

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

JAMES HALL	:	
	:	
AND	:	
	:	
N. C. "CLINT" MOSER, JR,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 2:13-cv-00663-MHT
	:	
JIM BENNETT, Secretary of State	:	
for the State of Alabama,	:	
	:	
Defendant.	:	

**PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO SUPPLEMENTAL
SUBMISSION IN FOLLOW-UP TO RE-ARGUMENT**

On December 14, 2014, Plaintiffs filed a supplemental submission directed to the very limited purpose of addressing three questions that were raised by the Court during the November 13, 2014 re-argument of the pending cross motions for summary judgment. [DE 73]

On December 31, 2014, Defendant filed his response to the supplemental submission. [DE 74]

Plaintiffs now file their reply to the Defendant's response.

The three limited matters that arose during re-argument which Plaintiffs sought to address in their supplemental submission were: (1) clarifying the relief Plaintiffs seek¹; (2) analyzing whether the time frame for the Special Election process in this case was typical of the time frame for U.S. House Special Elections in Alabama²; and (3) considering whether it is relevant that

¹ The Court's inquiry and the discussion on this issue can be found in the transcript of the November 13, 2014 hearing at Pages 3-6, 28-33.

² The Court's inquiry and the discussion on this issue can be found in the transcript of the November 13, 2014 hearing at Pages 6-17, 24, 31, 37, 40-44, 47-53. Specifically, at Page 6, the Court asked: "Before we get to that, **what is the time frame in general that applies to special elections?**" [Emphasis added] The Court later asked what the time frame is "typically" for special elections. [e.g. Tr. 11/13/14 at 7, 12: "... [Y]ou can't tell me what is a typical length of time between the announcement of a vacancy by the governor and the setting of a special election?"]

there has never been an independent candidate on the ballot in Alabama in a Special Election for a seat in the U.S. House, or whether the relevance or weight of that factor depends on whether or not there is evidence of how many have tried.³

NO SUBSTANTIVE REPLY IS REQUIRED ON POINTS 1 OR 3

In the first part of their supplemental submission, Plaintiffs simply clarified that the relief they seek in this action is (A) a declaration that the 3% signature requirement is unconstitutional as applied to Special Elections in Alabama for a U.S. House seat and (B) an injunction prohibiting the requirement from being applied to an independent candidate in Special Elections in Alabama for a U.S. House seat. [DE 73 at 2] Defendant acknowledges that this, is what Plaintiffs seek. [DE 74 at 2]⁴ Nothing further is required by way of a reply on this point.

Defendant entirely failed even to address the third point in the supplemental submission.

At Pages 47-48 of the transcript from the November 13, 2014 hearing, the Court expressly asked defense counsel in various formulations of the question, whether historically there is a time frame that is typical for special elections for congressional seats in Alabama. Defense counsel repeatedly asserted that there is a lot of “differentiation” in the schedule and that there is no “consistent” time frame, because the schedule purportedly is in the Governor’s “complete discretion” [e.g. Tr. 11/13/14 at 41-42, 48, 50-51, agreeing with the Court that one ‘... can’t get a real good idea, other than the governor’s discretion, as to the time frame between the announcement of a vacancy and the special election”]; but with all due respect, this just is not accurate. Indeed the historical record shows a very consistent time frame provided for special elections in Congressional races in Alabama - indeed it is without question a uniformly short time frame within very consistent parameters - and logically so, given the State’s interests in moving rapidly to fill the seat.

As defense counsel noted during the hearing [Tr. 11/13/14 at 48], this history is information that is “publicly available.” Perhaps it is not surprising, given the results and specifically, the degree to which they establish quite a consistent record of the severely truncated time frame historically for special elections in Congressional races in Alabama, and directly contradict the Defendant’s position that there is no consistent time frame, that the Defendant chose not to provide such time frames to the Court. Defendant’s complaints that Plaintiffs have now provided this “publicly available” information in response to the Court’s inquiry, [See e.g., DE 74 at 4, ¶11], are not well placed.

³ The Court’s inquiry and the discussion on this issue can be found in the transcript of the November 13, 2014 hearing at Pages 17-25, 35-37.

⁴ Defendant refers to “doc. 76 at 1-2” on this point [See DE 74 at 2]; but this clearly is just a typographical error. There is no “doc. 76” in this case yet.

