alabama Green, Constitution and Libertarian parties); two of the parties' nominees for President of the United States (Green Party candidate Jill Stein and Libertarian Party candidate Gary Johnson); and several of the parties' officers and supporters (the remaining individual plaintiffs). The defendant, Jim Bennett, is sued in his official capacity as Alabama's Secretary of State and chief elections official under Ala. Code § 17-1-3(a).

Alabama law permits an independent candidate for president to appear on the general election ballot *without party identification* by filing a petition no later than September 6<sup>th</sup>, two months before the general election, containing the signatures of at least 5,000 qualified voters. Ala. Code § 17-14-31(a) and (b). A candidate for president may appear on the Alabama ballot *with his or her party name* if the party obtained at least 20% of the entire vote cast for a state officer in the prior general election. Ala. Code § 17-13-40 and 41. None of the party plaintiffs met this threshold in 2010. Doc 112 - Pg 5. In the alternative, a candidate for president may appear on the ballot *with his or her party name* if a petition is filed by the date of the March primary election containing signatures of qualified voters numbering at least 3% of the votes cast for governor in the last general election. Ala. Code § 17-6-22(a)(1).

Plaintiffs wanted their presidential candidates to be listed on Alabama's November 2012 general election ballot together with their party names. However, this would have entailed filing a petition containing at least 44,828 valid signatures by March 13, some eight months before the general election. Doc 112 - Pg 5; Ala. Code § 17-13-3(b). As the district court noted, "[n]one of the Party Plaintiffs thought they could manage to get that many signatures in time, so they did not try." *Id.* Instead, the plaintiffs set out to collect 5,000 valid petition signatures by September 6 in order to place their candidates on the ballot as

independents, without party names. They succeeded, and the Green, Libertarian and Constitution parties' presidential candidates (plaintiff Jill Stein, plaintiff Gary Johnson and Virgil Goode, respectively) were listed on the Alabama ballot as independent candidates without their party names. .

Plaintiffs sought a preliminary injunction allowing their names to appear on the ballot without complying with the March 13 deadline or the 44,828-signature requirement. Doc 22. The district court denied plaintiffs' motion on the ground that they "failed to provide an evidentiary basis to conclude' Alabama's election law imposed an unconstitutional burden on them." Doc 64 - Pg 19. Plaintiffs later amended their complaint seeking, *inter alia*, a declaratory judgment that the March filing deadline is unconstitutional under the First and Fourteenth Amendments, facially and as applied. Doc 77.

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

The district court's denial of plaintiffs' motion for summary judgment is subject to *de novo* review. See, e.g., *Willard v. Fairfield S. Co.*, 472 F.3d 817, 821 (11<sup>th</sup> Cir. 2006); *Swanson v. Worley*, 490 F.3d 894, 902 (11<sup>th</sup> Cir. 2007).

## **SUMMARY OF ARGUMENT**

Alabama has the earliest petition filing deadline in the nation for a new or previously unqualified party to place its presidential candidate on the ballot with his or her party affiliation. While this fact alone does not disqualify the March

deadline as unconstitutional, and the state has substantial leeway in fashioning its ballot access framework, it does raise questions about the extent to which the state interests involved make such an early deadline necessary. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

The district court grounded its analysis in two false premises, namely, that plaintiffs had to prove that Alabama's March filing deadline imposed *severe burdens* on their First Amendment rights and that they made *diligent efforts to comply* with the deadline. In denying the relief plaintiffs sought, the district court contravened this Court's decision in *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568 (11<sup>th</sup> Cir. 1991) and the methodology for analyzing ballot access restrictions developed by the Supreme Court in *Anderson v. Celebrezze*, *supra*, and its progeny.

Under the applicable authorities, the plaintiffs should only have had to establish that the March filing deadline imposed a significant burden on their rights and that the burden was not necessary to advance the state's legitimate interests. This, the plaintiffs accomplished. In fact, the early deadline is manifestly burdensome and unnecessary.

