RECORD NO. 16-16766

In The

United States Court Of Appeals
For The Eleventh Circuit

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

Plaintiffs – Appellees,

v.

SECRETARY, STATE OF ALABAMA,

Defendant – Appellant.

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

BRIEF OF APPELLEES

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APPELLEES' CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. Rules 26.1-1, 26.1-2(c), and 28-1(b), the undersigned counsel for Appellees hereby certifies that the following persons and have an interest in the outcome of this case:

1. Brasher, Andrew, L. - Counsel for Appellant;
2. Davis, James William - Counsel for Appellant in the district court;
3. Fuller, Hon. Mark E. - U.S. District Judge originally assigned to the case;
4. Hall, James - Appellee;
5. Mangan, Mary K. - Counsel for Appellant;
6. Merill, John - Appellant (Alabama Secretary of State);
7. Messick, Misty S. Fairbanks - Counsel for Appellant;
8. Moorer, Terry F. - Magistrate Judge assigned to the case in the district court;
9. Moser, N.C. "Clint," Jr. - Appellee;
10. Schoen, David I. - Counsel for Appellees;
11. Thompson, Hon. Myron H. - U.S. District Judge, presiding below.

Respectfully Submitted,

/s/ David I. Schoen
David I. Schoen

Counsel for Appellees

STATEMENT REGARDING ORAL ARGUMENT

Appellant has asserted that the Court would benefit from holding oral argument in this case. Appellee certainly has no objection to presenting oral argument in the case; however, Appellee respectfully asserts that the appeal is frivolous and that the dispositive issues in the case have been authoritatively decided. *See* Rule 34(a)(2)(A)&(B); 11th Cir. R. 34-3(b)(1)(2).

Appellee agrees that the appeal "raises important issues under the First Amendment;" but those issues were analyzed and decided by the lower court based on the application of long-standing principles of law in a thorough, careful, and authoritative manner. Interestingly, these same "important issues under the First Amendment" have been present in this case all along; yet Appellant urged this Court not to hear oral argument when the case was before the Court the first time around for review of the lower court's denial of a preliminary injunction. *See* Docket No. 13-15214, Appellee's Brief at 3.

Appellant also has asserted oral argument should be granted because the case "concerns a novel issue of mootness when special-election procedures are challenged after the only such scheduled election has already been held." This issue is wholly frivolous and was thoroughly, carefully, and authoritatively

decided by two different district court judges in the lower court in all of the various iterations Appellant asserted. There is nothing novel about the issue.

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PRELIMINARY STATEMENT

Pursuant to 11th Cir. R. 28-2, Appellee Hall will not set out those sections listed in 11th Cir. R. 28-1(g), (h), and (i). Mr. Hall does not concede either the accuracy or the relevance of the facts submitted by the Appellant; but he will limit his submission of the facts to those portions of the Argument Section to which they specifically relate.

SUMMARY OF THE ARGUMENT

1. The lower court carefully, thoroughly, and correctly decided this case. The decision below should be affirmed. This appeal is frivolous.

2. This case is not moot and both district court judges who considered Appellant's various mootness arguments correctly analyzed and decided the issue. [*See* Doc. 54; Doc. 81 at 27-34]. Appellant ignores an entire body of jurisprudence on the question of mootness in the specific context of ballot access law.

A. Appellant's argument that because the last special election before the race at issue in this case was years earlier, Mr. Hall has no reasonable expectation of another one is wrong. Special elections are regularly occurring events and usually arise without notice, occasioned by such unplanned events as death, arrest, resignation, or other disqualifying factors during an elected term. History shows that Appellant always has acknowledged the Governor's obligation

to call a special election right away when there is a mid-term vacancy. Such a vacancy can occur at any time and regularly has occurred in political offices throughout Alabama, as the record evidence established.

B. Appellant's argument, that when there is another special election its time frame and other attributes would be determined at that time and could be different, is misleading and ignores the record evidence in this case, including the Appellant's admission repeatedly that the time frame in this case was actually extraordinarily long relative to the time frame historically provided and the historical data that proves that all special elections for U.S. House seats in Alabama always have been on a severely truncated schedule. [*See e.g.*, Doc. 73; Doc. 75; Doc. 81 at 67] Indeed, the Appellant himself adamantly insisted that such special elections must be held on a severely truncated schedule in order to fill the office as quickly as possible for the voters. Additionally, the argument is irrelevant because the judgment entered below only applies when the time frame for the special election is severely truncated as it always has been.