In that section of their submission, Plaintiffs reiterated the well settled and oft repeated principle in ballot access cases that ballot access history which reflects the fact that there never has been an independent candidate on the relevant ballot (here, the relevant ballot history is a Special Election ballot in Alabama for a U.S. House seat), is one factor to consider when evaluating how severe a burden ballot access requirements for independent candidates have been. [DE 73 at 7-9]

On this point, the Defendant has argued that the history is only meaningful if there is evidence that independents tried and were denied access to the ballot at issue. This, of course, would be information which is exclusively within the Defendant's control; however, despite the Defendant's indication earlier to this Court that it would investigate and provide such information, [Tr. 11/13/13 at 43-44], Defendant never has done so.

More importantly, as set out under Point 3 of the Plaintiffs' supplemental submission, the idea that the history is only relevant if there is evidence as to how many independents tried is a complete fallacy and certainly was not part of the inquiry in the landmark cases which established the relevance of the history. [See DE 73 at 7-9] To hold such history relevant only if there were evidence as to how many had tried, would miss entirely the phenomenon of independent candidates who were dissuaded from running **because** the ballot access requirements were overwhelmingly severe.

As Plaintiffs reminded the Court in its supplemental submission, the record in this case, of course, has two wholly unrebutted declarations from experienced candidates who decided not to enter or field a candidate in the Special Election at issue in this case specifically because, from their experience and, in one case, from an actual aborted effort in this race, it was clear that any attempt would be futile and cost-prohibitive, doomed to failure **because** of the 3% signature requirement within a truncated time frame. [See DE 73 at 7-9; DE 25-2; 25-3]. Since there is no response on this point, no reply is needed.

**THE DEFENDANT’S RESPONSE ON POINT 2 MISSES THE POINT
AND MISSTATES THE LAW**

Defendant Has Entirely Missed the Point of the Supplemental Submission on Point 2.

The Defendant seems entirely to have missed the very limited purpose of Plaintiffs’ submission on the second point. The Defendant’s response really seems to take issue with the Court’s inquiry, rather than with Plaintiffs’ supplemental submission.

During the re-argument on November 13, 2014, the Court asked in several different formulations, whether the time frame for the Special Election in this case was typical in length (from the time of the vacancy or the Governor’s proclamation to the time of the general Special Election) of the time frame historically provided for Special Elections for a U.S. House seat in Alabama. [Tr. 11/13/14 Hearing at 6, 7, 12, 47-48; See Footnote 2, *infra*.]

The answer to that question indisputably is “yes” and that is all that the Plaintiffs’ supplemental submission on this point intended to show and did, in fact, show, with publicly available historical data.

From the fact that the overall time frame from vacancy to Special general election always has been and, indeed is by definition a severely truncated time frame, it is obvious that the time frame for filing ballot access petitions in the context of a Special Election necessarily will always be even more severely truncated than the overall period between vacancy and the Special general election.

This is true, again historically and by definition, whether the ballot access petitions were due on the date of the first Special primary election (as Alabama law absolutely requires)⁵ or on some other date which, according to the Defendant’s arguments throughout this case, has to be sufficiently in advance of the Special general election to meet the State’s administrative interests in verification, preparation of absentee ballots, and well in advance of UOCAVA’s requirement that they go out at least 45 days before any general election, whether Special or regularly

⁵ This point will be addressed in greater depth in the next part of this section of the reply.

scheduled.

It is also true because no valid ballot access petition can be circulated under Alabama law until after the Governor has issued his/her proclamation setting the date for the Special general election. Ala. Admin. Code § 820-2-4-.05.

This is the only point Plaintiffs intended to make under Point 2 by presenting the history which shows the Special Election time frame uniformly to be short. Obviously, this is relevant here because the same 3% signature requirement that applies in a regularly scheduled election with an “unlimited time” for gathering signatures applies to this severely truncated period, with no ramp up time, lower voter interest, etc.

When it comes to this basic truth - that the time frame always has been and always will be severely truncated - it would appear that for this Defendant, the concept of consistency is nothing other than an inconvenient “hobgoblin.”⁶ It is impossible to reconcile the protestations in its response with the opposite position it argued all along in this case in an effort to prevent putting Plaintiff Hall on the ballot.

