RECORD NOS. 13-15214-AA

In The
United States Court Of Appeals
For The Eleventh Circuit

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

Plaintiffs – Appellants,

v.

SECRETARY, STATE OF ALABAMA,

Defendant – Appellee.

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

REPLY BRIEF OF APPELLANT

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OVERVIEW OF THE APPELLEE'S BRIEF

Given both the expedited nature of this appeal and the arguments raised by Secretary Bennett ("Bennett") in response to the Hall and Moser brief, this Reply Brief will "cut to the chase" and directly address the two arguments made by Bennett in opposition to the requested injunctive relief. Both arguments Bennett makes are wholly without support in fact or law on this record and must be dismissed out of hand.

Bennett argues first that the election already has started, by virtue of the process initiated under the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 42 U.S.C. § 1973ff *et seq*. ("UOCAVA"), and putting Hall on the ballot would mean stopping the election and rescheduling it.

This factor, Bennett argues, outweighs Appellees' First and Fourteenth Amendment rights and renders putting him on the ballot against the public interest. Bennett goes so far as to argue that this Court need look no further than this issue to deny the requested relief and need not even consider the merits of the appeal. [SOS Brief at 1]

In order for Bennett to prevail in this appeal, he needs the Court not only to ignore the merits, but the actual record in the case as well. His argument on this issue and on his "merits" argument require nothing less; for the actual record and

the application of the well settled legal principles that actually apply demand a full rejection of Bennett's arguments and require the immediate injunctive relief requested.

In terms of the idea that no matter the merits, it is simply too late in the process to put Mr. Hall on the ballot, Bennett ignores a whole body of law quite to the contrary. Moreover, the argument is disingenuous, for it is the State that unilaterally made up the Special Election schedule and that entered into the OACAVA agreement without regard to the interests of independent candidates and the impact on them, even though Bennett had direct notice of their concerns. Further, when Hall and Moser asked to have this case consolidated with the OACAVA case to avoid just this circumstance, Bennett opposed it and the lower court denied the motion, finding it could adjust the schedule on its own if necessary. Most significantly, there is no evidence whatsoever in this case that a single OACAVA ballot for the general election in this Special Election ever has been requested or mailed out. There were no facts whatsoever in the record from which the district court could have drawn its conclusions on the third and fourth prong of inquiry for the requested preliminary injunction.

Bennett's second argument - his "merits" argument - is that the lower court was within its discretion in (1) ignoring the actual unrebutted facts on the ground,

case specific record evidence and expert testimony; (2) ignoring the unchallenged historical evidence that not a single independent candidate ever has appeared on the ballot in any of the 18 Special Elections for Congress in Alabama, and (3) ignoring the dramatic contrast between Alabama's requirement of almost 6,000 signatures and the requirements in other States in the same situation (Florida - 0; Georgia - 0; Tennessee - 25; Mississippi - 200), in favor of applying a legally prohibited litmus test, to find that the burden is not "severe" because in the 1971 Supreme Court decision, *Jenness v. Fortson*, 403 U.S. 431 (1971), the Court upheld, in a regular election cycle, a 5% signature requirement and a 180 day deadline which, the lower court somehow "found" (without any evidence) was more burdensome than the requirements in the instant case.[1]

The lower court clearly abused its discretion and used an incorrect (and expressly prohibited) legal standard to come to an incorrect and completely unsupportable legal conclusion.[2]

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[1] When the court asked Bennett the rather basic question of how many registered voters there were in *Jenness*, counsel was completely unable to answer and so could not even discuss what the 5% burden meant in *Jenness* in any real terms. [Tr. 11.13.13 at 35]

[2] An additional error the lower court made in applying the incorrect legal standard was its mistaken belief that its inquiry starts and stops with whether the burden imposed by the ballot access regulation creates a "severe" burden, with any lesser burden not legally cognizable. This is simply wrong. While the law is clear

To buy into Mr. Bennett's argument, this Court would have to ignore 42 years of ballot access jurisprudence since *Jenness*, in which the Supreme Court consistently has directed that a court must use a case by case analysis, and may not use a litmus test, which attempts to extrapolate the burden from one completely unrelated scenario to another.