C. Appellant's third mootness argument - that the case is moot because Appellee Hall ran in another unrelated race as a Republican after the special election in this case - is meritless. Mr. Hall is not constrained by a life-time contract with the Republican Party, the undisputed record evidence is that Hall intends to run

as an independent candidate for U.S. House in any future special election for the seat and to vote for an independent candidate. [Doc. 48-1] *See e.g., Constitution Party of Mo. v. St. Louis Cnty.*, 2015 U.S. Dist. LEXIS 82478 (E.D. Mo. June 25, 2015)(fact that case involved emergency special election and that candidate ran as independent in race does not render case brought by political party moot). As the district court noted, Hall brought this case as a voter as well as in his capacity as a candidate and he is free to vote for an independent candidate whether or not he was at one time a Republican candidate. [Doc. 81 at 32] Moreover, Appellant conceded the point at a Hearing in the lower court. [May 29, 2014 Hearing Tr. at 24-25] Appellant's argument has been waived and is just plain silly.

D. Appellant's argument that the Declaratory Judgment entered by the lower court is "little more than an advisory opinion" is wrong. Out of deference to the legislature, the lower court refrained from entering an injunction and limited its relief to a Declaratory Judgment holding facially unconstitutional Alabama's 3% signature requirement in a special election for the U.S. House of Representatives held on a similarly truncated schedule (as all special elections for U.S. House have been historically in Alabama). [Doc. 81 at 66-67; Doc. 73w/exhibits; Doc. 75] The Court's Order was a perfectly appropriate exercise of the Court's authority under the Declaratory Judgment Act, 28 U.S.C. § 2201.

3. Alabama's 3% signature requirement for independent candidates in the context of a special election for U.S. House of Representatives, held on a severely truncated schedule, as all such special elections in Alabama always have been and, by Appellant's own admission, always will be, constitutes a severe burden on the rights of candidates and voters, is not justified by any compelling (or other) state interest, and is unconstitutional under the First and Fourteenth Amendments to the United States Constitution. This Court and others that have considered the issue in the context of special elections all recognize that imposing the same requirements for obtaining signatures that apply for a regularly scheduled election pose a severe burden on a candidate and voters for a truncated schedule special election and cannot remain the same.

Appellant simply just does not get it.

Appellant submitted no evidence whatsoever in the district court in any way rebutting the evidence Mr. Hall adduced establishing the severe nature of the burden the 3% signature requirement places on independent candidates and Alabama's voters when applied to a special election held on a severely truncated time frame, as opposed to the "unlimited" time frame for collection that same amount of signatures in a regularly scheduled election. [*See e.g.*, Doc. 81 at 57]

Similarly, Appellant presented absolutely no evidence in support of the purported state interests it claimed justify the 3% signature requirement in the context of a special election. [*See e.g.,* Doc. 81 at 60] Instead, Appellant repeatedly announced to the district court that it had no obligation to prove the legitimacy or relevance of any of its stated interests. It maintained that it was only required to state the interests and nothing more [e.g. Doc. 28 at 5-6] - notwithstanding a long line of authority in this Circuit and from the United States Supreme Court to the contrary. *See e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 790 (1983); *Green Party of Georgia v. Georgia*, 551 Fed. Appx. 982, 984 (11th Cir. 2014)(expressly cited by Mr. Hall - see 5/29/14 Hearing Tr. at 7); *Fulani v. Krivanek*, 973 F.2d 1539, 1546 (11th Cir. 1992); *Bergland v. Harris*, 767 F.2d 1551, 1553-54 (11th Cir. 1985); *Gill v. Scholz*, 2016 U.S. Dist. LEXIS 113702, *10-*12 (C.D. Ill., August 25, 2016).

Appellant's entire argument in this case has been based at all times on a prohibited "litmus test" approach, rather than the case-by-case analysis the law requires, with a consideration of the record evidence concerning the burden imposed and the state's interests established in the record. [Doc. 81 at 46] Appellant simply ignores the mandated framework for analysis in ballot access jurisprudence and the record.

The district court's analysis and conclusions are fully supported by the record and the law. The judgment in this case must be affirmed.

ARGUMENT

I. The Lower Court Properly Rejected Appellant's Mootness Claim.

At Pages 20-30 of its Brief, Appellant Merrill argues that the claims in this case became moot as soon as the special election was held. Merrill is absolutely wrong and ignores the entire abundant body of jurisprudence surrounding mootness claims in the context of ballot access law.

