

CASE NO. 13-15556

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

JILL STEIN, ET AL.
Plaintiffs/ Appellants,

v.

SECRETARY OF STATE, STATE OF ALABAMA,
Defendant/ Appellee.

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

**APPELLEE'S BRIEF FOR
SECRETARY OF STATE, STATE OF ALABAMA**

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Secretary of State hereby certify, pursuant to Rule 26.1-1 of the Eleventh Circuit Rules, that the following have an interest in this appeal:

Alabama Green Party

Bennett, Hon. Jim

Bodenhause, Mark

Brasher, Andrew L.

Cassity, Joshua

Collins, Robert

Constitution Party of Alabama

Davis, James W.

Johnson, Daniel E.

Johnson, Gary

Kirkland, Vicki

Kneussle, Steven

Libertarian Party of Alabama

Messick, Misty S. Fairbanks

Sinaswki, Gary

Stein, Jill

Strange, Hon. Luther

Watkins, Hon. W. Keith

Whitney, Richard J.

STATEMENT REGARDING ORAL ARGUMENT

The Secretary does not request oral argument.

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JURISDICTIONAL STATEMENT

Plaintiffs challenge Alabama's deadline for political parties to petition for ballot access. Doc. 77 at ¶¶ 1, 16 – 22. Their claim is grounded in the First Amendment as incorporated against the States by the Fourteenth Amendment, doc. 77 at ¶ 23, and is brought pursuant to 42 U.S.C. § 1983, doc. 77 at ¶ 1. Accordingly, the district court, the Honorable W. Keith Watkins, had federal question jurisdiction pursuant to 28 U.S.C. § 1331. Doc. 112 at 2.

The parties filed cross motions for summary judgment, and, on September 5, 2013, the court granted the Secretary's motion and denied the Plaintiffs' motion. Doc. 112 at 2, 24; doc. 113 at 1 (final judgment). On October 3, 2013, Plaintiffs timely moved for reconsideration pursuant to Fed. R. Civ. P. 59(e). Doc. 114. The court denied that motion on November 4, 2013. Doc. 121. Plaintiffs then timely noticed their appeal on December 3, 2013. Doc. 124. *See also* Fed. R. App. P. 4(a)(1)(A); Fed. R. App. P. 4(a)(4)(A)(iv).

This Court has appellate jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The Secretary agrees with the Plaintiffs, Bl. Br. at 20, that the case is "capable of repetition, yet evading review," *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283 (1911).

STATEMENT OF THE ISSUE

Whether the district court erred in granting the Secretary of State summary judgment in a ballot access case where the Plaintiffs failed to demonstrate their burden as a matter of fact or law and where the challenged petition deadline is justified by important State interests.

STATEMENT OF THE CASE

Focusing on their presidential candidates, Plaintiffs argue that Alabama's deadline for political parties to petition for ballot access violates the First Amendment. They allege that the deadline, which now falls in March in presidential years, is so early that, in their view, they are forced to petition for ballot access for their presidential candidates as independents by the later deadline of September 6th. Doc. 77 at ¶¶ 1, 16, 19 – 22. The district court properly granted the Secretary of State summary judgment. Doc. 112.

I. Course of Proceedings and Dispositions

On January 13, 2012, the Alabama Green Party, Jill Stein (who would become the Green Party's 2012 presidential candidate), Matthew Hellinger (then-State Organizer of the Alabama Green Party), Robert Collins (a voter who supports the Green Party's presidential candidate), the Constitution Party of Alabama, Joshua Cassity (Chairman of the Constitution Party of Alabama), Steven Kneussle (a voter who supports the Constitution Party's presidential candidate), the Libertarian Party of Alabama, Mark Bodenhausen (Chairman of the Libertarian Party of Alabama), and Vicki Kirkland (a Florida voter who supports the Libertarian Party's presidential candidate) filed suit against Alabama's Secretary of State, in her official capacity. Doc. 1 at ¶¶ 4 – 14; doc. 77 at ¶¶ 4, 6 – 15; doc. 80 at ¶¶ 4, 6 – 15. Subsequently, Matthew Hellinger was dismissed as a plaintiff,

docs. 93-94, Gary Johnson, the Libertarian Party's 2012 presidential candidate, was added as a plaintiff, doc. 77 at ¶ 5, doc. 80 at ¶ 5, and the current Secretary was substituted as the defendant, doc. 109 at 1, Fed. R. Civ. P. 25(d).

The complaint alleged that, with respect to presidential candidates, Alabama's ballot access laws violate the First and Fourteenth Amendments. Doc. 1 at ¶ 1. Plaintiffs sought a declaratory judgment and injunctive relief. Doc. 1 at 6 – 7. The Secretary answered. Doc. 16.

Plaintiffs moved for a preliminary injunction. Docs. 22 – 36. The Secretary propounded limited discovery. *See* doc. 37 at 1. The parties filed a joint stipulation of facts primarily focused on presidential races for 1996 through 2012. Doc. 38. The Secretary filed two evidentiary submissions and opposed the motion. Docs. 39 – 41. The Plaintiffs filed a reply. Doc. 42.

The court set an evidentiary hearing on the burden the deadline places on the Plaintiffs, the Plaintiffs' ballot access efforts (for 2012 and earlier), and the State's interest in the deadline. Doc. 45 at 1. The court also set oral argument and a deadline for filing any additional stipulations. Doc. 45 at 1 – 2.

The parties stipulated to the 2012 presidential nominees of two of the Plaintiff political parties and a non-exclusive list of elections held in Alabama in 2011. Doc. 46. They also stipulated to facts concerning the successful 2012 statewide ballot access petition of Americans Elect, doc. 50 at ¶¶ 7 – 18, and that

five independent candidates achieved ballot access for local races by submitting petitions to the Secretary by the March deadline, *id.* at ¶¶ 2 – 6.

Plaintiffs requested a pre-hearing conference, doc. 47, which was held, docs. 51 & 53; *but see* doc. 71. Thereafter, the court cancelled the hearing and argument, docs. 54 & 55, and set a schedule for supplemental briefing and evidentiary submissions, doc. 56. The Plaintiffs filed three non-binding cases and two affidavits. Docs. 57, 59 & 61. The Secretary filed an evidentiary submission and a supplemental opposition. Docs. 58 & 60. The parties filed replies, docs. 62 & 63, with the Plaintiffs filing a supplemental expert report, doc. 62-1.

On July 19, 2012, the court denied the motion for preliminary injunction. Doc. 64. No appeal was taken.

On September 18, 2012, the Plaintiffs filed an Amended Complaint. Doc. 77. It focused heavily on the fact that Alabama provides a later petition deadline for independent presidential candidates than it does for political parties, *id.* at ¶¶ 1, 16 – 23; *see also* doc. 78 at ¶ 4, making clear that it was the deadline that is challenged, doc. 77 at ¶¶ 1, 16 – 23, 25 & Prayer for Relief; *see also* Bl. Br. at 1. The Amended Complaint purposefully dropped the claim for injunctive relief. *Id.*; *see also* doc. 78 at ¶ 2.¹ The Secretary answered. Doc. 80.

¹ The Civil Appeal Statement erroneously indicates that permanent injunctive relief was denied.

Plaintiffs filed a motion for summary judgment, affidavits from the presidential candidate Plaintiffs, and a memorandum of law in support. Docs. 81, 81-1, 81-2 & 82. Plaintiffs argued that binding case law established their burden, and they “concede[d] they did not make any effort to comply with the early deadline.” Doc. 82 at 1, 3 – 8.

After discovery closed, the Secretary moved for summary judgment, relying on the joint stipulations of fact, an expert report, affidavits, and deposition excerpts. Docs. 95 – 96-25. With new counsel for the Plaintiffs, the parties opposed each other’s motions, including evidence, docs. 97 – 98-12, and replied in support of their own motions, with evidence, docs. 100 – 101.

On September 5, 2013, the court granted the Secretary’s motion and denied the Plaintiffs’ motion. Doc. 112 at 2, 24; doc. 113 at 1 (final judgment). The court concluded that Plaintiffs did not suffer a severe burden such that strict scrutiny applied, and that the ballot access requirements rationally served important State interests. Doc. 112 at 8 – 23.

On October 3, 2013, Plaintiffs timely moved for reconsideration pursuant to Fed. R. Civ. P. 59(e). Doc. 114. The Secretary opposed. Doc. 120. The court denied the motion on November 4, 2013. Doc. 121. Plaintiffs timely noticed their appeal on December 3, 2013. Doc. 124. *See also* Fed. R. App. P. 4(a)(1)(A); Fed. R. App. P. 4(a)(4)(A)(iv).

II. Statement of the Facts

It is entirely appropriate for Alabama to have ballot access requirements. *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279 (1974) (“[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”). And it is appropriate for those requirements to demand “reasonabl[e] diligen[ce],” from political parties seeking ballot access. *Id.* at 742, 94 S.Ct. at 1285.

In evaluating Alabama’s ballot access requirements for petitioning political parties, this Court should look at the State’s entire ballot access system. *Cf. Jenness v. Fortson*, 403 U.S. 431, 438-39, 91 S.Ct. 1970, 1974-75 (1971); *McCrary v. Poythress*, 638 F.2d 1308, 1312-13 (5th Cir. Mar. 12, 1981)². It is particularly appropriate to do so in this case because Alabama’s interest in providing a fair playing field—as between the established parties on one hand and petitioning parties (and independents) on the other—supports its decision to tie the challenged petition deadline to the March primary election.³ The Supreme Court

² See *Bonner v. City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*).