THERE IS NO MERIT TO BENNETT'S UOCAVA ARGUMENT

Secretary Bennett argues in his brief that this Court need not reach "the merits" of the request for an injunction and should just summarily affirm without bothering with such things as a consideration of the burden on the First and Fourteenth Amendment rights of Messrs. Hall and Moser and other voters who support them, because "[T]he election, scheduled for December 17, 2013, is already underway via absentee balloting." [SOS Brief at 1, 26-28, 58-59]

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that a severe burden triggers strict scrutiny and requires that for the ballot access restriction at issue to be upheld, it must be supported by a "compelling" state interest that employs the "least restrictive means," restrictions that are something less than strict nevertheless can only survive if supported by a proven state interest sufficiently weighty to justify the level of severity of the burden on a scale. The court must weigh the level of severity and the importance of the claimed interest(s) supporting it. *Norman v. Reed*, 502 U.S. 279, 288 (1992); *Jones v. McGuffage*, 921 F. Supp. 2d 888, 897 (N.D. Ill. 2013). This authority also, of course, directly undercuts the claim Bennett has made in this action that it need not prove any state interest justifying any burden; rather it just needs to articulate an interest and the court has to accept it without any further analysis.

The OACAVA argument and conclusions based on it have become the tail wagging the dog in this case. There is no basis in fact or law for it.

The district court abused its discretion in basing its denial of the injunction on the purported OACAVA factor for these same reasons. It used the OACAVA argument to find in Bennett's favor on the last two prongs of the four prong test for the preliminary injunction. The following is the entirety of the district court's analysis and conclusion on those two prongs:

> "The Court finds that the threatened injury to the movant, Mr. Hall, does not outweigh the damage an injunction would cause to the state. The election has already begun because of the UOCAVA ballots and the fact that those have already been mailed. If the court were to both grant an injunction placing Mr. Hall on the ballot and require that the state comply with the UOCAVA requirements of this election, the Court would have to cancel the special election which is currently set for December 17, 2013. This would result in great expense to the state and would increase the time Alabama's First Congressional District was without a representative. The Court finds granting an injunction is against the public interests. It would place an undue burden on the candidates who have complied with the qualification requirements and who are on the ballots for election in the general election. Canceling an election and rescheduling an election would cause voter confusion. The voters would lose the opportunity to have a representative when Congress reconvenes in January.[3]

Tr. 11/13/13 at 60 [App. Tab 30 at 60]

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[3] On this last point, the court, without any evidence on the subject whatsoever, went even further than Bennett did. Bennett argued that to reschedule the election to comply with the 45 day OACAVA date would mean rescheduling to the end of December (approximately 10 days). [Tr. 11/13/13 at 40] The OACAVA ballots are not even due to be returned until December 27th, if any are to be used. [DE 16-1 at 12]. The entire argument is a red herring in any event, as putting Hall on the ballot would not require rescheduling the election.

The following are some of the reasons Bennett's argument purporting to rely on OACAVA is a complete canard and why the lower court's conclusions based on the OACAVA argument were clearly erroneous and an abuse of discretion, based on purported facts and assumptions found nowhere in the record:

1. First of all, and perhaps most significantly on this issue, **there is not one iota of evidence in this record that a single OACAVA ballot was requested, mailed out, or cast for the general election of the Special Election at issue**.

As Bennett's Supplemental Appendix reflects, he filed some 21 exhibits in support of his position below on the issues in this case. [DE23]. The attorneys representing Bennett before this Court and the lower court in this case are the same attorneys who represent Bennett in the OACAVA case. [DE23-17] These same attorneys appeared before the lower court in the instant case at all times and, significantly, appeared at the hearing on November 13, 2013, expressly to argue, *inter alia*, that Mr. Hall should not be put on the Special Election ballot because of the OACAVA ballots.

Yet, not only is there not one shred of evidence in the documentary record indicating that any OACAVA ballots for the general election for this Special Election actually were requested, mailed, or cast, when asked directly during the November 13th hearing on the injunction if he knew how many OACAVA ballots

were requested or sent out for the Special Election at issue in this case, Bennet's counsel answered: "I do not." [DE30; Tr. 11/13/13 at 52]. Bennett's attorney then went further and acknowledged that even if some number went out "for the early round in the primary election," that does not mean anything about how many were requested or were sent out for the general election. [*Id*.][4]

Bennett argues that the OACAVA factor is so significant in this case, that even if Hall and Moser are right on the merits of their severe burden argument, Hall should not be placed on the ballot because of the OACAVA ballots and this Court does not even need to consider the severity of the burden caused by the combination of the signature requirement and the truncated schedule because of OACAVA.