In trying to keep Mr. Hall off the ballot, Defendant could only be heard to argue vehemently that the Special Election process always must be handled in an “extraordinarily short” time frame, that the State’s interests required the time frame to be short and specifically, required independent candidates to get their ballot access petitions in by no later than the first Special primary election, and so on. Now, in trying to again foist its unsupportable mootness claim on the Court in the guise of a response, all of a sudden, its position has taken a 180 degree turn - even from its own motion for summary judgment. [*Compare e.g.*, DE 23 at Pages 2, 14, 30-31, DE 23, Exh. D, DE 28 at 30 - all explaining why in fairness to all parties and based upon claimed State interests, the date for an independent to file its ballot access petition is tied to the first Special Election primary and why the deadline has to be early on in the Special Election process in order to allow for verification, as well as why due to the UOCAVA deadlines the

⁶ See Emerson, Ralph Waldo, *Self-Reliance* (1841).

ballot access petitions have to be in early].

Notwithstanding the facts that: (1) Every Special Election for a U.S. House seat in Alabama has been on a severely truncated time frame of 1-5 months or less; (2) Defendant has argued throughout this case that independent candidates who seek ballot access must be required to file their ballot access petitions sufficiently early in that process to meet the whole host of administrative interests that require the same, as well as the UOCAVA ballot distribution deadlines; (3) Defendant has argued throughout that by definition the Special Election time frame has to be “extraordinarily short” in order to fill the suddenly vacant office (and for other reasons articulated by the Defendant); and (4) Defendant characterized the severely truncated time frame in this case as “uniquely long,” Defendant now argues that, nevertheless, there is no reason to believe that an independent candidate would ever face a similarly burdensome time frame to gather and file its 3% signature petition in the future, because the Governor has discretion in scheduling.

With all due respect, the Defendant’s position on this point in its response is pure nonsense, cannot be reconciled with history, its earlier arguments, or the record in this case and finds no cognizable support anywhere.

Defendant Asks the Court to Ignore the Relevant Ballot Access History.

In its response, Defendant argues that the Court should not consider the time frames provided for any past Special Elections for a U.S. House seat in Alabama because “... only the 2013 special election is at issue in this litigation.” [DE 74 at 3, ¶8]

It should be surprising that a Secretary of State who professes to have a “... very strong interest” in treating all parties seeking ballot access fairly, [11/13/14/ Tr. at 45], would ask the Court to ignore the entire history concerning the relevant time frame provided for Special Elections for a U.S. House seat in Alabama, when the matter directly at issue in this case is the severe burden a severely truncated time frame for a Special Election places on a petitioning candidate - especially when the law tells us that such a history is directly relevant and **must** be

considered and when the Court asked the relevant question.

The Defendant never complains that any of the data provided by Plaintiffs is inaccurate or that the historical time frames presented for the past Special Elections for a U.S. House seat in Alabama are wrong; rather it complains that the data Plaintiffs provided to show that the time frame here was typical for such Special Elections historically is not relevant because the ratio in time between Special Election primary dates and the general Special Election and other factors might have been different. [DE 74 at 3-10]

Again, Defendant misses the purpose for Plaintiffs' submission on Point 2. Plaintiffs provided specific historical information on the Special Election primary dates and the date of the Governor's proclamation for those historical Special Elections where available; but the purpose of the submission of the historical data was solely and exclusively to address the Court's inquiry and to demonstrate that the time frame from the date of the vacancy giving rise to the Special Election for a U.S. House seat until the general Special Election for that seat typically (indeed, **ALWAYS**) is a severely truncated time frame similar to the time frame provided in the instant case.⁷

Along with its complaint that the time frame from such races historically should not be considered at all, Defendant complains that Plaintiffs only provided data from 5 of the 18 Special Elections for a U.S. House seat that expert witness Richard Winger testified were held

⁷ The irony in having to keep making the point is that, again, it is the Defendant who insisted over and over again in seeking to avoid the TRO in this case that such time frame absolutely has to be severely truncated and the date for filing the ballot access petition absolutely must be early on in the overall time frame for a variety of purported reasons. [See e.g. DE 23 at 3 & 34 - need to fill vacancy as quickly as possible to minimize time without representation; DE 23 at 3 - signature deadline must be set early to be in compliance with UOCAVA 45 day rule; DE 23 at 30 - signature deadline must be set early to give time to verify; DE 23 at 20; DE 23-2, at 5-6 - "Everyone must act quickly in the context of a special election; "extraordinary pace"; DE 23, Exh. "D"; DE 28 at 3, n.1 - Governor cannot order special election until vacancy becomes effective].

historically since 1893, when ballots first were printed. [DE 74 at 3, ¶8 and n.2]⁸ Defendant, in effect, faults Plaintiffs for not providing enough data, after claiming the data to be irrelevant.