³ The State also has an administrative interest in a deadline that provides sufficient time to verify petitions.

has approved of a ballot access system that treats political parties differently, but fairly, *Jenness*, 403 U.S. at 441-42, 91 S.Ct. at 1976, as Alabama does.

a. Alabama’s ballot access laws treat different players differently

“Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike” *Jenness*, 403 U.S. at 442, 91 S.Ct. at 1976. “[T]here are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other.” *Id.* at 441, 91 S.Ct. at 1976. A State may recognize this and “provid[e] different routes to the printed ballot,” *id.* at 442, 91 S.Ct. at 1976, as Alabama does.

i. Alabama provides a path to the ballot for political parties that demonstrate support through election results

The Democrats and Republicans repeatedly achieve statewide ballot access, and thus are permitted to field presidential (and other) candidates under their party labels, based on their performance in the statewide general elections preceding the presidential election. *See* doc. 96-1 at ¶¶ 2, 23, 34, 47, 63; *see also* Ala. Code § 17-13-40; *American Party of Texas v. White*, 415 U.S. 767, 783 n.16, 94 S.Ct. 1296, 1307 n.16 (1974) (“the nominees of the two major parties are automatically placed on the general election ballot, but this is only because these parties have recently demonstrated substantial voter appeal”). Thus, each achieved statewide ballot access for the 2012 general election based on performance in the November

2010 general election. Doc. 96-1 at ¶ 2. These parties have the option of having primary elections, Ala. Code § 17-13-42, and they have chosen to do so.

1. The Alabama Republican Party is an established organization and both the party and its candidates have responsibilities with respect to the primary election

Bill Armistead, Chairman of the Alabama Republican Executive Committee, testified that the party has a governing board, subdivisions throughout the State, a staff and headquarters, and “an active donor base of regular monthly contributors.” Doc. 96-5 at ¶¶ 1-5. In advance of the March primary, the executive committee adopted a resolution concerning the presidential preference primary election and a resolution addressing other races. Doc. 96-5 at ¶¶ 8, 10; *id.* at 18 – 33. At the primary election, both candidates for public office and delegates to the Republican National Convention were selected. *Id.* at ¶ 9; doc. 96-6 at ¶¶ 2-3. “Each of the elected delegates was pledged to a particular Presidential candidate, and the [party] worked with the candidates to ensure that they had a full slate of delegates” Doc. 96-6 at ¶ 4. Three hundred five candidates qualified with the party to run as delegates, and qualifying opened in August 2011.⁴ *Id.* at ¶¶ 6-7.

Eight presidential candidates also qualified with the party. Doc. 96-6 at ¶ 8. Qualifying opened on August 13, 2011, *id.* at ¶ 6, and closed on December 14,

⁴ There is a typographical error in the affidavit. Doc. 96-6 at ¶ 6. Qualifying opened in 2011, not after the primary for which the candidates were qualifying.

2011, ninety days before the primary, Ala. Code § 17-13-102. To qualify, the candidates had to file petitions signed either by 500 Alabama voters or by 50 voters from each of Alabama's Congressional Districts. *Id.* Together, eight Republican candidates filed a total of 7,708 signatures by mid-December 2011. Doc. 96-6 at ¶ 8, Each also paid a \$10,000 fee. *Id.*; *see also* Ala. Code § 17-13-103. Mitt Romney qualified at the end of August, while the others qualified in November and December. Doc. 96-6 at ¶ 8.

The Republicans “qualified more than 700 candidates in the Alabama 2012 Primary Election.” Doc. 96-6 at ¶ 18. They were all required to declare their loyalty to the party, doc. 96-5 at ¶ 11, which has “disqualified certain potential candidates who were determined to not truly be Republicans,” doc. 96-6 at ¶ 20. The Party “was also responsible for handling challenges lodged against its candidates in advance of the election.” *Id.* at ¶ 19.

After the primary election, the party “was . . . responsible for determining which delegates had been elected,” and complications prompted State court litigation. Doc. 96-6 at ¶ 22.

2. The Alabama Democratic Party is an established organization and both the party and its candidates have responsibilities with respect to the primary election

J. Bradley Davidson was the Alabama Democratic Party's Executive Director when he executed an affidavit in this case. Doc. 96-7 at ¶ 1. He testified

that the Democrats elected candidates for public office, State Committee members, and delegates to the national convention at the primary. *Id.* at ¶ 5. Candidates had to qualify with the party, which worked to recruit “a diverse slate of delegate candidates” and expended effort “to determine which Primary ballots delegate candidates are supposed to be printed on.” *Id.* at ¶ 21. The party might “be required to respond to a challenge to a candidate’s qualifications” or to disqualify a candidate, and it defended three lawsuits in State court “generally challeng[ing] President Obama’s eligibility for office.” *Id.* at ¶¶ 6-7. The party certified results after the fact, and runoffs and contests calling for its attention could occur. *Id.* at ¶ 6.

President Obama qualified with the party to run for re-election. Doc. 96-7 at ¶ 8. His campaign “submitted 2,345 signatures . . . collected over the course of about two weeks” and he paid the \$2,500 qualifying fee. *Id.* at ¶¶ 10-12, 17; *see also* Ala. Code § 17-13-102; Ala. Code § 17-13-103. He also certified his loyalty to the party, as other Democratic candidates are required to do. Doc. 96-7 at ¶¶ 15-16; *id.* at 78-79 (Exhibit D to the affidavit). “A Party staffer spent hours verifying the signatures” *Id.* at ¶ 13.

“More than 285,000 voters participated in the 2012 Democratic Presidential Preference Primary Election” Doc. 96-7 at ¶ 9.

3. Alabama recently rescheduled her presidential preference primary election in response to the current political realities of the presidential race

When “Alabama held her Presidential preference primary election in June,” it came too late to be meaningful. Doc. 96-1 at ¶ 27. “Alabama scheduled her Presidential preference primary election in February 2008 in an effort to increase the voice of Alabama voters in selected nominees for President of the United States.” *Id.* That year, the primary election for other federal, State and county offices remained in June, as did the petition deadline. *Id.* at ¶¶ 24 – 25.⁵ To save the money associated with having two elections, the two primaries were brought back together in 2012, *id.* at ¶ 16, which had the effect of moving the petition deadline to the new election day, *id.* at ¶ 5. The primaries were held on the second Tuesday in March “in an effort [once again] to increase the voice of Alabama voters in selecting nominees for the Presidency.” *Id.* at ¶ 6.⁶ In 2012, the Republican nomination was “effectively clinched” in May, doc. 96-6 at ¶ 16, and “Mitt Romney, Rick Santorum and Newt Gingrich each spent time in Alabama,” *id.* at ¶ 11, as did Herman Cain, doc. 96-24 at 201:10-17.

⁵ To the extent that the district court’s understood the facts differently, *see* doc. 112 at 5 n.2, the stipulations control.

⁶ In non-presidential election years, the primary election remains in June. Ala. Code § 17-13-3(a).

The record reflects that the presidential race starts early. “Rick Perry came to Alabama on August 12, 2011 and spoke at [a dinner]. The next day, he announced his candidacy for the Presidency in South Carolina.” Doc. 96-6 at ¶ 14. Plaintiff Gary Johnson announced that he was a candidate for the Republican nomination for president in April or May of 2011 (before announcing he would seek the Libertarian nomination around January 2012). Doc. 96-23 at 20:4-18; 77:14-18. Running for president was a full-time job for Johnson even before his announcement, and he had begun laying the groundwork for a presidential race in 2010. *Id.* at 76:12-13; 79:4-8.

4. Summary

The Democratic and Republican parties, and their candidates, were actively engaged in the primary process and that engagement started months in advance of the March primary. Ultimately, their selected nominees appeared on the Alabama ballot at the general election with their party labels. *See* doc. 96-4, at Table 1. The parties achieved ballot access based on their electoral performance two years earlier in the November 2010 elections. Doc. 96-1 at ¶¶ 2; *see also* Ala. Code § 17-13-40.

ii. Alabama allows political parties that have not demonstrated support through election results to instead demonstrate “a significant modicum of support” via petition⁷

The Alabama Green Party, the Constitution Party of Alabama, and the Libertarian Party of Alabama did not demonstrate electoral success statewide in 2010; their path to the 2012 general election ballot was through a petition. For statewide general election ballot access, they had to, *inter alia*, file with the Secretary, “on the date of the first primary election[,] a list of the signatures of at least three percent of the qualified electors who cast ballots for the office of Governor in the last general election.” Ala. Code § 17-6-22(a)(1).

None of the Plaintiff political parties made a “significant effort” to comply with this requirement. Doc. 82 at 3; doc. 112 at 5. Had they, they could have fielded multiple candidates.⁸ Additionally, they would have had the opportunity to

⁷ The Supreme Court has explained that “There is surely an important state interest in requiring some preliminary showing of a *significant modicum of support* before printing the name of a political organization’s candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.” *Jenness*, 403 U.S. at 442, 91 S.Ct. at 1976 (emphasis added); *Munro v. Socialist Workers Party*, 479 U.S. 189, 194, 107 S.Ct. 533, 537 (1986).

⁸ By policy of the Secretary of State, if a political party qualifies for statewide general election ballot access, it can field candidates for all of the offices voted on at a statewide level as well as for offices voted on at that election at a less than statewide level, *e.g.*, a State legislative seat, without meeting additional requirements. Opn. to Hon. Jim Bennett, A.G. No. 98-00070 (Jan. 13, 1998); Opn. to Hon. Jim Bennett, A.G. No. 99-00099 (Feb. 2, 1999); *see also* doc. 96-8 at ¶ 18. Throughout her deposition, Green Party presidential candidate Jill Stein

qualify for ballot access in 2014 based on performance pursuant to Ala. Code § 17-13-40, something that has happened before. A Libertarian Party candidate for the Alabama Supreme Court won 20% of the votes cast in the 2000 general election and thereby secured statewide party ballot access in 2002. Doc. 96-1 at ¶ 41.