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[4] The fact that Bennett could not tell the district court how many UOCAVA ballots had been requested by November 13, 2013 (or whether any had been) is telling, given the provision in the Order setting the schedule for this Special Election, requiring a report by Bennett of detailed information confirming any UOCAVA ballots requested for the Special Election (including their number) by no later than August 13, 2013, October 11, 2013, and November 4, 2013, [DE 16-1 at 14-15] all of which pre-dated the November 13, 2013 hearing. Interestingly, the Order expressly requires reports to the court in advance of November 4th and November 21st of all OACAVA ballots requested and provided for the general election in this Special Election; yet the publicly available docket sheet in the case, 12-cv-179 does not reflect any report of requested OACAVA ballots for the general election by those dates.

Similarly, the lower court found the OACAVA issue so significant that it found that harm to the State and to voters outweighed the harm to Appellants' constitutional rights and that it would have to reschedule the election to bring the State into compliance with OACAVA if it put Mr. Hall on the ballot, and that this would result in great expense. Yet the court had before it not even a scintilla of evidence that even a single OACAVA ballot had been requested or sent out for the general election in this Special Election.

The Secretary knows no shame on this issue. He asserts here, again without any record evidence whatsoever that even one OACAVA ballot for the general election in this Special Election ever was sent out, "[A]s just explained, the election is already underway as absentee balloting has begun and, **indeed, more absentee ballots have likely been transmitted since the district court ruled.**" [SOS Brief at 58][5] This is completely improper argument *dehors* a record that does not show that even one absentee ballot was even requested.

Similarly, there is no record evidence supporting the district court's conclusions about the purported expense of putting Mr. Hall on the ballot at this

[5] The Brief includes a citation to Document 36 at 60, apparently a citation to the 11/13/13 hearing transcript which certainly provides no support for this assertion that would be completely *dehors* the record in the best case scenario, but is completely unsupported by the record in reality.

point. These are not subjects about which unsupported assumptions, based on no factual record are to be made - especially given the irreparable impact on Appellants' fundamental constitutional rights and on the voters who support them.

In buying into this canard, the district court found that because of the OACAVA factor, putting Mr. Hall on the ballot would be unfair to the voters at this point and the balance of harm favored the State. There is no evidentiary basis for that conclusion.

Even if *arguendo*, Bennett had adduced some evidence that there were OACAVA ballots requested and sent out for this Special Election, if the number of such ballots was 5, 10, 50, or even 200, there is no basis for the district court's conclusion that the balance of harm to this small number of absentee voters from having Hall on the ballot outweighs the harm to Hall or the approximately 3000 qualified voters who signed petitions to have Hall on the ballot if he is not. How could the lower court possibly have engaged in any meaningful balancing without any evidence that even a single OACAVA ballot had been requested or sent out for the general election? It could not have and its findings must be reversed.

2. OACAVA was enacted to expand voters' rights, not to shrink them. The Secretary in this case seeks to use OACAVA improperly as a shield in furtherance of his agenda to restrict the ability of independents to get access to the ballot,

while arbitrarily bending the rules for Democrats or Republicans and, in the context of OACAVA in this case, while engaging in the complete fiction that the Special Election started on November 2, 2013.

If anything in this entire scenario is likely to cause voter confusion, it is the sending out of a ballot on November 2, 2013 - **two days before the Republican primary runoff** - that includes people who as a matter of law will not and cannot be on the real general election ballot, and then sending out a different ballot on November 13th, reflecting the result of the November 4th primary runoff. [DE 16-1 at 5]

When the district judge asked Bennett what would happen if an OACAVA voter returned both ballots, counsel for Bennett answered as follows: "If a voter returns both ballots, one or the other will count, not both, obviously. And as I stand here, I'm not sure which one that will be. But there are rules in place that prevent both ballots from being counted." [Tr. 11/13/13 at 38] Needless to say, the district court was not enlightened before his ruling as to what those "rules" might be.

The bottom line is, if the artificial device used to "comply" with OACAVA's 45 day rule - a ballot sent out on November 2, 2013, that had people on it not even in the general election - can serve as a placeholder for compliance,

then it can serve as the same kind of compliance for a general election ballot that has Mr. Hall on it as well, even though he wasn't on the November 2, 2013 ballot. There is no authority whatsoever provided for the proposition on which Bennett's argument rests that adding Hall to the ballot would put the State out of OACAVA compliance. That is, there is no authority cited for the proposition that a ballot that lists candidates not actually in the general election complies with OACAVA if sent out 45 days in advance; but if it omits one candidate it does not comply.