It is true, of course, that Plaintiffs, through expert witness Richard Winger, earlier provided the Court with a list of the 18 Special Elections for a U.S. House seat that have been held in Alabama since 1893 and the dates on which each of those Special Elections was held. [DE 29-1 at 2-3].

It also is true that in their most recent submission, DE 73, in support of the very basic thesis that the severely truncated time frame for the ballot access petition process for the Special Election in the instant case was typical of the short time frame provided historically for Special Elections for a U.S. House seat in Alabama, Plaintiffs only provided the time frames for a sample of 5 of the 18 historic U.S. House Special Elections (the 5 most recent ones). But this was not done to present any sort of misleading picture; rather it was done to avoid unduly burdening the Court. Plaintiffs took the same approach earlier in this case, without complaint by the Defendant, using just a sample to show the major difference in voter participation between Special Elections and regular elections for a U.S. House seat in Alabama. [DE 63-1 at 2]

Of course Defendant must know that there was no intention to mislead, as he has full access to all of the underlying information and therefore knows that a full presentation of the time frames for all of the remaining historical U.S. House Special Elections in Alabama just provides further support for Plaintiffs' thesis.

Since Defendant has raised this complaint, however, the undersigned has taken the time to gather all of the information from the "publicly available" records Defendant referred to at oral argument and Plaintiffs will now accommodate the Defendant and provide herein a list of those time frames for the remaining 13 historical Special Elections for a U.S. House seat in Alabama,

⁸ Defendant characterizes the Special Elections for which data is provided as Special Elections Plaintiffs "say were held" [DE 74 at 3, ¶8]. These Special Elections at issue are historical facts, not a matter of what anyone "says." The Defendant has full access to all of these publicly available historical facts concerning Alabama elections and, notably, has not taken issue with any date provided.

listing the dates when the vacancy arose, causing a Special Election to be set, and the date on which the Special General Election to fill the seat was held:

The Time Frames for the 13 Additional Special Elections for U.S. House in Alabama:

1. On September 15, 1940, Rep. William B. Bankhead died and on November 5, 1940, a Special Election was held in the 7th District, electing Zadoc L. Weatherford (just over 2.5 months);
2. On January 11, 1938, Rep. J. Lister Hill was appointed to fill a U.S. Senate seat and on June 14, 1938, a Special Election was held in the 2nd District, electing George M. Grant. (5 months);
3. On March 2, 1935, Rep. John McDuffie resigned to become a U.S. District judge and on July 30, 1935, a Special Election was held in the 1st District, electing Frank M. Boykin (less than 5 months);
4. On June 22, 1933 Rep. Edward B. Almon died and on November 14, 1933, a Special Election was held in the 8th District, electing Archibald H. Carmichael (less than 5 months);
5. On August 16, 1928, Rep. William B. Bowling resigned to become a judge and on November 6, 1928, a Special Election was held in the 5th District, electing Lafayette L. Patterson (less than 3 months);
6. On March 27, 1928, Rep. John R. Tyson died and on August 14, 1923, a Special Election was held in the 2nd District, electing J. Lister Hill (less than 5 months);
7. On February 8, 1921, Rep. Fred Blackmon died and on June 7, 1921, a Special Election was held in the 4th District, electing Lamar Jeffers (4 months);
8. On November 1, 1920, Rep. Thomas J. Heflin resigned to fill a U.S. Senate seat and on December 4, 1920, a Special Election was held in the 5th District, electing William B. Bowling (just over 1 month);
9. On May 13, 1919, Rep. John L. Burnett died and on September 30, 1919, a Special Election was held in the 7th District, electing Lilins Bratton Rainey (3.5 months);
10. On May 25, 1914, Rep. Henry D. Clayton resigned to become a U.S. District judge and on June 29, 1914, a Special Election was held in the 3rd District, electing William O. Mulkey (just

over 1 month);

11. On March 31, 1914, Rep. William N. Richardson died and on May 11, 1914, a Special Election was held in the 8th District, electing Christopher Harris (just less than 1.5 months);

12. On June 17, 1908, Rep. Ariosto A. Wiley died and on November 3, 1908, a Special Election was held in the 2nd District, electing Oliver C. Wiley (4.5 months);

13. On March 20, 2004, Rep. Charles Winston Thompson died and on May 19, 1904, a Special Election was held in the 5th District, electing J. Thomas Heflin (2 months);⁹

There can be no question that the history in Alabama beyond any dispute demonstrates that the time frame provided in this case from the date of the vacancy giving rise to the Special Election at issue to the general Special Election was typical of or longer than the time frame historically for Special Elections for a U.S. House seat in Alabama. This is true historically and by definition.