## ARGUMENT

### I. Alabama's March Filing Deadline is the Earliest of its Kind

As previously noted, Alabama now has the earliest deadline in the nation for a new or previously unqualified party to place its presidential candidate on the ballot with his or her party affiliation. Winger, *Deadline Victories in Hawaii and New Mexico*, 29 BALLOT ACCESS NEWS 8 (Jan. 1, 2014), available at <http://www.ballot-access.org/2014/01/january-2014-ballot-access-news-print-edition> (last visited February 12, 2014). The chart on page 4 entitled "New Party Deadlines for 2016" shows the deadline for each state along with the statutory citation and the formula for setting the deadline.<sup>2</sup>

Plaintiffs are mindful of this Court's admonition that

... a court is "no more free to impose the legislative judgments of other states on a sister state than it is free to substitute its own judgment for that of the state legislature. *Libertarian Party of Florida v. State of Florida*, 710 F.2d [790] at 794. Furthermore, the Supreme Court has upheld a broad array of election schemes, and we confine our inquiry to whether Alabama's election scheme is constitutional, not whether Alabama's scheme is the best relative to other states. \* \* \*

*Swanson v. Worley*, *supra* at 910 (11<sup>th</sup> Cir. 2007). Plaintiffs are similarly cognizant

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<sup>2</sup>After this article was published, the author explained that he was mistaken in showing Mississippi with an earlier deadline than Alabama's, and that Alabama has the nation's earliest deadline for a newly qualifying party to access the ballot in a presidential election. See <http://www.ballot-access.org/2014/02/alabama-has-the-nations-earliest-petition-deadline-for-a-newly-qualifying-party-to-appear-on-presidential-ballot/> (last visited February 12, 2014).

of this Court's further advice in *Swanson*:

Because any percentage requirement or filing deadline is “necessarily arbitrary” and “impossible to defend ... as either compelled or least drastic,” the test is not whether the regulations are necessary but whether they rationally serve important state interests. *Libertarian Party of Florida* [*supra*].

*Id.* at 912.

Nevertheless, how a state's ballot access regulations compare with those of sister states, and whether or not similar regulations elsewhere have been upheld, provide some guidance as to the legitimacy of the regulations in question. Indeed, many courts have invalidated petition filing deadlines which were later than Alabama's. For example, the Supreme Court has struck down, as unconstitutionally early, a February deadline for filing minor party qualifying petitions, *Williams v. Rhodes*, 393 U.S. 23 (1968) and a March deadline for filing independent candidate petitions, *Anderson v. Celebrezze, supra*. It appears that the earliest mandatory petition-filing deadline ever upheld by a court is a North Dakota deadline set in mid-April of the election year. *McLain v. Meier*, 851 F.2d 1045 (8<sup>th</sup> Cir. 1988). It also appears that the only other cases in which courts have upheld petition-filing deadlines earlier than July of the election year are *Rainbow Coalition of Oklahoma v. State Election Board*, 844 F.2d 740 (10th Cir. 1988) (Oklahoma - May deadline), *Fishbeck v. Hechler*, 85 F.3d 162 (4th Cir. 1996) (West Virginia - May deadline) and *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64

(3d Cir. 1999) (New Jersey - June deadline).

## **II. The Standards for Adjudicating Ballot Access Restrictions**

### **A. The Methodology Developed by the Supreme Court**

The district court correctly noted that under the *Anderson* line of cases, a court reviewing a ballot access restriction

must first “consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments.” Then the court must “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.” Finally, the court must “determine the legitimacy and strength of each of those interests,” while also considering “the extent to which those interests make it necessary to burden the Plaintiff’s rights.”

Doc 112 - Pg 7, quoting *Anderson* at 789 (internal citations omitted).