Nor is there any authority cited for the proposition that Mr. Hall cannot simply waive inclusion on the OACAVA ballot as he has offered to do.

Finally, there is no authority cited for the proposition that it is more appropriate as a matter of law to sacrifice the First and Fourteenth Amendment rights of Appellants, their supporters, and the 3,000 people who signed petitions for Hall to be on the ballot, in order to make sure that the unknown number of OACAVA voters (if any exist) can have all candidates on their ballot.

3. Bennett should be estopped from claiming that the OACAVA schedule for this Special Election prevents putting Mr. Hall on the ballot.

On October 18, 2013, Hall and Moser moved in the lower court for an Order consolidating the instant case with the case before Judge Thompson in which he had issued an Order on July 26, 2013 [DE 16-1] concerning the schedule for the

OACAVA process in the Special Election at issue here. [DE 14] Appellants expressly brought to the lower court's attention the schedule Judge Thompson had set and asserted that consolidation was necessary to avoid a negative impact on Appellants, since independent candidates' interests thus far had been ignored by Bennett in that case, notwithstanding that Bennett was well of the concerns independent candidates had about the schedule by then.

Bennett filed a response in which he acknowledged that the relief sought here could alter the schedule of the Special Election and that the same would be relevant to the OACAVA case; but he opposed consolidation. [DE 15]

Appellants filed a Reply on October 22, 2013, emphasizing that the failure to consolidate the two cases could well result in inconsistent scheduling which could negatively impact Appellants. [DE 16 at 6]

On October 24, 2013, the lower court denied the Motion to consolidate the cases finding it to be "patently clear that the legal and factual issues ... (in the two cases) are not common." [DE 18 at 3] The lower court further characterized as "tangential" the effect on the rights of overseas voters that might result if the court had to alter the Special Election schedule based on Appellants' claims. Yet now we find the tail wagging the dog, with the lower court finding that because of the OACAVA schedule in that case, the injunction here should be denied. This is a

most unfair result for these Appellants who expressly put the district court on notice of the conflict at a time when it could have been addressed in one consolidated action that considered the rights of independents.

4. Finally, the district court's balancing of interests and findings concerning the public interest, centered on the OACAVA matter and the idea that because of OACAVA a new election would have to be ordered, the district court ignores authority ordering relief notwithstanding much greater disruption.[6]

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[6] Bennett's assertions in his Brief at 60, that "it is important to note that Plaintiffs (sic) could have put these issues before the courts sooner, but did not" and that "[T]heir claims likely ripened weeks before they filed their Complaint" and that they should have sought expedited processing sooner, are offensive. Appellants filed their Complaint on September 17, 2013, a week before the signature petitions were due to be filed. In the Complaint, Appellants expressly sought expedited processing of the case. [DE 2 at 9] On September 30, 2013, Bennett filed a Motion to Dismiss and the primary thrust of the Motion was a claim that Appellants had not sufficiently pled details of their efforts at gaining access to the Special Election ballot. [DE 9] Bennett's assertion in his Brief before this Court that the claims should have been brought weeks earlier is irreconcilable with his position in his Motion to Dismiss.

Appellants could not set out all of their efforts at gaining access to the ballot by the deadline before the deadline on September 24, 2013, if their averments were to include all efforts as Bennett demanded. Accordingly, on October 17, 2013, immediately after gathering all information concerning all such efforts, Appellants filed an Amended Complaint. [DE 12] In it Appellants once again expressly sought expedited processing of their claims. [DE 12 at 1] On October 18 and 22, Appellants filed their Motion to Consolidate and Reply, again emphasizing that expedited processing of their claims was required. [DE 14 at 3; DE 16 at 7]. On October 25, 2013, Appellants filed a formal Motion to Expedite, reiterating all of the previous requests to expedite. [DE 19] See also DE 26-3 (setting out efforts at expediting case).

In *Hadnott v. Amos*, 394 U.S. 358 (1969), an Alabama district court issued an injunction ordering a small party to be placed on the November 1968 ballot, then dissolved the injunction after a hearing. On October 14, 1968, the U.S. Supreme Court restored the injunction, held a hearing on October 18, 1968, and issued an Order directing that the party be placed on the ballot for the general election two weeks later. The party was still left off of the ballot for the election in Greene County and so the Supreme Court ordered a new election for that county, with the party to be placed on the ballot. 394 U.S. at 367.