The lower court twice addressed and soundly rejected Appellant's mootness claims. *Hall v. Merrill*, 2016 U.S. Dist. LEXIS 135446, *22-*28 (M.D. Ala., September 30, 2016)(Thompson, J.)[Doc. 81 at 27-34]; *Hall v. Bennett*, 999 F. Supp. 2d 1266 (M.D. Ala. 2014)(Fuller, J.)[Doc. 54][1]

[1] In rejecting Appellant's mootness arguments below, Judges Fuller and Thompson assumed, without deciding that the second prong of the "capable of repetition, yet evading review" doctrine required a showing of a reasonable expectation or a demonstrated probability that Mr. Hall will be subject, either as a candidate or as a voter, to the 3% signature requirement for independent candidates during a special election). [Doc. 80 at 29-30] Their conclusion that the "same complaining party" rule applies was based at least in part on the decision from this Court in *Arcia v. Florida Secretary of State*, 772 F.3d 1335, 1343 (11th Cir. 2014)(rejecting mootness), which so held without discussing the issue or the split of authority among the Circuits over this issue. [Doc. 81 at 29]

Appellee does not concede that the "same complaining party" principle is required for mootness analysis; but the matter is academic here because the unrebutted evidence is that Mr. Hall intends to run again as an independent in any special election for U.S. House in Alabama that arises and to vote for an independent candidate in such a race, [Doc. 48-1],thereby satisfying the "same complaining party" element. *See Davis v. FEC*, 554 U.S. 724, 735-736 (U.S. 2008)(rejecting mootness after election had passed, based on candidate's statement that he intended to run in a future election and to self-finance his campaign again). As long as Congressmen can die, resign, commit a crime, or otherwise be disqualified or the subject of re-districting while in office, there will be more special elections in Alabama for U.S. House seats, just like all previous ones and just like the ones that have sent a significant percentage of the members of any given U.S. Congress to their office. [*See* Docs. 73, 73-2, 75]

There is significant authority in the ballot access arena suggesting that the "same complaining party" requirement should not apply. *See e.g.*, *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (failing to evaluate the same party requirement in the context of an election case, even in the absence of a class action, and concluding that the case was not moot); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973) (concluding that plaintiffs' class action challenge to New York's Election Law was capable of repetition yet evading review, although primary election had passed and the petitioners would be eligible to vote in the next primary); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972) (in challenge to a provision of Tennessee's election law, concluding that, although plaintiff would be eligible to vote in the next election, the controversy was capable of repetition yet evading review); *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 628 (2d Cir. 1989) (holding that plaintiff's claims were not moot although the election was over, because the same issues would affect "minor-party candidacies" in the future, but failing to address whether Fulani herself would be affected).

The Supreme Court has applied the "capable of repetition, yet evading review" exception to mootness to hear challenges to election laws even when the nature of the law at issue "made it clear that the plaintiff would not suffer the same harm in the future." *Lawrence v. Blackwell*, 430 F.3d 368, 372, citing, *Rosario v. Rockefeller*, 410 U.S. 752, 756 n. 5 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2 (1972). *See also*, *Honig v. Doe*, 484 U.S. 305, 335-36 (1988)(Scalia, J. dissenting)("some of our

As the lower court recognized and as courts have held over and over again, "Challenges to election laws are one of the quintessential categories of cases which usually fit (within the doctrine of "capable of repetition, yet evading review") because litigation has only a few months before the remedy sought is rendered impossible by the occurrence of the relevant election." *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005), citing, *Morse v. Republican Party of Va.*, 517 U.S. 186, 235 (1996); *Norman v. Reed*, 502 U.S. 279, 287-88 (1992). This applies greater force for Special Elections. [Doc. 54 at 4-12; Doc. 81 at 28] The lower court thoroughly analyzed and rejected each of the mootness arguments

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election law decisions differ from the body of our mootness jurisprudence ... in dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur between the defendant and other members of the public."). Indeed, as the Court's opinion in *Honig* itself (not an election law case) provided, the test for the doctrine of "capable of repetition, yet evading review" is "whether the controversy was *capable* of repetition and not ... whether the claimant has demonstrated that a recurrence of the dispute was more probable than not." *Honig*, 484 U.S. 305, 319 n. 6 (Emphasis in original). In *Richardson v. Ramirez*, 418 U.S. 24, 35-36 (1974), Justice Rehnquist, writing for the Court, went even further and noted that in *Moore v. Ogilvie*, 394 U.S. 814 (1969), a case in which the Court found the challenge to the ballot access laws at issue to be "capable of repetition, yet evading review" and therefore not moot, notwithstanding the fact that "the particular candidacy was not apt to be revived in a future election." In the instant case, as in *Moore*, the fact that the election at issue is over is of no moment; the facial challenge is to the statutory prescription for how independent candidates gain access to the ballot in a Special Election.