1. Alabama's signature requirement is reasonable, the petition itself is simple, and the process alleviates the burden placed on petitioners

In 2012, a political party seeking statewide ballot access needed to submit 44,828 valid signatures by the March 13 primary election. Doc. 96-1 at ¶ 3. All registered voters in Alabama, of whom there were 2,992,291 in March 2012, were eligible to sign the petitions. Doc. 96-8 at ¶¶ 12-13. And so, the 3% requirement was actually only about 1.5% of the available pool of potential signers. (44,828 is almost 1.5% of 2,992,291.)

The petitions request “name, residential address, county of residence, city of residence (if applicable), voting place, date of birth, and signature,” but “[a] signature shall not be deemed invalid for lacking any portion of the requested information if the disclosed information is sufficient for determining the validity of

emphasized the importance of building the party through ballot access as a goal of her campaign. *E.g.*, Doc. 97-1 at 33:14-16; 40:1-12; 126:1-4.

Joshua Cassity testified that he thought the Secretary did not have this policy, but did so based on his understanding of what Rob Johnston, former Elections Attorney in the Secretary's office, allegedly told him, not experience. Doc. 96-9 at ¶ 2; doc. 96-25 at 314:14 – 316:12.

a signature.” Ala. Admin. Code § 820-2-4-.05(3). A sample 2012 petition for a political party is available in the record at doc. 96-8 at 9.

Staff in the Secretary’s office testified that a signer’s failure to include all the requested information did not prevent the signature from being counted, if the petition checker could have some degree of confidence that the signer matched a registered voter in the computerized voter registration database. *See* doc. 96-9 at ¶ 15; doc. 96-10 at ¶ 10; doc. 96-13 at ¶ 7; doc. 96-14 at ¶ 9; doc. 96-15 at ¶ 11; doc. 96-16 at ¶ 11; doc. 96-17 at ¶ 7; *see also* doc. 96-11 at ¶ 14. Similarly, signatures were counted where the petition checker could have some degree of confidence that the signer matched a registered voter despite discrepancies in address, name, or birth date. *See* doc. 96-10 at ¶ 9; doc. 96-13 at ¶ 6; doc. 96-14 at ¶ 8; doc. 96-15 at ¶¶ 10, 12; doc. 96-17 at ¶¶ 7, 9, 10, 12; *cf.* doc. 96-16 at ¶¶ 7, 9, 10.

This Court has previously recognized that Alabama has “alleviating factors” built into its petitioning system. *Swanson v. Worley*, 490 F.3d 894, 904 (11th Cir. 2007). In addition to the 3% signature requirement (which really amounts to a 1.5% signature requirement), the simplicity of the petition, and the efforts of the Secretary’s staff to count signatures, the following should be viewed as characteristics of Alabama’s petitioning system that alleviate the burden on petitioners:

- There is no requirement that a person who signs a petition abstain from voting in the primary election or otherwise affiliating with another political party. Doc. 96-8 at ¶ 14.⁹
- A voter may sign multiple petitions, doc. 96-8 at ¶ 14; *see also* doc. 96-25 at 310:20 – 311:8 (paid petitioners circulate multiple petitions simultaneously).
- Signatures need not be notarized or witnessed. Doc. 96-8 at ¶ 21.
- There is no limit on the number of signatures that may be submitted, doc. 96-8 at ¶ 16, which matters because not all signatures will be verified to be those of registered Alabama voters, *see* doc. 96-3 at ¶ 15; doc. 96-8 at ¶ 26.
- Petitions may be submitted in parts, though no part may be submitted after the statutory deadline. Doc. 96-8 at ¶ 17. The Secretary has the option to begin checking the partial petition, and notify the petitioner of its progress, as was done for the Americans Elect petition. Doc. 96-3 at ¶¶ 7 – 9; doc. 96-9 at ¶ 10.

⁹ The Alabama Democratic Party does have provisions in its Bylaws and in its Delegate Selection Plan which might be read to say that someone who signed a ballot access petition should not participate in the Democratic primary; however, even if that is what the party means by these provisions, there was no mechanism to enforce them and Davidson was aware of no voter being denied a ballot on this ground. Doc. 96-7 at ¶¶ 28-30. Moreover, Plaintiffs do not allege that the Democrats' provisions are enforced in that way. In fact, the Libertarian Party has previously solicited signatures at the primary polling places. Doc. 96-24 at 156:5-13.

- The Secretary's office does not charge a fee for verifying signatures.

Doc. 96-8 at ¶ 15.

▪ For statewide ballot access, there are no additional limits as to where the signatures come from, and so they may be distributed throughout the State to show widespread support or concentrated in more populous areas, should that make the task easier. Doc. 96-8 at ¶ 20.¹⁰

▪ With respect to the presidential race, there is no date after which a political party must start its petitioning efforts; there is only an end date.¹¹ The Libertarian Party obtained ballot access for the 1996 general election by submitting a petition in May 1995. Doc. 96-1 at ¶ 57.

These “alleviating factors” reduce the burden on petitioning political parties.

¹⁰ Any distribution requirement may have to be carefully crafted to avoid a one man one vote problem, *see Norman v. Reed*, 502 U.S. 279, 293-94, 112 S.Ct. 698, 708 (1992); *Moore v. Ogilvie*, 394 U.S. 814, 815, 818-19, 89 S.Ct. 1493, 1494, 1496 (1969), but the absence of such a requirement has been recognized as an alleviating factor in Alabama's ballot access system, *Swanson v. Bennett*, 219 F.Supp.2d 1225, 1232 (M.D. Ala. 2002); *Swanson v. Worley*, 490 F.3d 894, 904 (11th Cir. 2007) (quoting the district court with approval).

¹¹ In *Swanson*, the plaintiffs alleged that the Alabama Fair Campaign Practices Act, Ala. Code §§ 17-5-1 *et seq.* limited independent candidates' petitioning period. *Swanson v. Worley*, 490 F.3d at 909 n. 16. Plaintiffs have not made that claim here.

2. Americans Elect achieved statewide ballot access via petition in 2012

Americans Elect achieved statewide party ballot access in Alabama in 2012, though for reasons of its own it did not select or field a presidential candidate. Doc. 96-3 at ¶¶ 14, 18. The party began submitting signatures in September 2011, and, by March 2012, had submitted 15 parcels of petitions pages totaling 71,859 signatures. *Id.* at ¶¶ 8, 15. The last parcel that was needed to obtain ballot access arrived on February 9, 2012. *Id.* at 15 – 16. The Americans Elect petition was checked, without the use of the random sample method (discussed below), between September 2011 and May 2012. Doc. 96-3 at ¶¶ 13 – 15; doc. 96-8 at ¶ 27; doc. 96-10 at ¶ 6.

3. The State has an important administrative interest in having sufficient time to verify the petitions in time for ballot transmission to start in September

It is time-consuming to verify petitions, doc. 96-3 at ¶¶ 10 – 11, 15; doc. 96-8 at ¶¶ 24 – 27; doc. 96-9 at ¶¶ 5, 8; doc. 96-10 at ¶¶ 4, 8; doc. 96-14 at ¶¶ 4, 10; doc. 96-15 at ¶¶ 3, 8, 13; doc. 96-16 at ¶¶ 5, 8; doc. 96-17, at ¶ 2, 13 – 14; doc. 96-18, at ¶¶ 2 – 3, particularly when the Secretary's staff conduct multiple searches in an attempt to count signatures, doc. 96-9 at ¶¶ 13 – 15; doc. 96-14 at ¶ 8; doc. 96-15 at ¶¶ 5 – 8; doc. 96-16, at ¶¶ 7, 10; doc. 96-17, at ¶¶ 6 – 10; doc. 96-18, at ¶¶ 5 – 7. The Secretary operates with a lean staff, doc. 96-12, at ¶¶ 4 – 5, and had to recruit personnel outside the Elections Division to handle the Americans Elect

statewide petition, doc. 96-3 at ¶ 10; doc. 96-8 at ¶ 27; doc. 96-14 at ¶¶ 2, 4; doc. 96-15 at ¶¶ 2 – 3. “The last time that anyone had submitted anywhere near the volume of signatures that Americans Elect did this election cycle was when the Libertarian Party achieved Statewide ballot access for the 2000 election cycle. Those signatures were verified by the Secretary of State’s Office over a lengthy period of time – beginning no later than June 21, 1999.” Doc. 96-3 at ¶ 11.

The Secretary has an administrative regulation that enables streamlining the process through random sampling. Doc. 96-3, at ¶ 13. When the three Plaintiff political parties submitted their petitions for independent candidate access for their 2012 presidential candidates just before the close of business on the last possible day, Thursday, September 6, the Secretary’s office implemented the random sampling method for the first time. *Id.*; doc. 96-11, at ¶¶ 4, 7 – 8.

Random sampling was used in an attempt to comply with a federal requirement that absentee ballots be sent to voters protected by the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA), 42 U.S.C. §§ 1973ff *et seq.*, 45 days before the general election if they have been timely requested by then. Doc. 96-11, at ¶¶ 7 – 8. *See also* 42 U.S.C. § 1973ff-1(a)(8).¹² In 2012, the

¹² Alabama is engaged in litigation concerning compliance with this federal law. *United States v. Alabama*, Case No. 2:12-cv-179-MHT-WC (M.D. Ala.).

UOCAVA deadline was Saturday, September 22, and so the printed and electronic ballots were supposed to be transmitted by then.

Recognizing that the election starts in September, Rob Johnston, who formerly served as the Elections Attorney in the Secretary's office, explained that:

One reason it also makes sense in Presidential years to tie the petition deadline to the Primary in March, and to have an early June deadline for completing verification of the petitions for political parties and independent candidates running for offices other than President, is that these deadlines reserve a window of time from early June until sometime in September (when the ballots must be printed) for checking the petitions of independent candidates for President. Those petitions are due on September 6, but may be submitted earlier.

Doc. 96-9 at ¶¶ 2, 25.