The Defendant Has Misstated the Law in its Response.

The Defendant takes the position, without any statutory citation whatsoever, that for Special Elections, Alabama does not require that an independent candidate file his or her signature petition by the date of the first primary election; rather the Governor is free to set whatever date he wishes for the petitions to be filed. In fact, the Court is told, the Governor only chose the first primary date as the filing date in this case, to “respect[]” the “legislative policy choice expressed in the Alabama Code.” [See DE 23 at 6-7; DE 74 at 4-5, ¶¶ 13-16].¹⁰

The Defendant is absolutely wrong!

In his most recent filing, [DE 74], no authority at all is given for this assertion; rather the

⁹ Additionally, while not covered in Mr. Winger’s expert Declaration, DE 29-1, publicly available data reflects that On October 12, 1882 Rep. William M. Lowe died and on January 15, 1883, a Special Election was held in the 8th District, electing Joseph Wheeler (just over 3 months); then on April 20, 1900, Rep. Wheeler resigned and on August 6, 1900, a Special Election was held in the 8th District, electing William N. Richardson (3.5 months).

¹⁰ Defendant acknowledges, as he must, that for regularly scheduled elections all independent and minor party candidates must file their 3% ballot access petitions by no later than the date of the first primary election. [DE 74 at 5, ¶14]

Defendant provides an example from a State Special Election in which the Governor set a date other than the first primary election. Obviously just citing an example of the Governor's use/abuse of power does not provide any legal authority for the assertion.

In his motion for summary judgment, [DE 23], the Defendant's only citation to any authority for this assertion was to the United States Constitution, Article 1, Section 2, Clause 4. [DE 23 at 7]. This is absurd. To read this Constitutional provision as the Defendant urges the Court to do would require the Court to either completely ignore or read selectively, without any guiding principle Alabama's statutory framework on elections.

Article 1, Section 2, Clause 4 of the U.S. Constitution provides as follows:

"When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."

Obviously, this constitutional provision empowers a Governor to call for the holding of a Special Election to fill a vacant U.S. House seat within his or her State; but it just provides the broad start of the process. The Alabama legislature has provided the details for the relevant events in the Special Election process in Alabama.

Let's take a step back to get a full view of how the statutory process works:

Section 17-9-3 (a)(3) of the Alabama Code expressly provides for the only way an independent candidate for elected office can have his or her name placed on a ballot for **any general election**. This Code section, set out below in pertinent part, requires that independent candidates for any office other than at the county level gather signature petitions meeting the 3% signature requirement and file them with the Secretary of State "**on or before 5:00 P.M. on the date of the first primary election as provided for in Section 17-13-3.**"¹¹ [Emphasis added].¹²

¹¹ Alabama Code § 17-9-3 provides in pertinent part as follows:

§ 17-9-3. Persons entitled to have names printed on ballots; failure of Secretary of State to certify nominations.

(a) The following persons shall be entitled to have their names printed on the

The statute makes no distinction between regularly scheduled general elections (or primary elections) and Special general elections (or primary elections). For **any** general election, Special or regularly scheduled, whenever the first primary is set, an independent candidate has to have his 3% signature petition filed by 5:00 p.m. on the date of that first primary.

A reading of other provisions of Alabama's election statutes clearly demonstrates that the Alabama legislature knows very well how to expressly distinguish between regularly scheduled elections and Special elections when it intends for there to be a difference.

For example, as reflected in § 17-13-3, the Alabama legislature decided to statutorily require that for regularly scheduled elections, first primary elections in the state are to be held on the first Tuesday in June and if a second or runoff primary is required thereafter, such second or runoff primary is to be held on the sixth Tuesday following that first Tuesday in June.

Obviously, though, since there is no way to know in advance when on the calendar a Special Election might be required due to the death, resignation, or other event creating a vacancy in any given elective office, this calendar setting would not work for Special Elections. Therefore, under § 17-13-3, the legislature expressly excluded the scheduling of Special primary elections from this fixed calendar setting for regularly scheduled primary elections.¹³

appropriate ballot for the general election, provided they are otherwise qualified for the office they seek: ...