Further, 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.” But when a state’s election law imposes only “reasonable, nondiscriminatory restrictions” upon a plaintiff’s First and Fourteenth rights, “a State’s important regulatory interests will usually be enough to justify [the] “reasonable, nondiscriminatory restrictions.” In short, the level of the scrutiny to which election laws are subject varies with the burden they impose on constitutionally protected rights – “Lesser burdens trigger less exacting scrutiny.”

*Id.*, quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (internal citations omitted).

The challenged restriction must also be considered in conjunction with the state’s other ballot access restrictions, as just one component of the state’s entire ballot access regimen for non-major parties and candidates. *See, e.g., Williams v.*

*Rhodes, supra* at 34. Here, the March deadline must be evaluated in combination with Alabama's three-percent petition threshold.

In carrying out its analysis, the reviewing court should also be guided by the historical record of success and failure in complying with the restriction. In Alabama, for example, no statewide three-percent petition has succeeded since the year 2000, except for the Americans Elect petition in 2011. As the Supreme Court stated,

... to assess realistically whether the law imposes excessively burdensome requirements ... it is necessary to know other critical facts \* \* \* [from which] there will arise the inevitable question for judgment: ... could a reasonably diligent ... candidate be expected to satisfy the signature requirements, or will it be only rarely that the ... candidate will succeed in getting on the ballot?

*Storer v. Brown*, 415 U.S. 724, 738, 742 (1974).

No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms. *Id.* at 730. ("[N]o litmus-paper test ... separat[es] those restrictions that are valid from those that are invidious .... The rule is not self-executing and is no substitute for the hard judgments that must be made.")

This Court has characterized the *Anderson* approach as "a balancing test that ranges from strict scrutiny to a rational-basis analysis, depending upon the factual circumstances in each case," circumstances which perforce include the extent to which the challenged restriction burdens the plaintiff's rights. *Duke v. Cleland*, 5

F.3d 1399, 1405 (11th Cir. 1993), citing *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992).

**B. The Character and Magnitude of the Injury to Plaintiffs' Rights**

In *Williams v. Rhodes*, *supra* at 30 (holding unconstitutional Ohio election laws that made it virtually impossible for a minor party to access the presidential election ballot), the first case in which the Supreme Court addressed the constitutional status of state ballot access restrictions, the Court considered the nature of the rights implicated. The Court noted that such restrictions

place burdens on two different, although overlapping, kinds of rights -- the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms.

There is no question that ballot access restrictions like Alabama's March filing deadline impact on plaintiffs' associational and voting rights. The important questions are how serious the burden on plaintiffs' rights is and the extent to which the state interests involved justify the burden. The district court acknowledged that plaintiffs suffered "'more-than-trivial' burdens on [their] 'associational rights'"

Doc 112 - Pg 8 (quoting *Timmons* at 358) and asserted that "... the question here is whether those burdens rise to the level of 'severe.'" Doc 112 - Pg 8. Indeed, it is well established that the outcome of this and similar cases turns on the degree of severity (the "magnitude," *Anderson* at 789) of the injury to plaintiffs' First and

Fourteenth Amendment rights. While severe burdens call for strict scrutiny, “[l]esser burdens trigger less exacting scrutiny.” *Timmons* at 358. In fact, as this Court has pointed out, the level of scrutiny to be applied ranges from strict scrutiny to a rational basis analysis, depending on the magnitude of the burden. *See, e.g., Duke v. Cleland, supra.*

The district court argued at length that plaintiffs failed to prove that the March deadline imposed severe burdens on their rights or that they made diligent efforts to comply with the three-percent petition requirement. Therefore, the court concluded, the deadline is not subject to strict constitutional scrutiny and “Alabama need only show that its deadline for ballot-access petitions ‘rationally serves important state interests’” (quoting *Swanson v. Worley, supra* at 912. However, the court said that this showing turns on whether the deadline “freeze[s] the status quo by effectively barring all candidates other than those of the major parties” (quoting *Libertarian Party of Florida v. State of Florida*, 710 F.2d 790, 793 (11<sup>th</sup> Cir. 1983).