Johnston also noted that the petition “deadline is one of many in the election cycle” and “[t]ying” it “to the Primary is clearer than making yet another date on the election calendar, while also recognizing that many candidates (all those who do not face a runoff) are selected on that day.”¹³ *Id.* at ¶¶ 23-24.

Julie Sinclair, who also formerly served as Elections Attorney, agreed with Johnston's assessment, and she attached to her affidavit a copy of the 2012 Administrative Calendar “list[ing] a variety of deadlines related to the election.” Doc. 96-10, at ¶¶ 3, 11-12, and Exhibit A thereto. Later, Sinclair added:

¹³ “Contests may also impact whether a candidate continues to the General Election.” Doc. 98-9 at ¶ 24.

The practical application of my [agreement with Johnston] was illustrated when the three minor parties filed thousands of signatures to be checked by our office on Thursday September 6, 2012, the last day for filing those petitions. If we had received all of the petitions for all available offices in September, there would have been no feasible way to complete verification of all of those petitions with our small office staff and meet the existing deadlines.

Doc. 96-11, at ¶ 16.¹⁴

Accordingly, it is time consuming to verify petitions for ballot access, and in setting a deadline for submission, one must recognize that the November election begins in September.

iii. Independent candidates may also petition for ballot access

Independent candidates appear on the ballot without any party affiliation. They achieve ballot access through the petitioning process, but, unlike a political party, they achieve access only for one candidate (themselves) and cannot earn ballot access for a future election through electoral success. Ala. Code § 17-9-3; *see also* Ala. Code § 17-13-40.

¹⁴ There has been a change in law while this case has been on appeal. At the time that Johnston executed his affidavit, Ala. Code § 17-9-3(b) and Ala. Code § 17-13-22 required the Secretary to certify to the probate judges the names of successful independent candidates and the candidates of successful petitioning political parties by 45 days after the primary runoff election. In 2012, this deadline was June 8, 2012. Doc. 96-9 at ¶ 22. Alabama Act No. 2014-006 pushed back the deadline to 74 days before the general election. Act No. 2014-006 at § 1.

1. Non-presidential independent candidates are subject to the same ballot access requirements as petitioning political parties, and five candidates for local office qualified by the March deadline pursuant to these rules in 2012

Like political parties seeking *statewide* general election ballot access, independent candidates must file a petition signed by a number of qualified electors equal to at least 3% of those who cast ballots in the last gubernatorial general election by the primary election. Ala. Code §17-9-3(a)(3). In 2012, this meant an independent candidate seeking statewide ballot access needed 44,828 valid signatures by the March 13 primary election. *See* Ala. Code § 17-9-3(a)(3); Ala. Code § 17-6-22(a)(1); doc. 96-1 at ¶ 3.

Five independent candidates for *local* office qualified for the 2012 general election ballot by submitting petitions to the Secretary. Doc. 96-3 at ¶¶ 2 – 6. To qualify, they had to collect a number of signatures equal to at least 3% of the qualified electors who voted in the last gubernatorial race in the jurisdiction in which they sought to qualify, and they had to do so by the March deadline that the Plaintiffs challenge. *Id.*; *see also* Ala. Code § 17-9-3(a)(3).

As of January 2013, the Secretary's office had already received inquiries from persons interested in running as independent candidates in 2014. Doc. 96-11 at ¶ 18.

2. Presidential independent candidates have a lesser signature requirement and a later petition deadline, and the result is that the Plaintiff political parties were able to place their presidential candidates on the Alabama ballot in 2012

There is one exception to general rule for independent candidates. When the candidate seeks to run for president, the petition need be signed by only 5,000 qualified electors and the deadline is September 6, Ala. Code § 17-14-31(a) & (b), perhaps in recognition of the State's lesser interest in the presidential election, *Anderson v. Celebrezze*, 460 U.S. 780, 794-95, 103 S.Ct. 1564, 1573 (1983). (September 6 is also the day by which the political parties must name their presidential candidates. Ala. Code § 17-14-31(b).) The petitioning process described above applies, with the qualification that Ala. Code § 17-14-31(b) provides "Any nominating petition, to be valid, must contain the signatures as well as the addresses of the petitioners."

Jill Stein (Green Party), Virgil Goode (Constitution Party), and Gary Johnson (Libertarian Party) each appeared on Alabama's 2012 general election ballot as an independent presidential candidate and each received less than 1% of the votes cast. *See* doc. 96-2 at ¶¶ 1-2; doc. 77 at ¶¶ 4-5; doc. 80 at ¶¶ 4-5; doc. 96-4 at 8 (Table 1). Nationally, Gary Johnson won about 1% of the vote with about 1.3 million votes. Doc. 96-23 at 39:2-7. Jill Stein won about 500,000 votes nationally. Doc. 96-19 at 76:1-8; doc. 96-20 at 51:9-17.

Alabama did not prevent Stein, Goode, and Johnson from campaigning as the nominees of their parties; the candidates simply lacked a party label on the ballot. According to her campaign manager, Stein's campaign had national television buys that identified her as the Green Party candidate. Doc. 96-20 at 13:4-7; 17:17 - 18:1; *see also id.* at 31:18 - 32:11. Johnson's yard signs identified him as the Libertarian Party candidate. Doc. 96-24 at 232:14 - 233:6.

iv. Alabama allows write-in candidates for President

Alabama also allows write-in votes for President. *See e.g.*, doc. 96-1 at ¶¶ 22, 33, 46, 62.

b. Plaintiffs did not produce evidence that moving the petition deadline from June to March prevented them from achieving ballot access and some provided testimony that undermines that theory

i. The Alabama Green Party failed to produce evidence that the deadline prevented it from achieving statewide party ballot access

The Alabama Green Party did not exist for the 2000 presidential election, doc. 100-3 at 29:16 – 20; doc. 100-4 at 12:6 – 11, when the petition deadline was July 3, doc. 96-1 at ¶ 48. In 2004, when the deadline was June 1, *id.* at ¶ 35, Gene Hunter (the party's Fed. R. Civ. P. 30(b)(6) representative) thinks they were seeking statewide ballot access for the party but only got two or three thousand signatures. Doc. 100-4 at 7:19-23, 43:7-17, 44:15 – 45:5. Plaintiff Rob Collins testified: that the state party focused its efforts on recruiting members rather than

petitioning in 2004, doc. 100-3 at 36:2 – 37:1; that the petitioning effort involved about six volunteers, *id.* at 40:11 – 41:22; and, that they “have not organized a systematic canvass, not since 2000, which was before the state party’s time,” *id.* at 42:18-21. As to 2008, when the petition deadline was June 3, doc. 96-1 at ¶ 24, Hunter and Collins did not know if any efforts were made. Doc. 100-4 at 60:16 – 22, 61:14 – 62:2; doc. 100-3 at 43:22 – 44:4, 47:4 – 11. The Greens made no effort or “no significant effort” to achieve statewide ballot access for the party in 2012. Doc. 82 at 1, 3.

According to Hunter, no candidate has ever run in Alabama under the party label. Doc. 96-22 at 7:19-23, 69:2-5; *see also* doc. 96-21 at 69:11-13. As of a December 2012 deposition, the party did not yet have plans to seek ballot access in 2014, though it was not too soon to plan. Doc. 96-22 at 157:14-21.

ii. The Constitution Party of Alabama failed to produce evidence that the deadline prevented it from achieving statewide party ballot access, and it provided testimony that undermines that theory

Joshua Cassity has no personal knowledge about the party’s ballot access efforts in 2000 or 2004. Doc. 100-6 at 271:11 – 274:19. He got involved in Dr. Chuck Baldwin’s presidential campaign in 2008, at a time when there was no State party. *Id.* at 24:2 – 5, 27:12 – 16. Cassity got involved around April 2008 and initially thought that it would be possible to get 37,000 or 38,000 signatures by June 2008; after collecting only about 5 signatures in his neighborhood, the goal

changed to 5,000 signatures by September. *Id.* at 280:7 – 10, 280:20 – 23, 282:2 – 284:22.¹⁵

The party made no effort or “no significant effort” to achieve statewide ballot access in 2012, doc. 82 at 1, 3. The party did not have any candidates on the 2012 general election ballot. Doc. 96-25 at 340:23 - 341:2. Asked why, Cassity referred to the 3% requirement and the deadline, but admitted that he “pay[s] attention to the elections four years down the road.” *Id.* at 341:8-19. He then talked about the non-presidential offices which were up for election and confirmed that the decision not to run local candidates was based on the offices up for election as that relates to the ability to collect the number of signatures needed. *Id.* at 341:20 - 344:2. As to 2014 (when the primary election and hence the petitioning deadline is in June, *see* Ala. Code § 17-13-3(a); Ala. Code § 17-6-22), efforts had begun by the time of the December 2012 deposition, but the party did not then plan to attempt to achieve statewide ballot access because it does not have the money to pay petitioners to collect the required number of signatures. Doc. 96-25 at 129:7 – 13, 130:4 – 16, 344:3 – 17 & Ex. E; *see also id.* at 354:20 – 355:13.

The Plaintiffs introduced Cassity’s testimony “that, even if his state party could raise \$100,000, it would likely not devote such resources to a statewide

¹⁵ The district court credited Cassity’s efforts as the last time one of the political party plaintiffs made an effort to get on the ballot, doc. 112 at 5, n.3, but Cassity testified there was no State party then.

ballot effort without knowing who the presidential candidate was going to be.” Doc. 98 at 8 (Plaintiffs’ memorandum). The parties stipulated that the Constitution Party’s convention to select a presidential candidate was in mid-April, doc. 96-1 at ¶ 11, about a month after Alabama’s primary elections.

iii. The Libertarian Party of Alabama failed to produce evidence that moving the deadline from June to March prevented it from achieving statewide party ballot access, and it provided testimony that undermines that theory

The Libertarians achieved ballot access in 2000, when the deadline was July 3, nearly a month after the June 6 primary. Doc. 96-1 at ¶¶ 40, 48 – 49, 51. The next year, the petition deadline was moved to correspond with the primary election, *id.* at ¶ 51, prompting the *Swanson v. Worley* litigation, which upheld that connection. 490 F.3d 894 (11th Cir. 2007).