In the matter underlying the decision in *Norman v. Reed*, 502 U.S. 279 (1992), an Order from the U.S. Supreme Court issued on October 25, 1990, just 12 days before the general election (and well after absentee ballots had been cast - *See*, Section 19-2 of 1990 Illinois Election Law providing for absentee balloting between 5 and 40 days before general election), required adding a minor party to the November 6, 1990 general election ballot for Cook County, Illinois, requiring

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Based on Bennett's position in his Motion to Dismiss, an independent candidate could not have brought a sustainable claim until after September 24, 2013. When considered with his position now that the Special Election actually started on November 2, 2013 with the inaccurate OACAVA ballots, an independent candidate would have a total of 5 weeks to fully litigate his First and Fourteenth Amendment claims, based on the schedule the Governor set or it would be too late, on the lower court's reasoning here. That is a completely unfair scenario which impermissibly devalues the fundamental constitutional rights at issue.

the printing of over 2 million new ballots less than two weeks before the election in order to add the Harold Washington Party, which was kept off by the State under unduly burdensome ballot access restrictions. 502 U.S. at 287; William E. Schmidt, "The 1990 Campaign; Court Orders Cook County to Allow Third Party Slate," (New York Times, October 26, 1990);[7] Charles Mount and John Klass, "3rd-party Decision Snarls Absentee Ballots" (Chicago Tribune, October 30, 1990).[8]

On October 28, 1990, just 9 days before the November 6, 1990 general election, the Republican candidates for Governor and Lt. Governor in Minnesota were ordered replaced on the ballot by two others, after the original candidate for Governor withdrew in a scandal. *See Clark v. Growe*, 461 N.W.2d 385 (1990)(rejecting original Lt. Governor candidate's efforts to be reinstated on ballot); "Republican Quits Minnesota Governor's Race," (Los Angeles Times,

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[7] www.nytimes.com/1990/10/26/us/the-1990-campaign-court-orders-cook-county-to-allow-third-party-slate.html?pagewanted=print&src=pm.

[8] http://articles.chicagotribune.com/1990-10-30/news/9003300825_1_absentee-ballots-harold-washington-party (Referring to the thousands of absentee ballots already cast on ballots without Harold Washington Party on them which had to be re-voted.) There were 2,670,093 registered voters in Cook County in 1990. *See* Official Vote, General Election Nov. 6, 1990, Illinois State Board of Elections; so at least that number of ballots had to be reprinted in order to uphold the First and Fourteenth Amendment rights of the Party whose candidates had been improperly left off the ballot.

October 29, 1990).[9] All ballots had to be reprinted to list the new Republican ticket. This required the re-printing of more than a million and a half ballots as the official election returns show the replacement Republican team winning with 895,988 votes, while the losing Democratic candidates received 836,218 votes. By then, 10,941 absentee ballots already had been cast for the original team that withdrew and they remain listed on the official election returns for the November 6, 1990 election. *See* Minnesota Election Returns 1990, Minnesota Legislative Reference Library.[10]

See also, *McCarthy v. Askew*, 540 F.2d 1254 (5th Cir. 1976)(October 7, 1982 Order, 26 days before general election requiring that independent be placed on November 2, 1976 ballot); *Toporek v. South Carolina State Election Commission*, 362 F. Supp. 613 (D.S.C. 1972)(On October 16, 1972, court ordered a minor party candidate to be put on the ballot just 22 days before the November 7, 1972 general election); *Whitley v. Johnson*, 260 F. Supp. 630 (S.D. Miss. 1966)(On October 26, 1966, only 13 days before November 8, 1966 general election, court ordered several independent candidates to be put on the general election ballot).

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[9] http://articles.latimes.com/1990-10-29/news/mn-2704_1_ minnesota-governor-s-race.

[10]http://www.leg.state.mn.us/archive/sessions/electionresults/ 1990-11-06-g-sec.pdf

The courts have not hesitated in case after case to issue an injunction putting a candidate on the ballot, even in the last minute, even when tens of thousands of absentee ballots have been cast without the candidate on them, and even when it means re-printing millions of ballots in short order or ordering a new election in a county where the candidate was left off. There is no basis for the assertion that this Court need look no further than the OACAVA issue to see that it is too late to even get to the merits of the important constitutional issues in this case, let alone too late to put Mr. Hall on the ballot. The underlying constitutional rights are paramount.

The lower court erred in its consideration of the OACAVA and in its conclusions regarding the same and its impact on the injunctive relief requested here. On this record, there is no lawful way that OACAVA can be a factor in the consideration of the 4 prong test for the requested injunction and it cannot be the basis for finding in Bennett's favor on the last two prongs, for there is no evidence whatsoever in the record on which any such finding could be based.