Merrill makes here and its conclusions were legally and factually sound. [Doc. 54; Doc. 81 at 27-34] Mr. Hall relies on those decisions.

Appellant's Mootness Claims:

Appellant first makes the untenable assertion that Mr. Hall's claims are directed only to a "special election to fill a seat in Alabama's First House District.." [Appellant's Brief at 21][2] The lower court rejected this out of hand. [Doc. 54 at 8]

He follows this up with, "And of course, the plaintiffs can realistically only run or vote in an election for the House District in which they reside - Alabama's First House District. So that district is the focus for the mootness inquiry: is there a 'reasonable expectation' or 'demonstrated probability' that the plaintiffs will run as or vote for an independent candidate in a special election in the First District House again?" [Appellant's Brief at 22]. Appellant cites no authority.

There is no law in Alabama that restricts a candidate for U.S. House to the District in which he lives or that prevents him from running in a special (or regularly scheduled) election for any U.S. House seat anywhere in Alabama - nor

[2] Appellant knows this to be untrue. [Doc. 12; Doc. 73] The district court expressly asked the parties the scope of the relief sought [11/13/14 Hearing Tr. at 4] and in a follow-up submission Mr. Hall confirmed to the Court that the relief sought in this case was directed to all special elections for a U.S. House of Representatives seat in Alabama. [Doc. 73 at 1-2]

could there be any such law. *See, e.g.*, U.S. Constitution, Art. I, § 2, Cl. 2; *U.S. Term Limits v. Thornton*, 514 U.S. 779, 799 (1995), *citing, Exon v. Tiemann*, 279 F. Supp. 609 (D. Neb. 1968)(Three Judge Panel); *Hellman v. Collier*, 217 Md. 93, 141 A.2d 908 (1957), and listing cases striking down any district residency requirement imposed by a State. Oddly, Appellant seems to recognize this legal principle [Appellant's Brief at 23, n.7]; but he makes this untenable argument anyway.

Appellant next argues that even if the inquiry is broadened to any House District in the Alabama, (1) the chances of there being a special election in any district in Alabama are too remote and (2) the time frame for the special election can vary from special election to special election; therefore the possibility of the question arising again is too remote, such that the issue effectively "disappeared" once the special election in this case was held.[3] [Appellant's Brief at 23-25] It is

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[3] Appellant has never cited a single ballot access case supporting his claim that this case is moot because it involved a special election instead of a regular election cycle election. The closest he came to citing a ballot access case that supports his position is a "Cf." citation to *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188 (1979) [Doc. 41 at 4]. Appellant badly misread the case.

The case supports Mr. Hall. It arises from a Special Election (called to fill the vacancy arising from the death of then Chicago Mayor Richard J. Daley), 440 U.S. at 178, and it fully litigated the question of the signature requirements at issue all the way through, despite the fact that the special election from which the challenge arose occurred almost two years before the Supreme Court's decision in the case. The brief discussion of mootness was on a completely tangential issue. *Id*., 440 U.S. 187-188.

most odd that Merrill raises this latter claim on appeal. As both district court judges who rejected his mootness claims below expressly found, Merrill never disputed the first prong of the "capable of repetition, yet evading review" doctrine - that the "challenged action is in its duration too short to be fully litigated prior to its cessation of expiration." [Doc. 54 at 3; Doc. 81 at 28]

Appellant ignores the record evidence on this issue, all of which went entirely unrebutted.[4]

The Court held the signature requirement at issue in the case, arising from a special election, to be unconstitutional. *Id*. 440 U.S. at 187. It clearly undercuts Appellant's position, for it reflects the continuation of the case - a challenge to the signature requirement in a special election - all the way through the United States Supreme Court, long after the actual special election from which the challenge arose had occurred. *See also, Munro v. Socialist Workers Party*, 479 U.S. 189, 192 (1986)(upholding ballot access requirements in a case arising from a special primary election to fill a vacancy in the office of U.S. Senator - deciding the case approximately 3 years after the special election occurred).