Mark Bodenhausen had no knowledge about the ballot access efforts made in 2004 or 2008, other than that the 2004 campaign made an effort. Doc. 100-5 at 160:6 – 163:16. He was being deposed both individually and as the Fed. R. Civ. P. 30(b)(6) representative of the party. Doc. 100-5, *id.* at 16:1-9.

The Libertarians decided sometime in 2011 not to even try to achieve statewide ballot access in 2012; factors in the decision included the March deadline, the number of signatures required (and associated costs for paid petitioners), and the offices on the ballot other than the presidency. Doc. 96-24 at 27:10-21, 73:3 - 75:2, 123:14 - 126:10, 205:1 - 206:14, 259:9 - 262:20. That said,

the national party had decided to run its candidate as an independent, and it would have been up to Bodenhausen to convince them otherwise. *Id.* at 259:9-14, 261:21-262:20, 308:14-21. No candidates appeared on the Alabama ballot as Libertarians in 2012 and no Libertarian currently holds a partisan office in Alabama. *Id.* at 263: 6-13. In November 2012, the Libertarians had already started petitioning for statewide ballot access in 2014. *Id.* at 113:14 - 114:3.

c. The Secretary introduced expert testimony that, historically, it has not hurt the electoral fortunes of presidential candidates to appear as independents, rather than with the party label, on the Alabama ballot

The Secretary retained and timely disclosed M.V. (Trey) Hood, III, as an expert.¹⁶ Professor Hood “collected comprehensive data on the popular vote for president in Alabama over the last eleven elections” in order to assess the extent to which, if any, Alabama’s ballot access laws impacted the electoral success of third-party candidates, which he defined as “any candidate who is not the Republican or Democratic Party nominee.” Doc. 96-4 at 4 & n. 1. “The overwhelming majority (87.5%) of third-party candidates during this period of time received less than 1% of the popular vote” and only Ross Perot achieved more than 2%. *Id.* at 4, 6. “In

¹⁶ Plaintiffs failed to timely disclose their expert at the merits stage, *see* doc. 89 at ¶¶ 6-8; doc. 89-2 at 2; doc. 89-3 at 2; doc. 89-4 at 1, and, on motion, doc. 89, the court ruled that it would not consider any evidence that the Plaintiffs might offer from this expert if he was not timely disclosed, doc. 92 at 2. On appeal, Plaintiffs cite to recent blog entries of their former expert. Bl. Br. at 6.

addition, over this period of time third-party candidates without a party label next to their name on the ballot outperformed those third-party candidates with a party label,” as a general matter, while the Libertarian candidates “performed exactly the same” with a label as without. *Id.* at 4-6. Finally, since 1972, third-party presidential candidates appearing on the Alabama ballot have not come close to achieving the State’s Electoral College votes, which in each election went to a candidate winning more than 45% of the vote. *Id.* at 6.

III. Standard of Review

“This Court reviews a district court’s grant of summary judgment *de novo*, applying the same legal standards used by the district court. [It] will affirm if, after construing the evidence in the light most favorable to the non-moving party, [it] find[s] that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. [It] may not weigh conflicting evidence or make credibility determinations of [its] own. If the record presents disputed issues of fact, the court may not decide them” *Seff v. Broward Cnty., Fla.*, 691 F.3d 1221, 1222-23 (11th Cir. 2012) (internal citations and quotation marks omitted). Here, the Plaintiffs have addressed the facts in a cursory way, declining to quarrel with the district court’s understanding of any of the facts or to identify any facts in dispute.

SUMMARY OF THE ARGUMENT

Plaintiffs allege that the petition deadline, which falls in March in presidential years, is so early that they were forced to field their presidential candidates as independents, rather than with the party label. Doc. 77 at ¶ 1; *see also id.* at ¶ 22; Bl. Br. at 3 – 4. However, as explained in Part I, Plaintiffs did not produce evidence that moving the petition deadline from June to March prevented them from achieving ballot access. Indeed, they provided some testimony that undermines that theory by pointing to additional reasons for not seeking ballot access, and, in the case of one party, admitting that the party does not plan to seek statewide ballot access this year, when the deadline is back in June.

Part II explains that this Court has “conclude[d] that Alabama’s filing deadline on the primary election date, in tandem with the three-percent signature requirement, is a reasonable, nondiscriminatory regulation” that survives challenge so long as it “rationally serve[s] important state interests.” *Swanson v. Worley*, 490 F.3d 894, 910, 912 (11th Cir. 2007). Part III concerns Alabama’s decision to tie the petition deadline to the primary election date, which *Swanson* viewed as non-discriminatory, *id.* at 908, and which serves as the State’s most important interest in the March deadline. Parts IV and V explain that neither the move to the March date nor the fact that the presidential race is at issue necessitates a different result.

Part VI explains that Alabama's accommodation of the presidential race through reduced ballot access requirements for independent presidential candidates further undermines Plaintiffs' allegations of burden. Indeed, the district court, recognizing that Plaintiffs' presidential candidates were in fact on the Alabama ballot in 2012, concluded that the Supreme Court's decision in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364 (1997), established that Plaintiffs' burden is not severe.

Finally, Part VII sets out the State's important administrative interest in having sufficient time to verify the petitions and explains that the November general election actually begins with a federal requirement for transmitting absentee ballots in September.

Given the factual record, applicable precedent (most importantly *Swanson* and *Timmons*), and the State's important interests in providing a fair playing field and in ensuring sufficient time to verify the petitions, the district court was correct to grant the Secretary summary judgment on Plaintiffs' constitutional challenge to the deadline.

ARGUMENT AND CITATIONS OF AUTHORITY

ALABAMA'S PETITION DEADLINE IS WITHIN THE RANGE OF THE CONSTITUTIONAL CHOICES AVAILABLE TO THE STATES

In assessing Alabama's petition deadline for political parties, this Court is to "weigh the character and magnitude of the burden the [deadline] imposes on [Plaintiffs'] rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct 1364, 1370 (1997) (internal citations and quotation marks omitted). Laws that impose "severe burdens" must be narrowly tailored to advance a compelling State interest. *Id.*, 117 S.Ct. at 1370. At the other end of the scale, "reasonable, nondiscriminatory restrictions" can usually be justified by "a State's important regulatory interests." *Id.*, 117 S.Ct. at 1370) (internal citations and quotation marks omitted). The State must advance, but need not provide an evidentiary basis for, its interests. *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95, 107 S.Ct. 533, 537 (1986); *Swanson v. Worley*, 490 F.3d 894, 912 (11th Cir. 2007).

I. Plaintiffs did not produce evidence that moving the petition deadline from June to March prevented them from achieving ballot access and they did provide testimony that undermines that theory

Plaintiffs allege that the petition deadline, which falls in March in presidential years, is so early that they were forced to field their presidential

candidates as independents, rather than with the party label. Doc. 77 at ¶ 1; *see also id.* at ¶ 22; Bl. Br. at 3 – 4.¹⁷ But “[c]onclusory allegations cannot prevail,” *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 794 (11th Cir. 1983), and the evidence in this case fails to demonstrate that the deadline is the reason the Plaintiff political parties failed to achieve statewide party ballot access.

The district court accepted that the deadline burdened the Plaintiffs, but concluded there was no evidence of a severe burden which would trigger a higher level of scrutiny. Doc. 112 at 13 – 16. Nonetheless, as the district court also recognized, the “Plaintiffs have failed to offer any evidence that a later deadline would lessen their burden.” *Id.* at 18. That is not surprising since they “concede[d] they did not make any effort to comply with the early deadline for political parties.” Doc. 82 at 1. Having made no effort to comply, it is hard to understand how they can demonstrate what the barrier to success, if any, was. On appeal, the Plaintiffs have not argued that the district court misunderstood any of the facts, or that there are any material facts in dispute.

¹⁷ Plaintiffs’ brief includes an undeveloped section on political opportunity. Bl. Br. at 19. If this is a new claim, Plaintiffs should not be allowed to raise it for the first time on appeal. *Denis v. Liberty Mut. Ins. Co.*, 791 F.2d 846, 848-49 (11th Cir. 1986) (“Failure to raise an issue, objection or theory of relief in the first instance to the trial court generally is fatal.”). If it is encompassed in the claim raised in the court below, then the response lies in all that is said here. Notably, the argument itself does not even cite to the record, simply asserting that Alabama’s deadline is unconstitutional because the Plaintiffs have asserted as much. Bl. Br. at 19.

If the Plaintiff political parties had routinely achieved statewide ballot access before the deadline change, their attack on the deadline might be more compelling. However, as set out above, none have made any diligent efforts since the Libertarian Party achieved ballot access in 2000, when the deadline was in early July, after the primary runoff election. *See* 34 – 38, *supra*. The Alabama Green Party did not exist in 2000, collected a modest number of signatures in 2004, may or may not have made efforts in 2008, and made little or no effort in 2012. *See* 34 – 35, *supra*. The Constitution Party of Alabama could not produce evidence as to efforts in 2000 or 2004, determined that an independent candidacy was more practical in 2008 when Cassity started the process in April of the election year, and made little or no effort in 2012. *See* 35 – 36, *supra*. The Libertarian Party achieved ballot access in 2000, but could not speak to the efforts in 2004 or 2008 (when the deadline had moved to June) other than that the 2004 presidential campaign made an effort. *See* 37, *supra*. And, like the others, the Libertarian Party made no or little effort in 2012. *See* 37, *supra*.