THERE IS NO MERIT TO BENNETT'S "MERITS" ARGUMENT

Counsel for Bennett conceded for the first time at the November 13, 2013 hearing that the 3% signature requirement is more burdensome in this Special Election context than for a regular election cycle because of the truncated

schedule. [Tr. 11/13/13 at 41] When asked why that increased burden is not a "severe" one, Bennett's attorneys had only one answer: "*Jenness*." [Tr. 11/13/13 at 41; 34].

The Secretary's answer, adopted by the district court in its conclusion that there is no severe burden here, not only was wrong, it runs afoul of the mandated analytical framework, described in Hall's initial brief, which requires as a matter of law a case by case analysis that considers the burden on the candidate and weighs that against the claimed state interests in the restriction at issue in the context of the specific case in which the issue arises, on the backdrop of the facts on the ground that attend the election at issue in the locale at issue. *See e.g. Norman v. Reed*, 502 U.S. 279, 288-89 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).[11]

If the lower court's approach here were acceptable, such that the inquiry in each case was simply to be "is it more or less onerous than the 5% requirement in *Jenness*?" without any consideration of the actual facts on the ground, any weighing of the claimed state's interests against the harm caused by the restriction, etc., then it makes no sense, since 1971, for this Court or any other to have gone

[11] Bennett acknowledged at the hearing that *Anderson* is a case that controls the analysis here, [Tr. 11/13/13 at 45]; but he has ignored what *Anderson* held.

through any comprehensive analysis. But that is just what all of the ballot access cases since *Jenness* have held must be undertaken.

In addition to the prohibition against using a litmus test approach, there are many ways in which the lower court erred in its reliance on *Jenness* for finding against Mr. Hall on the "likelihood of success" prong.

1. The lower court ignored the fact that the *Jenness* Court looked at the operative facts and actually considered such things as the lower court here ignored: e.g. ballot history and ballot access laws in other states. *See Jenness*, 403 U.S. at 435, 439 (comparing Ohio's ballot access laws to Georgia', Louisiana's, Rhode Island's, New York's, California's, and Colorado's) and *Jenness*, 403 at 439, reviewing history in Georgia for ballot access for petitioning candidates).[12] The court below failed to consider any of that in the context of the operative facts here.

2. The Court in *Jenness* also relied on the availability of "write-in" votes as a suitable alternative to appearing on the ballot. Since *Jenness* this has resoundingly been rejected as a factor which may be considered. *Compare Jenness*, 403 U.S. at 434 (touting the lack of any limitation on the right to write-in the name of the

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[12] *See Mandel v. Bradley*, 432 U.S. 173, 178 (1977), *quoting from Storer v. Brown*, 415 U.S. 724, 742 (1974)("Past experience will be a helpful guide, if not always an unerring guide; it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not.")

candidate denied ballot access) *with Anderson v. Celebrezze*, 460 U.S. 780, 800, n.26 (1983)(the opportunity to write-in an independent candidate's name is "not an adequate substitute for having the candidate's name appear on the printed ballot."); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 831, n.45 (1995)(same).

3. In relying on the *Jenness* litmus test exclusively for its finding of a less than severe burden, the lower court not only ignored the fact that the analytical framework that is now to be employed in this situation did not even exist at the time *Jenness* was decided, it also ignores the fact that there have been many decisions since *Jenness* with demonstrably less severe burdens than in *Jenness* which, nevertheless, have been struck down as overly burdensome as a matter of law, thereby undermining the very heart of the incorrect legal standard applied here.

Indeed, in *Citizens Party v. Polythress*, 683 F.2d 418 (11th Cir. 1982)(Table)(Addendum), discussed at Pages 41-42 of the initial brief, notwithstanding *Jenness*, this Court vacated and remanded the lower court's decision dismissing a claim similar to that made here when the law at issue required only around 1200 signatures in 50 days, instead of 180 days. On remand, again notwithstanding *Jenness*, the district court extended the deadline.

The court in *McLain v. Meir*, 637 F.2d 1159, 1163 (8th Cir. 1980), expressly rejected the argument that it should approve the ballot access restriction at issue because in *Jenness* the Supreme Court approved a more severe burden. Instead, the court wrote that it had to engage in an analysis that focused on the facts and circumstances at issue for that specific election in that specific locale, just as the Court wrote in *Storer* and *Mandel*.