(3) Each candidate who has been requested to be an independent candidate for a specified office by written petition signed by electors qualified to vote in the election to fill the office when the petition has been filed with the judge of probate, in the case of a county office and with the Secretary of State in all other cases, on or before 5:00 P.M. on the date of the first primary election as provided for in Section 17-13-3. The number of qualified electors signing the petition shall equal or exceed three percent of the qualified electors who cast ballots for the office of Governor in the last general election for the state, county, district, or other political subdivision in which the candidate seeks to qualify.

¹² Alabama Code § 17-6-22(a) sets out the similar requirement for a minor party candidate to get his or her name on the ballot in Alabama.

¹³ § 17-13-3. Time and place for holding primary elections.

(a) Except as otherwise provided in subsection (b), primary elections, except

Excluding Special Election primary elections from the fixed calendar for regularly scheduled primary elections, however, has no impact whatsoever on the statutory requirement under § 17-9-3 (a)(3) that, regardless of when on the calendar the first primary election is set for a Special Election (or for a regularly scheduled election), independent candidates **must** as a matter of law file their ballot access petition by the first primary election, whether it is a regularly scheduled or Special election primary. There is no exception to that rule and no basis whatsoever from deviating from it for a Special Election - and the Defendant certainly has not cited any such authority.

Chapter 15 of Title 17 of the Alabama Code is the portion of Alabama's election related statutes that applies specifically to Special Elections. Indeed, defense counsel expressly advised the Court of this during the November 13, 2014 hearing (11/13/14 Tr. at 40). It is telling, but not surprising, that the Defendant does not cite to any section under Chapter 15 to support his unsupported and erroneous claim discussed here.

Chapter 15 runs from § 17-15-1 through § 17-15-7. There is no need to further burden this pleading by setting out each section. Suffice it to say, there is absolutely nothing in this Chapter on Special Elections that in any way even mentions, refers to, or relates to, let alone contradicts, the express requirement in § 17-9-3 (a)(3) that an independent candidate's ballot access petition must be filed by no later than 5:00 p.m. on the first primary election for **any** election in Alabama - whether that election is a regularly scheduled election set on the first Tuesday in June under § 17-13-3 or is a Special Election, set on some other calendar date, as

special primary elections and presidential preference primaries, held at the expense of the state or counties, shall be held on the first Tuesday in June. When necessary, as provided in this chapter, a second or runoff primary election shall be held on the sixth Tuesday following the primary election. Any second primary shall be held by the same election officers who held the first primary, and be held at the same places as the first primary election. No primary shall be held by any political party except as herein provided. Primary elections herein provided for shall be held at the regular polling places established for the purpose of holding general elections.

provided for under § 17-13-3.¹⁴

On the one hand, this erroneous claim by the Defendant, asserted without any authority that actually supports the assertion, is not particularly important. Most relevant here are the facts that the entire time frame for Special Elections for a U.S. House seat in Alabama by definition and as reflected in the relevant history is severely truncated (in contrast to the “unlimited period” of time for gathering signatures for a regularly scheduled election) and that by the Defendant’s own account, repeated throughout this case, the ballot access petitions must be filed early on in that overall severely truncated time frame in order to allow validation, meet ballot printing deadlines, meet UOCAVA requirements, etc. So whether tied to the first primary date or some other date, the Defendant himself has made the case repeatedly for why ballot access petitions for independent and minor party candidates have to be filed early on in the regular and Special election process. However, the fact is, the Defendant is wrong and both regularly scheduled and Special elections an independent candidate is required by Alabama law to file his/her ballot access petition by no later than 5:00 p.m. on the date of the first primary election.

Finally, on this point, the Defendant’s assertion that the Governor has “absolute discretion” to decide when in the Special Election process an independent candidate’s ballot access petition has to be filed, if true, would be even more problematic than the actual situation for a variety of reasons. *See e.g., Clingman v. Beaver*, 544 U.S. 581, 603 (O’Connor, concurring)(noting that the is not a “neutral arbiter;” rather it is controlled by the political party in power and a presumption that those in power have an incentive to “shape the rules of the electoral game to their own benefit.”) It is not the case, in any event, so the point need not be belabored; but Plaintiffs gladly will provide further on this point if the Court so requests.