On top of the lack of recent efforts to achieve statewide party ballot access, deposition testimony revealed factors other than the deadline were impacting the Plaintiff political parties' decision making. While attacking the deadline, Cassity testified that he thinks the 3% signature requirement is too high and that his party will not be seeking statewide ballot access in 2014 (when the primary election and

hence the petitioning deadline is in June, *see* Ala. Code § 17-13-3(a); Ala. Code § 17-6-22) because they do not have the money to pay petitioners to collect the signatures. *See* 36, *supra*. And, if the party had the money, it might not want to seek ballot access before knowing who the presidential candidate would be, which in 2012 would have meant waiting to start until mid-April. *See* 36 – 37, *supra*. What Cassity unashamedly wants is for all ballot access requirements to be eliminated. Doc. 96-25 at 246:12 – 16. Similarly Mark Bodenhause testified that factors in the Libertarian decision not to even try to achieve statewide ballot access included not only the March deadline but also the number of signatures required (and associated costs for paid petitioners) and the other offices on the ballot. *See* 37, *supra*. That is, Plaintiffs failed to even try for reasons that went beyond the deadline, yet the complaint is squarely focused on—and the claim in this case is limited to—the deadline alone.

And that is not all. Americans Elect sought statewide ballot access for the 2012 general election *and achieved it*. Doc. 96-3 at ¶¶ 14 – 15. The party submitted just over 70,000 signatures beginning in September 2011. *Id.* at ¶¶ 8, 15. Additionally, the record shows that five independent candidates for local offices likewise timely submitted successful petitions to the Secretary's office by

the same challenged deadline. *Id.* at ¶¶ 2 – 6.¹⁸ This is evidence that the March petition deadline does not “freeze the status quo.” *Libertarian Party of Florida*, 710 F.2d at 793 (internal citation and quotation marks omitted). “A reasonably diligent [] candidate [can] be expected to satisfy the signature requirements.” *Id.* (internal citation and quotation marks omitted; alterations by the Court).

On this record, Plaintiffs have failed to prove that the March deadline is the reason they have failed to achieve statewide ballot access for their presidential candidates. Doc. 112 at 19.

II. In *Swanson v. Worley*, this Court “conclude[d] that Alabama’s filing deadline on the primary election date, in tandem with the three-percent signature requirement, is a reasonable, nondiscriminatory regulation” that survives challenge so long as it “rationally serve[s] important state interests” 490 F.3d at 910, 912.

In *Swanson v. Worley*, this Court considered a challenge to Alabama’s 3% requirement as well as a challenge to the 3% requirement in combination with the petition deadline, which was then newly tied to the primary election. 490 F.3d 894, 902 (11th Cir. 2007). The Court found that the requirements were reasonable and nondiscriminatory, *id.* at 905, 910, and stated that “[b]ecause any . . . filing deadline is necessarily arbitrary and impossible to defend . . . as either compelled

¹⁸ Not all independent candidate petitions are submitted to the Secretary’s office—some are submitted to local probate judges. *See* Ala. Code § 17-9-3(a)(3). The record does not speak to whether there were such additional petitions.

or least drastic, the test is not whether the regulations are necessary but whether they rationally serve important state interests,” *id.* at 912 (internal citations and quotation marks omitted, second alteration by the Court). *Swanson* is highly instructive here.

The 3% requirement sustained in *Swanson* remains in effect. Ala. Code § 17-6-22. The record shows that it amounted to only about 1.5% of the available pool of signers in 2012, much less than what has been upheld by the Courts. Doc. 96-8 at ¶¶ 9, 12 – 13. *Cf. Jenness*, 403 U.S. at 432, 91 S.Ct. 1970, 1971 (upholding a 5% of all registered voters requirement); *Libertarian Party of Florida*, 710 F.2d at 792. The Sixth Circuit has reasoned that if a 5% requirement can be imposed with a deadline of July or August, a lesser requirement can be imposed with an earlier deadline. *Lawrence v. Blackwell*, 430 F.3d 368, 375 (6th Cir. 2005).

The *Swanson* Court also thought that “the burden posed by Alabama’s filing deadline is significantly lessened by the statute’s alleviating factors. In particular, Alabama sets no limit on the time period for conducting the petitioning effort, a far more permissive scheme than filing deadlines that have been upheld in the past.” *Swanson*, 490 F.3d at 909. With respect to the presidential race, there continues to be a deadline but not a start date for petitioning, and so more than sufficient time is

allowed. *See* 27, *supra*. Additional factors that alleviate the burden imposed by the deadline are:

- The State does not prevent petition signers from participating in the primary election or from signing multiple petitions. *See* 26 & n. 9, *supra*.
- Signatures need not be notarized or witnessed. *See* 26, *supra*.
- Petitioners may submit their petitions in parts and are not limited in the number of signatures they may submit. *See* 26, *supra*.
- The Secretary continues to check petitions without charging a fee. *See* 27, *supra*.
- Alabama imposes no distribution requirement. *See* 27 & n. 10, *supra*.

And this the record demonstrates that signatures are not rejected for incompleteness or inconsistencies, so long as the petition checker can have some degree of confidence that the petition signer is a registered voter, and that the Secretary's office dedicates scarce resources to searching for a positive match. *See* 25, *supra*. Additionally, it should be viewed as an alleviating factor that Alabama allows political parties achieving statewide ballot access the opportunity to field down-ballot candidates, without imposing further requirements. *See* 23 – 24 n. 8, *supra*. *Cf. Libertarian Party of Florida*, 710 F.2d at 792 (Florida required statewide and local petitions).

The *Swanson* Court's lengthiest discussion in this portion of the opinion was dedicated to the import of Alabama's decision to tie the petition deadline to the primary, rather than the earlier date by which candidates participating in the primary qualify to do so. *Swanson*, 490 F.3d at 906-09. Because that connection does double-duty as the State's most compelling interest in setting the deadline, it is discussed separately and next.

III. The *Swanson* Court concluded that tying the petition deadline to the primary election date is not discriminatory, 490 F.3d at 908, and here, setting a fair playing field through that connection is the State's most important interest in the March deadline

Alabama has a recognized interest in treating petitioning political parties in a manner that is fair and appropriate relative to the manner in which the political parties that secure ballot access based on prior electoral support are treated. *See e.g., Swanson*, 490 F.3d at 908 (quoted *infra*). Tying the petition deadline to the primary election furthers that interest.

Alabama has tied the petition deadline to the primary election date since Alabama Act No. 2001-1131, doc. 96-1 at ¶ 51, and the *Swanson* Court upheld that connection even in the face of claims that it deprives petitioners of the opportunity to seek signatures at the polling places during the primary election. *Swanson*, 490 F.3d at 898, 901, 905-06. In so doing, this Court focused heavily on the difference between *tying the petition deadline to the primary* and *tying it to the deadline for*

primary candidates to declare their candidacies (a prerequisite to participating in the primary election). *Id.* at 906-09.

As the *Swanson* Court understood the Supreme Court's decision in *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970 (1971), Georgia required the petition to be filed in June, on the day that candidates participating in the August primary had to qualify. *Swanson*, 490 F.3d at 906. The *Swanson* Court explains that the *Jenness* Court thought the deadline "was not 'unreasonably early'" and noted "that the absence of 'suffocating restrictions' on signature gathering minimized any burden posed by the deadline" *Swanson*, 490 F.3d at 906 (*quoting Jenness*, 403 U.S. at 438, 91 S.Ct. at 1974). The requirements at issue appear to have applied to presidential candidates. *Jenness*, 403 U.S. at 439, 91 S.Ct. at 1974 (noting that a presidential candidate petitioned for ballot access in 1968).

While the *Swanson* Court seemed to understand *Jenness*' judgment about the timing of the deadline as being measured against the general election, rather than against primary deadlines, it did go on to recognize the appropriateness of considering the burdens on the political parties participating in the primary elections: "Based on the reasoning in *Jenness*, other circuits have upheld statutes with filing deadlines on the primary election day (or even the day before) in

combination with signature requirements, despite the deadline's effect on signature gathering.” *Swanson*, 490 F.3d at 906 (citing cases); *see also id.* at 906-09.¹⁹

The *Swanson* Court distinguished the requirements struck down in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564 (1983), and *New Alliance Party v. Hand*, 933 F.2d 1568 (11th Cir. 1991), each of which it described as requiring the petition to be filed on the day that candidates participating in the primaries declared their candidacies, putting the petitioning candidates at a “relative disadvantage.” *Swanson*, 490 F.3d at 907-09.

Discussing *Anderson*, the *Swanson* Court explained:

In contrast, Alabama's statute does not discriminate against independent candidates relative to major party candidates when the filing deadline for independent candidates is set on Alabama's primary election date, which is sixty days after major party candidates must declare their candidacies. Although major party candidates enjoy the benefits of the publicity and automatic support of an experienced party organization, major party candidates in Alabama have the additional burden of filing earlier, thus placing independent and major party candidates in comparable positions. Although the Constitution bars states from discriminating against independent and minor party candidates, it does not mandate that states give

¹⁹ One of the cases cited, *Lawrence v. Blackwell*, 430 F.3d 368 (6th Cir. 2005), upheld Ohio's deadline for independent Congressional candidates to file their petitions, containing the signatures of 1% of the registered voters in the Congressional district, by the day before the primary, which is held in early March in Presidential election years. The Sixth Circuit explained that the early primary caused all candidates to engage in election activities early, but that setting the petition deadline at the day before the primary did not put the independent candidate at a disadvantage relative to the candidates participating in the primaries. *Id.* at 373.

independent and minor party candidates preferential treatment over major party candidates. By extending the filing deadline for independent and minor party candidates to the primary election date, sixty days after major party candidates must declare their candidacies, Alabama imposes no discriminatory burden on independent and minor party candidates.

Swanson, 490 F.3d at 908 (citations and footnote omitted).