[4] Appellant ignores his counsel's representations in the lower court on the likelihood of a special election recurring: "I will tell you, though, vacancies arise in lots of different situations. Here Congressman Bonner announced he would be retiring. Other times we've had situations where somebody was convicted of a felony or somebody died."

Appellant is well aware that the uncontroverted evidence showed that special elections are called for a wide variety of reasons, that there have been many in Alabama (and in every state) historically, including for U.S. House seats, and that all special elections in Alabama for a U.S. House seat **always** have been conducted on a severely truncated schedule, comparable or shorter than the special election schedule in the instant case. [Doc. 73, 73-1, 73-2; Doc. 75]

The time period for gathering signatures in a Special Election in Alabama is a significantly truncated time period by definition, whether the Special Election is called to fill a vacancy created by a death, resignation, or other disability arising during the term of the elected official. In contrast, this Court has characterized the time period for independents to gather signatures in a regular election year in Alabama to be an "unlimited" period of time. *See e.g.*, *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007)

Merrill's failure to cite relevant authority is not because there is no relevant authority.

In *ACLU of Ohio v. Taft*, 385 F.3d 641 (6th Cir. 2004), for example, a seat in the U.S. House of Representatives was vacated when Ohio's U.S. Representative, James A. Traficant was expelled. The Governor declined to schedule a Special

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Indeed, in fighting against the preliminary injunction in this case, Appellant vigorously argued the many reasons why such special elections always have been and always must be set on an extraordinarily truncated time frame. [*See e.g.* Doc. 23 at 3 & 34 - need to fill vacancy as quickly as possible to minimize time without representation; Doc. 23 at 3 - signature deadline must be set early to be in compliance with OACAVA 45 day rule; Doc. 23 at 30 - signature deadline must be set early to give time to verify; Doc. 23 at 20; Doc. 23-2, at 5-6 - "Everyone must act quickly in the context of a special election; "extraordinary pace"; Doc. 23, Exh. "D"; Doc. 28 at 3, n.1 - Governor can't order special election until vacancy becomes effective; 11/13/14 Hearing Tr. at 43 - Governor "very concerned" about filling the vacancy ... so that the new Congressman could be seated when Congress reconvened.]. Indeed Appellant represented to the district court that the truncated time frame in this case actually was uniquely long for such special elections. [Doc. 23 at 10]

Election to fill the seat before the next Congress convened, despite plaintiff's demands and so plaintiffs (voters) sought injunctive relief to force the governor to hold the Special Election, as well as declaratory relief concerning the underlying issue of whether a Special Election was required to fill such a vacancy.

The district court denied the emergency injunctive relief plaintiffs sought, dismissed the whole case and plaintiffs appealed. *Id*. 385 F.3d at 645. The court of appeals denied a request for emergency injunctive relief pending appeal. *Id*. Meanwhile, while the case was before the court of appeals, the next Congress had convened with a new Congressman elected and no vacancy at issue. *Id*. 385 F.3d at 646. Nevertheless, the court of appeals heard the merits of the case and ordered the case remanded for the district court to award the requested declaratory relief and attorneys' fees plaintiffs sought in their Complaint. *Id*. 385 F.3d at 650.

The Court expressly addressed the claim that because the seat already was filled and because the underlying issue involved a Special Election, it became moot when the seat was filled and there no longer existed a need for a Special Election for that seat in Congress in which the voters who brought the case were interested. The Court unequivocally rejected the claim that the Special Election nature of the underlying case rendered the request for declaratory relief moot. *Id*. 385 F.3d at 646-647.

Addressing the special election nature of the object of the challenge, the Court wrote:

> "Vacancies in the House can happen near the end of a Congressional term, making it difficult for litigation to provide an effective remedy." *See Jackson v. Ogilvie*, 426 F.2d 1333, 1337 (7th Cir.)(noting, while not treating an identical situation, that the case would not be mooted by the inappropriateness of an injunction, that plaintiffs would be entitled to declaratory judgment, and that cases 'of this type in the election field are peculiarly''capable of repetition yet evading review.')(quoting *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S. Ct. 1493, 23 L. Ed. 2d 1 (1969)), *cert. denied*, 400 U.S. 833, 91 S. Ct. 66, 27 L. Ed. 2d 64 (1970).