Each of the following cases, all post-dating *Jenness*, had ballot access restrictions less onerous than Georgia's requirements in *Jenness*, yet in each one the restriction was found to be too severe and was struck down: *Illinois State Bd. of Education v. Socialist Workers Party*, 440 U.S. 173 (1979); *Socialist Workers Party v. Secretary of State of Michigan*, 317 N.W.2d 1 (Mich. 1982)(3/10 of 1% required for party access); *Rockefeller v. Powers*, 78 F.3d 44 (2d Cir. 1996)(Lesser of 5% of registered voters or 1,250 signatures); *Delaney v. Bartlett*, 370 F. Supp. 2d 373 (M.D. N.C. 2004)(2% requirement for independents); *Mathers v. Morris*, 515 F. Supp. 931 (D. Md. 1981); *Green Party of Arkansas v. Daniels*, 445 F. Supp. 2d 1056 (E.D. Ark. 2006)(3% of last vote); *Vogler v. Miller*, 651 P.2d 1 (Alaska 1982)(Same); *Citizens to Establish Reform Party in Arkansas v. Priest*, 970 F. Supp. 690 (E.D. Ark. 1996)(3% of last vote); *Green Party of Tennessee v. Hargett*, 882 F. Supp. 2d 959 (M.D. TN. 2012); *Libertarian Party of Tennessee v.*

Goins, 793 F. Supp. 2d 1064 (M.D. TN. 2010); *Danciu v. Glisson*, 302 So. 2d 131 (Fla. 1974)(5% for independents).

CONCLUSION

The failure here to address other assertions in Bennett's Brief should not be deemed to concede their accuracy or relevance. Indeed, some simply are not true[13] and others are nonsensical.[14] They are not relevant here.

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[13] For example, Bennett asserts at Page 50 of his Brief, in arguing that the burden on Hall was less than the burden in *Jenness*, that "(Hall) had more time to collect a lesser percentage of signatures." That is not true. The candidate in *Jenness* had 180 days to gather his signatures in a regular election cycle with unlimited time in advance to plan the signature gathering process. There is no possible theory under which Mr. Hall had more than 180 days to gather his signatures.

[14] Perhaps on the theory that the best defense is a good offense, Bennett asserts at Page 46 of his brief that Appellants propose a mathematical approach to the analysis. In every filing in this case, Appellants have been arguing for an analysis based on the facts actually in the record, specific to the Special Election at issue and based on the unrebutted record evidence concerning the severity of the burden imposed by a time frame truncated from an "unlimited" time frame to a 57 day period. The only answer given by Bennett and accepted by the lower court is that none of that matters because 180 days and 5% in Georgia in 1971 was a tougher burden and that was approved. That is a mathematical formula; it is a litmus test. In contrast, the framework Appellants urge, the framework of *Anderson* and its progeny, which requires a case specific analysis, a consideration of the actual burden based on the evidence, an evaluation of purported state interests put forward in support of the restriction, is the antithesis of a "mathematical formula."

Bennett's argument at Pages 39-43 of his Brief that the Democrats and Republicans actually have it tougher than independents is just plain nonsense and

The lower court's reversible errors are clear in this case. There is a long-standing analytical framework laid down by the Supreme Court at least as far back as its decision in *Anderson*, discussed at length in Appellants' initial brief, and it was not followed here in any way, shape or form. Not only was that mandated legal standard ignored here, in its place, the district court used a prohibited litmus test approach.

The court ignored all of the completely unrebutted factual evidence from multiple sources, and supported by expert testimony from a ballot access expert witness, qualified as such in courts around the country, which demonstrates the severe burden the combination of the 3% signature requirement and the severely truncated time frame for a Special Election imposed on Mr. Hall.[15][DE 25-1, 25-2, 25-3, 25-4; DE 26-1, 26-2; DE 29-1]

Even if the Court had not, at Bennett's urging, impermissibly based its entire analysis and conclusion on a superficial comparison to the signature requirement and time frame in *Jenness*, while missing even those factors that

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was immediately exposed as such by respected ballot access expert witness Richard Winger at DE 26-2, pages 4-6.

[15] The court recognized the "incredible" efforts Mr. Hall went to to try to gather the signatures in this sharply abbreviated time frame and even counsel for the Secretary conceded this characterization. [Tr. 11/13/13 at 31-32] But it ignored the same in its analysis.

Jenness itself considered, its approach was in error for its belief that a candidate must either establish a "severe" burden, which defies precise definition, or, if something less, any restriction is acceptable.