The district court’s analysis relies heavily on *Libertarian Party of Florida v. State of Florida, supra*, *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568 (11<sup>th</sup> Cir. 1991), and *Swanson v. Worley, supra*. Plaintiffs contend that these cases support their position far more strongly than defendant’s. They also point out that

none of these cases involved a candidate for president.<sup>3</sup> This is crucial because the Supreme Court has made it clear that presidential contests are unique and are subject to fewer state-imposed restrictions than elections for other offices. The president is selected by all the voters in the nation. Moreover, the impact of the votes cast in each state is affected by the votes cast for the various candidates in other states. Thus in a presidential election a state's enforcement of more stringent ballot access requirements, including filing deadlines, has a cross-border impact. The state has a less important interest in regulating presidential elections than statewide or local elections, because the outcome of the former depends largely on voters beyond its boundaries. As the Supreme Court has pointed out:

In the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections because the outcome of the former will be largely determined by voters beyond the State's boundaries.

*Anderson* at 794-95.

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<sup>3</sup>Ed Clark, one of the original plaintiffs in *Libertarian Party of Florida* and the Libertarian candidate for president in 1980, was dismissed as a plaintiff for lack of standing. *Libertarian Party of Florida* at 795.

More recently, this Court underscored the special consideration which must be given to restrictions on presidential-candidate ballot access. In *Green Party of Georgia v. State of Georgia*, 2014 WL 30742 (11<sup>th</sup> Cir. Jan. 6, 2014), the plaintiffs contested Georgia’s one-percent petition requirement for independent presidential candidates. This Court reversed a lower court judgment dismissing the case on the ground that it was indistinguishable from controlling decisions. The Court stated:

The Plaintiffs contend that the district court erred by concluding that this case is indistinguishable from previous decisions upholding Georgia’s 5% petition-signature requirement for non-statewide elections. As the Plaintiffs note, we previously addressed whether our past decisions upholding a 5% petition-signature requirement preclude a challenge to a lower petition-signature requirement for a presidential candidate and we concluded that our past decisions are distinguishable. *See Bergland v. Harris*, 767 F.2d 1551 (11<sup>th</sup> Cir. 1985).

\* \* \*

In *Bergland*, the district court dismissed an action challenging Georgia’s then 2.5% petition signature requirement for a presidential candidate. The district court based its dismissal on our past decisions that upheld a 5% petition signature requirement for other offices. We rejected this “litmus-paper test” approach and held that our past decisions “do not foreclose the parties’ right to present the evidence necessary to undertake the balancing approach outlined in *Anderson*.” *Id.* Furthermore, a state’s interest in regulating a presidential election is less important than its interest in regulating other elections because the outcome of a presidential election “will be largely determined by voters beyond the state’s boundaries” and “the pervasive national interest in the selection of candidates for national office ... is greater than any interest of an individual State.” [Citing *Anderson* at 795]. Consequently, a ballot access restriction for presidential elections “requires a different balance” than a restriction for state elections. *Bergland*, 767 F.2d at 1554; *see also McCrary v. Poythress*, 638 F.2d 1308, 1314 n.5 (5<sup>th</sup> Cir. 1981) (holding that the constitutionality of Georgia’s ballot access law may be different as applied to a presidential election).

*Id.* at 3-5.

*Libertarian Party of Florida* was decided in July 1983, just three months after the Supreme Court issued its seminal decision in *Anderson* outlining the methodology for deciding ballot access cases. This Court upheld Florida's three-percent statewide petition requirement, an outcome that might well be repeated if the case were decided today. However, the Court's decision, on which the district court in this case relied heavily, did not strictly follow the *Anderson* approach. Instead, it cited pre-*Anderson* cases for the proposition that its task was to " ... determine whether the challenged laws 'freeze' the status quo by effectively barring all candidates other than those of the major parties ...." This description of a reviewing court's task, which was adopted by the district court in the instant case (Doc 112 - Pg 20), is questionable in light of *Anderson* and later cases like *New Alliance Party of Alabama, supra*, which have invalidated restrictions that neither freeze the status quo nor bar all non-major party candidates.