The *Swanson* Court similarly distinguished *New Alliance Party* because “major party candidates have the additional burden of declaring their candidacies sixty days before independent and minor party candidates must file their signature petitions in June, and independent and major party candidates thus are in roughly comparable positions.” *Swanson*, 490 F.3d at 909. The *Swanson* Court further explained the higher level of scrutiny applied in that case was because the petition deadline was before the primary. *Id.* at 908-09.²⁰

The distinction between qualification and the primary is strengthened when the Presidential race at issue because the qualifying deadline for so-called major

²⁰ Plaintiffs would have this Court treat *New Alliance Party* as controlling over the earlier decision in *Libertarian Party of Florida v. Florida*, 710 F.2d 790 (11th Cir. 1983), on which *Swanson* heavily relied. Bl. Br. at 14-15. However, the earlier panel decision is controlling under the prior panel precedent rule. *Smith v. GTE Corp.*, 236 F.3d 1292, 1301-02 (11th Cir. 2001). And, as explained in the text, the *Swanson* Court has already explained that there is no inconsistency between the cases. In any event, *New Alliance Party* is distinguishable. There the State “put forward nothing” to explain why its deadline choice served its interests. *New Alliance Party*, 933 F.2d at 1576. The Secretary explains the State’s interest in a fair playing field here.

party candidates is 90 days (not the 60 days in *Swanson*²¹) in advance of the primary election. Ala. Code § 17-13-102. By that deadline, the Democratic and Republican candidates had to submit petitions, Ala. Code § 17-13-102, and pay a filing fee set by their political party, Ala. Code § 17-13-103. Qualifying for the Republicans opened in August 2011, and a total of eight candidates qualified before it closed in December 2011. *See* 18 – 19, *supra*. Meanwhile, the Democratic and Republican parties bore a host of primary-related responsibilities, *see* 18 – 20, *supra*, while petitioning political parties were expected to be gathering signatures. Tying the petition deadline to the primary date itself provides fair treatment for the petitioning political parties *vis-à-vis* the political parties that achieved ballot access based on prior electoral performance.

IV. The fact that the deadline is now in March does not require a different result than the one in *Swanson*

Tying the petition deadline to the primary election date is something of a built-in protection against unfairness, for the reasons just discussed and because, frankly, it is generally the persons participating in the primary election who are

²¹ While this case has been on appeal, the deadline for non-presidential candidates to qualify with parties participating in the primary election has been moved back from 60 days before the primary to 116 days before the primary. Ala. Code § 17-13-5(a), as amended by Act No. 2014-006. As the beginning of the 2014 Act reveals, the changes were made to facilitate compliance with UOCAVA. *See also United States v. Alabama*, Case No. 2:12-cv-179-MHT-WC (M.D. Ala.).

writing the rules. Here, though, the case for March is stronger because Alabama went to that deadline because of the presidential race, not in spite of it.

Specifically, the political reality is that the presidential race starts early, and Alabama's voters were being left out of the selection of nominees for the major parties. *See* 21 – 22, *supra*. So, Alabama moved back the presidential preference primary election, and the corresponding qualification date went back with it, and then, to save resources, moved the State, county and other federal primary elections to the same date. *See* 21, *supra*; Ala. Code § 17-13-102. Alabama's preference for conducting the primary elections in June (outside of presidential considerations) is actually evidenced by the fact that the elections remain in June in non-presidential years. Ala. Code § 17-13-3. Since the presidential race drove the schedule, it hardly makes sense to argue the deadline is too early for the presidential race.²²

Money was, admittedly, a factor in the decision to move the non-presidential primaries, and, hence, the deadline. Doc. 96-1 at ¶ 16. But that is not a problem for the constitutionality of the law. When the presidential preference primary alone was moved in 2008, *see* 21, *supra*, those in the Plaintiffs' position received

²² In no way should this paragraph be read to suggest that the system is unfair to the non-presidential candidates, or their parties, to the extent that are so associated. The point is only that March is not too early for the presidential race because the presidential race dictated the March date.

an unfair advantage that they were not entitled to maintain. Not only were petitions due 4 months after the primary, they were due 7 months after the presidential candidates qualified for that primary, Doc. 96-1 at ¶¶ 25 – 26, Ala. Code § 17-13-102. That is not a fair playing field. Hence, the move restored the fairness to the presidential race that had existed with respect to the other races.

Relying on blog entries from their former expert, Plaintiffs argue that Alabama's March deadline is the earliest in the country. Bl. Br. at 6 – 8. But, as they acknowledge, this Court has already rejected an invitation to compare Alabama's ballot access requirements to those of other States or to an ideal, recognizing both the State's right to exercise judgment in setting reasonable requirements and that "a broad array of election schemes" are constitutional. *Swanson*, 490 F.3d at 910; Bl. Br. 6 – 7. Indeed, it was testimony from this same man that the Court rejected as "irrelevant" in *Swanson*. 490 F.3d at 910.

Plaintiffs argue that other courts have struck down other early deadlines. Bl. Br. at 6-7. However, the Plaintiffs do not detail the context or analysis involved in those cases. Only two are binding, *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968), and *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564 (1983), and they do not require striking down Alabama's deadline.

Taking *Anderson* first, the *Swanson* Court distinguished that case, as discussed above. See 51 – 52, *supra*. *Anderson* is also distinguishable because it

dealt with an independent presidential candidate, 460 U.S. at 782, 103 S.Ct. at 1566, for which Alabama has different rules—rules which allowed Plaintiffs to field their candidates, *see* 33, *supra*. As a result, and as the district court recognized, doc. 112 at 11, Alabama’s ballot access system for presidential candidates does not burden voters by limiting their choice of candidates, which is the “primary concern” of the Supreme Court when it comes to ballot access requirements, *Anderson*, 460 U.S. at 786, 103 S.Ct. at 1569. The district court rightly refused to reject these distinctions and focus on a date on the calendar. Doc. 112 at 11 – 12. This Court should do the same.

Turning to *Williams v. Rhodes*, the Supreme Court did not strike down Ohio’s February deadline simply because February is always too early. As the Old Fifth Circuit has explained, “It is clear from reading *Jenness* that the Supreme Court looked at the totality of the Georgia statutory election machinery in approving certain criticized sections of the statute, as it did in *Williams v. Rhodes*, in which the court disapproved of the Ohio election system *because of its collective deficiencies*.” *McCrary v. Poythress*, 638 F.2d 1308, 1312-13 (5th Cir. Mar. 12, 1981) (emphasis added). And deficiencies were numerous. As the Supreme Court described it, Ohio required signatures totaling “15% of the number of voters cast in the last preceding gubernatorial election” and imposed “substantial additional burdens,” which “ma[d]e it virtually impossible for any

party to qualify on the ballot except the Republicans and Democratic Parties,” who “face[d] substantially smaller burdens” to maintain ballot access. *Williams*, 393 U.S. at 24-26, 89 S.Ct. at 7-8.

Alabama’s system is very different. Alabama has a lesser petitioning requirement—3% as opposed to 15%—with built in alleviating factors, *see* 25 – 27, *supra*, and the State does not impose the sort of “substantial additional burdens” that Ohio did. *Williams*, 393 U.S. at 25, 89 S.Ct. 7. As to treatment of the Democrats and Republicans, *Swanson* explained that “[b]y extending the filing deadline for independent and minor party candidates to the primary election date, sixty days after major party candidates must declare their candidacies, Alabama imposes no discriminatory burden on independent and minor party candidates.” *Swanson*, 490 F.3d at 908. *See* n. 21, *supra*. *See also* Ala. Code § 17-13-102 (presidential candidates must qualify 90 days before the primary). Additionally, Ohio required of the Democrats and Republicans only half the performance that Alabama requires of them to maintain access, *Williams*, 393 U.S. at 25-26, 89 S.Ct. at 8 (10% of the gubernatorial race); Ala. Code § 17-13-40 (20% of any statewide race).

The fact that the deadline is now in March does not advance Plaintiffs’ case far.

V. The fact that the presidential race is at issue does not require a different result than the one in *Swanson*

It is true that some of the State's interests are reduced when the presidential race, which is national in scope, is at issue. *Anderson v. Celebrezze*, 460 U.S. 780, 794-95, 103 S.Ct. 1564, 1573 (1983). But Alabama is not without interests to support its ballot access requirements.

Both this Court and the *Anderson* Court continued to recognize the State's interest in requiring a showing of support before making room on the ballot. *Fulani v. Krivanek*, 973 F.2d 1539, 1547 (11th Cir. 1992); *Anderson*, 460 U.S. at 788 n. 9, 103 S.Ct. 1564 ("The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates.").

For the 2012 presidential election, the Federal Election Commission website lists just over 400 people who filed forms to be candidates. http://www.fec.gov/press/press2011/presidential_form2nm.shtml, visited February 18, 2013; *confirmed* March 4, 2014. Alabama is clearly entitled to some means of determining which candidates make her presidential ballot. *Lubin v. Panish*, 415 U.S. 709, 715, 94 S.Ct. 1315, 1319 (1974) ("The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots

of reasonable size limited to serious candidates with some prospects of public support is not.”).

And the Supreme Court has had no problem with a petition being that means. *See Storer v. Brown*, 415 U.S. 724, 738-40, 94 S.Ct. 1274, 1283-84 (1974); *id.* at 740, 94 S.Ct. at 1284 (“Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden. ... On its face, the statute would not appear to require an impractical undertaking for one who desires to be a candidate for President.”); *see also Lubin*, 415 U.S. at 718, 94 S.Ct. at 1321 (in a case holding a filing fee unconstitutional, stating petition requirements “are obvious and well-known means of testing the ‘seriousness’ of a candidacy”). It follows that a deadline must be set for submitting the petition. And, for reasons already explained, Alabama has tied that deadline to the primary election date, a date that was chosen based on the political assessment that Alabama’s political leaders made of the presidential race’s current realities. *See* 21 – 22, *supra*.