The court missed the whole concept explained in *Anderson, Norman* and in *Clingman v. Beaver*, 544 U.S. 581 (2005) of a "sliding scale" which starts with "severe" at the top, requiring a compelling state interest and the least drastic means, but then requires a sufficiently weighty state interest, the closer the burden is to "severe."

Perhaps most importantly, the lower court erred and abused its discretion by ignoring the actual record evidence in the case. It drew conclusions on the balance of harms and in regard to the public interest prongs without any record evidence to support such conclusions or from which it could even find relevant facts.

This Court is duty bound to base its decision on the record developed in the district court and not on unsupported assumptions. Secretary Bennett had more than ample time to try to rebut any or all of the factual evidence that demonstrates the severe and even impossible burden the combination of the signature requirement and the truncated schedule impose; yet he either chose not to or was not able to gather any rebuttal evidence - not even in the 21 exhibits, including many affidavits, that he submitted below.

Bennett failed to adduce any evidence in support of any state interest supporting this deadline or this signature requirement in a Special Election and, instead has argued throughout that he has no obligation to prove any interest. That is just plain wrong, for the reasons discussed in Appellants' initial brief at 49-53.

Finally, Bennett failed to adduce even one iota of record evidence showing any OACAVA ballots for the general election in this Special Election were requested or were mailed out. He submitted no authority for the idea that even if a handful or even upwards of 100 OACAVA ballots were mailed out, how this should be deemed a significant enough event to lead to a summary denial of ballot access for Hall. Bennett never explains why Appellants' fundamental constitutional rights and the rights of the 3000 people who signed petitions for Hall to be on this Special Election ballot should get short shrift and should be overridden by statutory rights - especially where, as here, Messrs. Hall sought an avenue to coordinate all OACAVA scheduling issues in a manner that would equally serve independent candidates, and his efforts were opposed by the Secretary.

For all of the foregoing reasons, the reasons set out in his initial brief and based on the record in this case and the applicable case law, Appellants respectfully submit that this Court must issue an injunction immediately requiring

that Mr. Hall be placed as an independent candidate on the general election ballot for the Special Election at issue in this case. Anything less would be wrong and unfair and would cause him irreparable harm. The harm from denying him what he is entitled to as a matter of law, on this record, far outweighs the harm of putting him. It is strongly in the public interest to allow him to participate in the electoral process as a candidate after the level of support he has demonstrated in a sharply truncated period of time.

The undersigned can be available to appear for oral argument in this case on a moment's notice.[16]

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[16] Appellants filed an Appendix with their initial brief which comported with 11th Cir. R. 30-1, in effect when this case was commenced. For some reason, Appellee has filed a "Supplemental Appendix," providing just his pleadings and exhibits from the lower court. This gives Appellee an unfair advantage by providing the Court with more ready access to its submissions below. Appellants can only hope that the Court will review the record below and specifically focus on the citations to the record that Appellants have provided in their brief, in compliance with the local rules.

In his April 16, 2013 Order amending the Federal Rules of Appellate Procedure, the Chief Justice Roberts clearly wrote that the amendments "shall take effect on December 1, 2013, and shall govern in all proceedings in appellate cases **thereafter commenced** and, insofar as just and practicable, all proceedings then pending." [Available at www.supremecourt.gov, October 2012 Terms, listed as Order of April 19, 2013; also available at http://www.gpo.gov/fdsys/pkg/CDOC-113hdoc27/pdf/CDOC-113hdoc27.pdf (Emphasis added).

Respectfully Submitted,

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This case was commenced on November 14, 2013, and it is on an expedited track. It would not be "just and practicable" to apply the amended 11th Cir. R. 30-1 to the instant case. The expedited briefing order, while greatly appreciated, came by telephone at approximately 8:00 p.m. on the eve of Thanksgiving. It ordered the brief to be filed by noon on December 2nd, with all printing services and this Court closed between the time of the Order and the morning of December 2nd.

In the "Supplemental Appendix" Bennett has filed, he improperly included at Tab 38, a pleading that is not in any way a part of the record for this appeal - a document filed almost two weeks after the conclusion of the proceedings below that are the subject of this appeal. In his Brief at Page 14, n.2, Bennett refers to an assertion made in that document, completely in contravention of proper appellate procedure. Appellants object to this action.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief does not comply with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 6,965 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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

/s/ David I. Schoen
David I. Schoen

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 9th day of December, 2013, I electronically filed the foregoing via the CM/ECF System, which will send notice of the same to the following registered users:

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

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

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