¹⁴ If the Defendant’s argument that the deadline requirements of § 17-9-3 (a)(3) do not apply to Special Elections is carried to its logical conclusion, then it also would follow that the 3 percent signature requirement would not apply to Special Elections either, with both requirements found in this same statutory section. Plaintiffs certainly have not heard the Defendant argue that the 3 percent requirement is just limited to regularly scheduled elections, with the percentage for Special Elections also in the Governor’s “discretion.”

CONCLUSION

The points addressed above are the only portions of Defendant's response to which Plaintiffs intend to reply; but Plaintiffs, of course, remain ready to respond to any additional questions the Court might have on any subject in this case.¹⁵

Miscellaneous misstatements in the Defendant's response like those found in DE 74 at 2, n. 1 already have been exposed as completely contrary to the law as it really exists. New claims like the one Defendant asserts in DE 74 at 9, ¶ 28 - that what Defendant really meant when it represented earlier that the time frame in this case actually was "uniquely long" for such a Special Election, was that the UOCAVA requirements made this one long - are proven as untrue by Defendant's own words.¹⁶

Both sides have represented to the Court that the case is due to be decided on summary judgment. At the end of the day, this case is simple from every perspective. Without any question, the 3% requirement as applied to Special Elections for a U.S. House seat in Alabama must be struck down as unconstitutional.

If, as Defendant now claims, the focus should just be on the 2013 Special Election at issue and not on history as a predictor, then Defendant must lose. The fully supported and completely un rebutted factual record in this case demonstrates unequivocally a severe burden that kept Mr. Hall off the ballot and kept others even from trying, denying voters who wish to cast their votes for them as independents that opportunity - and that is true even if the Court finds, over Plaintiffs' objection, the signature gathering period to have been 106 days, making the

¹⁵ It is difficult to resist replying to an historical inference the Defendant, without support, suggests the Court should draw. The Defendant implies that perhaps no independent candidate has appeared on a Special Election ballot for a U.S. House race in Alabama because in an earlier "political landscape" independents just were not a factor. [DE 74 at 9-10, ¶ 31]. Such a claim would be historically incorrect. For example, in the regularly scheduled 1930 U.S. Senate race in Alabama, independent candidate J. Thomas Heflin received 100,952 votes, which amounted to 40.07% of the overall vote.

¹⁶ See DE 23 at 10, where Defendant explained that the time frame in this Special Election was "unique" because of the "great deal of advance notice" Congressman Bonner gave of his resignation.

whole Special Election period longer than others historically and longer than any would be in the future, given the “unique(ly)” long period here.

The record is completely devoid of any evidence supporting any State interest, let alone any compelling State interest. Moreover, the Defendant repeatedly has told the Court, contrary to clearly established law, that it has no obligation whatsoever to prove any interest in support of its position. The reasons the State articulated (without proof) in support of its motion for summary judgment, and in trying to prevent the TRO from issuing in this case, stand only for the proposition that the Special Election process must always be conducted in a severely truncated time frame and ballot access petitions must be filed early on in that overall Special Election process in order to meet other State interests.

No State interest ever in this case has even been articulated that in any way even begins to justify setting the same 3% signature requirement for a Special Election that means gathering the same number of signatures in a severely truncated time frame, with low voter awareness, interest, and turnout, as are required for a regularly scheduled election for the same seat, for which an independent candidate literally would have years to gather such signatures.

Such a requirement cannot be permitted under the authority of the Special Election cases that have been provided to the Court or under any established ballot access jurisprudence and certainly not on the facts of this case, as developed without dispute in this record - and that of course must be the analytical focus, rather than any litmus test that compares the number of signatures or time frame here to an unrelated situation.

Finally, this result is commanded by the clear ballot access history regarding Special Elections in Alabama for a U.S. House seat. No independent candidate has appeared on such a ballot ever.

For all of the reasons previously asserted to the Court and for the reasons herein set forth, Plaintiffs are entitled to a judgment in their favor as a matter of law and Alabama’s voters and those who would be independent candidates for the next U.S. House seat to be decided through a

Special Election - an event that could arise any time - need that decision as soon as possible.

Respectfully Submitted.

/s/ David I. Schoen
Counsel for Plaintiffs
(ASB-0860-O42D)

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing Reply on all counsel of record by filing the same through this Court's ECF system on this 6th day of February, 2015.

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