Eight years after *Libertarian Party of Florida*, this Court handed down its decision in *New Alliance Party of Alabama*. The decision invalidated what was then an April deadline for a new or unqualified party to meet what was then a one-percent petition signature requirement. Departing from the Court's earlier reasoning in *Libertarian Party of Florida*, the decision stated:

... although Alabama's early deadline does *not* serve to "freeze the status quo" [citing *Jenness v. Fortson, supra*] it does make it *moderately difficult* for a minor party candidate to qualify to be on the ballot ....

Although the Court finds that the burden imposed on minor parties is *not insurmountable*, the Court determines that plaintiffs are due to be granted the relief requested because the interests put forth by the defendant do not adequately justify the restriction imposed. \* \* \* *No one can seriously contend that a deadline for filing for a minor party and its candidate seven months prior to the election is required to advance legitimate state interests.* \* \* \*

*New Alliance Party of Alabama* at 1576 (emphasis added). The March deadline to file a three-percent petition in this case is certainly more onerous than the April deadline to file a one-percent petition that was invalidated in *New Alliance Party of Alabama*. Arguably, however, like the requirements in the earlier case, the March deadline and three-percent requirement are (only) “moderately difficult” and are “not insurmountable.” What is equally clear in both cases is that “[n]o one can seriously contend that a deadline for filing for a minor party and its candidate seven months [here, eight months] prior to the election is required to advance legitimate state interests.” *Id.* (emphasis added).

The district court attempts to distinguish *New Alliance Party of Alabama*, as well as *Anderson*, by pointing out that in both cases the plaintiffs submitted an adequate number of signatures whereas, in the instant case, plaintiffs did not even attempt to obtain the 44,828 valid signatures required by the March 13 deadline. However, there exists no requirement that they or similarly situated plaintiffs comply fully or partially with ballot access requirements they challenge as unconstitutional. The courts have permitted plaintiffs who filed no petition

signatures whatsoever to challenge ballot access restrictions, including signature requirements. *See, e.g., Williams v. Rhodes, supra* (challenge by minor party to ballot access restrictions, including petition signature requirement); *Storer v. Brown supra* (challenge by independent presidential candidate to ballot access restrictions); *Greaves v. Mills*, 497 F. Supp. 283 (E.D. Ky. 1980) (challenge by independent presidential candidate to filing deadline; 1,086 signatures filed, 5,000 required); *Goldman-Frankie v. Austin*, 727 F.2d 603 (6<sup>th</sup> Cir. 1984) (challenge by independent candidate to statutes providing no ballot access for independents); *Stevenson v. State Board of Elections*, 794 F.2d 1176 (7<sup>th</sup> Cir. 1986) (challenge by independent presidential candidate to early filing deadline); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board, supra* (challenge by minor parties to petition requirements and filing deadline).

*Swanson v. Worley, supra*, decided in 2007, upheld Alabama's *June* deadline for filing three-percent petitions in non-presidential election years. The Court noted that the Supreme Court had also upheld a June deadline in *Jenness v. Fortson*, 403 U.S.431 (1971),<sup>4</sup> distinguishing it from the February deadline invalidated in *Williams v. Rhodes, supra*. *Swanson* at 906. No presidential election was implicated. The decision confirmed the state's authority to regulate

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<sup>4</sup>*But see* Justice Stevens' dissent in *Mandel v. Bradley*, 432 U.S. 173, 181 (1997), pointing out that the *Jenness* Court did not actually decide the merits of the June deadline.

ballot access for local candidates, which, as previously noted, is greater than the state's authority to regulate ballot access for presidential candidates.