Moreover, Alabama’s separate provision for independent presidential candidates—which provides both a lesser signature requirement and a later deadline, Ala. Code § 17-14-31(a) & (b)—provides further protection for the interests of the Plaintiffs while apparently recognizing the State’s lesser interest in the presidential race. It is a shield for the State, not a sword for the Plaintiffs.

Finally, with respect to the focus on the presidential race, *Green Party of Georgia v. State of Georgia*, 2014 WL 30742 (11th Cir. 2014) (*per curiam*) (unpublished), cited by the Plaintiffs, Bl. Br. at 13, is highly distinguishable. There, the district court dismissed for failure to state a claim, and this Court held that the plaintiffs should have had an opportunity to present their evidence so that the Court could conduct the balancing analysis, including consideration of the presidential context. *See id.* at * 1-*2. Here, the case reaches this Court following extended preliminary injunction proceedings, discovery by the party that sought it, and cross-motions for summary judgment. *See* 13 – 15, *supra*. These Plaintiffs had every opportunity to make their case.

VI. Alabama's accommodation of the presidential race through reduced ballot access requirements for independent presidential candidates further undermines Plaintiffs' allegations of burden

Plaintiffs' case is unusually weak because their presidential candidates *were on the Alabama ballot*, just as independents rather than with their party labels, *see* doc. 77 at ¶¶ 4 – 5; doc. 96-2 at ¶ 1; doc. 96-4 at 8; Bl. Br. at 3 – 4; *see also* Ala. Code § 17-14-31(a) & (b). On this issue, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364 (1997), is instructive, as the district court found, doc. 112 at 8 – 9.

The Supreme Court in *Timmons* confronted Minnesota's ban on fusion candidates, *i.e.*, individuals appearing on the ballot as the candidate of multiple

parties. 520 U.S. at 353-54, 117 S.Ct. at 1367. In that context, the Court was “unpersuaded . . . by the party’s contention that it has a right to use the ballot itself to send a particularized message, . . . to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression.” *Id.* at 363, 117 S.Ct. at 1372. The Court noted that “[t]he party retains great latitude in its ability to communicate ideas to voters . . . through its participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party’s candidate.” *Id.*, 117 S.Ct. at 1372.

Similarly, the Plaintiffs’ presidential candidates were not prevented from appearing on Alabama’s ballot. They appeared—just without their party labels. They attained ballot access because Alabama has provided an alternative, and easier, route to the ballot for independent presidential candidates, Ala. Code § 17-14-31(a) & (b), perhaps in recognition of the State’s lesser interest in that race, *Anderson*, 460 U.S. at 794-95, 103 S.Ct. at 1573. This alternative route has the practical effect of enabling political parties that are unable or unwilling to meet the petition requirements for statewide party ballot access to field their presidential candidates as independents. Professor Hood’s undisputed expert testimony is that there is no statistical support for the proposition that these candidates would have received more votes if their party labels appeared on the ballot. Doc. 96-4 at 4 – 6.

Moreover, Alabama law does not prevent these “independent” presidential candidates from campaigning on their party platforms or from communicating their party connection. Stein’s campaign had national television buys that identified her as the Green Party candidate. Doc. 96-20 at 17:17 – 18:1; *see also id.* at 31:18 – 32:11. Johnson’s yard signs identified him as the Libertarian Party candidate. Doc. 96-24 at 232:14 – 233:6. And, as the district court put it: “Among the ways the Party Plaintiffs and Party Candidates could have communicated with voters were commercials, signs, speeches, debates, town-hall meetings, endorsements, canvassing, social networking, websites, newsletters, bumper stickers, handshaking, baby-kissing, robodialing, leatleting, good-old-fashioned stumping, *etc.*” Doc. 112 at 10 n. 7. Alabama did not cut off any of these means of communication. It simply declines to provide the Plaintiffs with the ballot as an additional forum for communicating their political views. *Cf. Timmons*, 520 U.S. at 363, 117 S.Ct. at 1372 (“Ballots serve primarily to elect candidates, not as forums for political expression.”).

As the district court said, “*Timmons* settles that the burden [Plaintiffs] shouldered was not severe.” Doc. 112 at 9.

VII. The State has an important administrative interest in having sufficient time to verify the petitions in time for ballot transmission to start in September

Alabama's interest in providing a fair playing field by setting the petition deadline at the primary election date has been discussed. The State also has an administrative interest in a deadline that provides sufficient time to verify the petitions, and the *Swanson* Court recognized such an interest as important.²³ *Swanson*, 490 F.3d at 912 n. 18.

The record demonstrates that it is time-consuming to verify petitions and that the Secretary operates with a lean staff. *See* 28, *supra*. The Secretary's office checked about 65,000 signatures submitted by Americans Elect petition without the use of random sampling. Doc. 96-3 at ¶¶ 13 – 15. The signatures began arriving in September 2001, *id.* at ¶ 8, and the office recruited personnel and began checking signatures that same month, *id.* at ¶ 10; doc. 96-8 at ¶ 27; *see also* doc. 96-9 at ¶ 8. Not since the Libertarian Party's successful drive for statewide ballot access in 2000, had anyone "submitted anywhere near the volume of signatures that Americans Elect did this election cycle," and the office had begun checking those signatures no later than June of the year before the election. Doc. 96-3 at ¶ 11.

²³ The Secretary does not argue that only a March deadline will suffice. He argues that sufficient time is needed, and relies on the fair playing field argument to set the deadline specifically at the primary election in March.

The random sampling method, authorized by administrative regulation, was used for the first time in 2012 when the three Plaintiff political parties submitted their petitions for independent candidate access for their Presidential candidates just before the close of business on the last possible day, Thursday, September 6. Doc. 96-3 at ¶ 13; doc. 96-11 at ¶¶ 4, 7-8. Even checking fewer signatures, eight people were engaged in the process on Friday and three worked some portion of Saturday in order to have the results certified by close of business on Monday in furtherance of a pressing deadline from the ballot printer. Doc. 96-11 at ¶¶ 9-11, 13.

Though the general election was not until November, voting began in September. Federal law required that absentee ballots be sent to UOCAVA voters 45 days before the general election if they have been timely requested. 42 U.S.C. § 1973ff-1(a)(8). In 2012, 45 days before the election was Saturday, September 22, and so the printed and electronic ballots were supposed to be transmitted by then. That necessarily required determining the content of the ballots and having the ballots prepared before then. It was in an attempt to comply with this federal law requirement that the random sampling method was used. Doc. 96-11 at ¶¶ 7-8. This requirement helps to define the State's important administrative interest in a deadline that provides sufficient time to verify the petitions; the petitions must be

submitted in time for the Secretary's office to have sufficient time to verify them and it must be recognized for these purposes that voting starts in September.

Recognizing that the election starts in September, Rob Johnston, who formerly served as the Elections Attorney in the Secretary's office, explained that it made sense to have a March petition deadline followed by a June deadline for the office to finish checking the petitions so that June until September could be reserved for checking the petitions of independent presidential candidates. Doc. 96-9 at ¶¶ 2, 25. Johnston also noted that the petition "deadline is one of many in the election cycle" and "[t]ying" it "to the Primary is clearer than making yet another date on the election calendar, while also recognizing that many candidates (all those who do not face a runoff) are selected on that day."²⁴ *Id.* at ¶¶ 23-24.

Julie Sinclair, who also formerly served as Elections Attorney, agreed with this assessment, and she attached to her affidavit a copy of the 2012 Administrative Calendar "list[ing] a variety of deadlines related to the election." Doc. 96-10, at ¶¶ 3, 11-12, and Exhibit A thereto. Later, Sinclair added:

The practical application of my [agreement with Johnston] was illustrated when the three minor parties filed thousands of signatures to be checked by our office on Thursday September 6, 2012, the last day for filing those petitions. *If we had received all of the petitions for all available offices in September, there would have been no*

²⁴ "Contests may also impact whether a candidate continues to the General Election." Doc. 98-9 at ¶ 24.

feasible way to complete verification of all of those petitions with our small office staff and meet the existing deadlines.

Doc. 96-11, at ¶ 16 (emphasis added). As previously explained, *see* n. 14, *supra*, the law has changed while this appeal has been pending. There is, obviously, no new testimony what that change might mean for future elections. But the testimony is valid as to the 2012 election. Also, Sinclair's just-quoted testimony about the inability of the office to check petitions "for all available offices" if not submitted until September remains. Doc. 96-11, at ¶ 16.

Accordingly, it is time consuming to verify petitions for ballot access, and in setting a deadline for submission, one must recognize that the November election begins in September. The petitions must be verified in time to comply with the UOCAVA transmission deadline.

CONCLUSION

Plaintiffs have not demonstrated, as a factual matter, that moving the petition deadline from June to March prevented them from achieving ballot access, and they undermined their allegations through their testimony. Both *Swanson* and *Timmons* demonstrate that Alabama's petition deadline is a "reasonable, nondiscriminatory restriction[]" that can be justified by the "State's important regulatory interests." *Timmons*, 520 U.S. at 358, 117 S.Ct. at 1370) (internal citations and quotation marks omitted). And here, the State justifies the March deadline through its important interest in setting a fair playing field. The State also has an interest in providing sufficient time to verify the petitions. The district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,718 words, excluding the parts of the brief exempted by 11th Circuit Rule 32-4. I have relied upon Microsoft Word 2007 to determine the word count.

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

s/Misty S. Fairbanks Messick
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 17th day of March 2014, I am electronically filing the forgoing APPELLEE'S BRIEF FOR SECRETARY OF STATE, STATE OF ALABAMA with the clerk of court using the ECF system, which will serve the following Attorney Filer electronically:

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s/Misty S. Fairbanks Messick
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