Finally, the district court says that *Timmons, supra*, “settles that the burden [plaintiffs] shouldered was not severe,” pointing particularly to the Supreme Court’s observation “[t]hat a particular individual may not appear on the ballot as a particular party’s candidate does not severely burden that party’s associational rights.” Doc 122 - Pg 9, quoting *Timmons* at 359. As already explained, plaintiffs did not have to prove that the burden imposed by Alabama law was “severe.” In the alternative, while *Timmons* says keeping one or a few candidates of a minor party off the ballot is not a severe burden, Alabama law keeps all of a minor party’s candidates off the ballot if the party does not file a three-percent petition in March. *Norman v. Reed*, 502 U.S. 279, 289-91 (1992) makes it clear that a party’s ability to have its name on the ballot is entitled to protection.

### **C. The State Interests Put Forward to Justify Plaintiffs’ Injuries**

Under the *Anderson* test, “[o]nce a plaintiff has identified the interference with the exercise of her First Amendment rights, the burden is on the state to ‘put forward’ the ‘precise interests’ ... [that are] justifications for the burden imposed by its rule.” *Fulani v. Krivanek, supra* at 1544, citing *Anderson* at 789. Here, Alabama puts forward its interest in requiring parties to demonstrate a “modicum of support” as a prerequisite for ballot access; its interest in setting a deadline early

enough so petition signatures can be verified in time to print ballots; and its interest in treating minor parties “in a manner that is fair and appropriate relative to” the major parties. Doc 112 - Pg 21.

**D. The Legitimacy and Strength of these Interests, and the Extent to Which They Make it Necessary to Burden the Plaintiffs’ Rights**

Requiring a showing of public support, having enough time to verify signatures, and ensuring fair treatment of minor parties are characterizations of generic state interests that are undeniably important. However, these general descriptions leave important questions unaddressed, such as: Are 44,828 petition signatures really necessary to demonstrate public support? Wouldn’t fewer signatures take less time to verify and thereby permit a later filing deadline? May the state legitimately justify a filing deadline so early in the election cycle by citing its need to verify this many petition signatures on time? Indeed, aren’t the filing deadline and signature-verification issues problems of the state’s own making? Couldn’t the state lower the signature requirement, or set a later deadline and hire more help to verify signatures? *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217-18 (1986), making it clear that a state may not cite costs or administrative burdens to justify an unconstitutional election law.

### **III. The March Deadline Unnecessarily Curtails Political Opportunity**

The federal judiciary's ballot access jurisprudence has evolved since the Supreme Court decided *Williams v. Rhodes* in 1968. The *Anderson* line of cases has developed more flexible standards for determining the constitutionality of ballot access restrictions. The goal remains, of course, to maximize political opportunity for candidates, voters and parties while preserving the integrity of states' electoral processes so long as they do not unduly undermine that opportunity. The Supreme Court stated in *Anderson* that

[o]ur ballot access cases . . . focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens 'the availability of political opportunity. [Citations omitted.]

As this Court noted in *Cartwright v. Barnes*, 304 F.3d 1138 (11<sup>th</sup> Cir. 2002), "[t]he power to create procedural regulations does not, however, 'provide States with license to exclude classes of candidates from federal office,'" quoting from *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995). Plaintiffs assert that Alabama's March filing deadline, in combination with its three-percent petition requirement, unnecessarily burdened their opportunity to participate in the 2012 presidential election on a par with the major parties. For that reason, the deadline should be held unconstitutional.

#### **IV. This Controversy is not Moot**

For the reasons articulated by the Supreme Court in *Storer v. Brown*, *supra* at 737 n.8, this case is not moot:

The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is ‘capable of repetition, yet evading review.’ [Citations omitted.] The ‘capable of repetition, yet evading review’ doctrine, in the context of election cases, is appropriate when there are ‘as applied’ challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

*See also Libertarian Party of Florida* at 796; *Swanson v. Worley* at 906.

#### **CONCLUSION**

For the foregoing reasons, this Court should reverse the district court and declare the challenged ballot access restrictions unconstitutional.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I certify that on February 13, 2014 I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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