Id. 385 F.3d at 646-647.[5]

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[5] Appellant's own official website establishes that in Alabama, Special Elections are, in fact, a regularly recurring phenomenon. From the years 2004 through 2013, for example, there have been no less than 31 Special Elections held in Alabama. In 2013 alone, the year in which the Special Election at issue in the instant case arose, there were 7 Special Elections (Senate District 35, House Districts 11, 31, 53, 74, and 104, and the Special Election for District 1, U.S. House of Representatives at issue here). Defendant's attempt to distinguish a Special Election from a regular election cycle case for mootness purposes by portraying it as an event not certain to happen is completely unavailing. The historical facts establish that they happen all the time and, unless Appellant can guarantee that there will be no deaths or resignations by an elected official from Alabama before the end of his or her term, Special Elections will continue to be a regularly recurring part of Alabama's election scheme, and, as such, of course, they are a part of the "statutory prescription" in Alabama's ballot access laws. A review of other States' websites reveals at least 6 Special Elections for the office of U.S. House just in 2013 alone. [*See* Doc. 73 and exhibits thereto].

Doc. 73-2 is a November 19, 2013 article appearing on the "Smart Politics" website of the University of Minnesota's Humphrey School of Public Affairs. It reflects the reality that close to 20% of all Democratic members of the U.S. House of Representatives and 10% of Republicans were elected through Special Elections. The

The fact that the Governor has discretion when to set a special election [Appellant's Brief at 24] does not impact on the inquiry here at all. The Court does not look at the matter in a vacuum. The record below established without any evidence to the contrary that historically every single special election held for a U.S. House seat in Alabama has been on a severely truncated schedule, [Doc. 73 and Exhibits attached thereto; Doc. 75], for the very reasons Appellant in this case argued when he was trying to convince the Court to deny the injunctive relief, emphasizing the need to serve the voters and the public interest by filling the vacancy as soon as possible.

Against that historical record and the Appellant's own repeated admission below that the time frame for the special election in this case was uniquely long compared to other special elections, the Appellant cannot now argue that there is no way to know that future special elections will be on a truncated schedule. All record evidence establishes that they always have been and always will be.

In any event, if there were a special election held on a time frame that provides 124 days or more between the announcement of the vacancy or the petition deadline or the date of the special election is announced 57 days or more

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Special Election for a U.S. House seat is a significant phenomenon around the country for both voters and candidates and it can arise anytime without advance notice.

before the petition deadline, the terms of the Declaratory Judgment in this case will not apply. [Doc. 82 at 2]

It is odd that Appellant has put forward his argument on appeal that the case is moot because Mr. Hall at some other point in time ran as a Republican and therefore it is not likely he would ever run again as an independent in a special election. [Appellant's Brief at 25-27] It is surprising because Appellant conceded in the lower court that this provides no basis for avoiding the merits on mootness grounds since Mr. Hall brought the case as a candidate and as a voter and could always vote for independent candidates for U.S. House in a special election, even if he remained a Republican. [See 5/29/14 Hearing Tr. at 24-25 - "Mr. Hall has told you that he plans to vote for independents in the future. So if that continues to be his intention, then you can proceed on his claims as a voter ... then you can reach the merits."; *see also* Doc. 66 at ¶4.]

Like Appellant's other arguments, this one again ignores the actual record evidence in the case - specifically, Mr. Hall's uncontradicted Declaration that he intends to continue to seek office as an independent candidate for U.S. Congress in any special election and that he intends to vote for an independent candidate in such a race. [Doc. 48-1] The idea that running once for another office as a Republican somehow renders this case moot, notwithstanding the fact that Mr.

Hall tried to run as an independent for U.S. House and has declared, subject to perjury that he will run as an independent and vote for an independent in any future U.S. House special election, is pure nonsense. [Doc. 81 at 31-34]

The single case to which Appellant cites in this section of his Brief, *Golden v. Zwickler*, 394 U.S. 103 (1969), for certain general principles concerning declaratory judgments and mootness, is completely inapposite. Appellant ignores well settled ballot access jurisprudence establishing the special nature of election cases vis a vis mootness, and their special amenability to the doctrine of "capable of repetition, yet evading review" - a doctrine which applies with equal or greater force in special election cases. *See e.g.*, *Constitution Party of Mo. v. St. Louis Cnty.*, 2015 U.S. Dist. LEXIS 82478 (E.D. Mo., June 25, 2015)(rejecting mootness argument in emergency special election case, well after the emergency special election and notwithstanding the independent plaintiff's placement on the ballot as a party's nominee).

Appellant makes one additional mootness argument, much of which has nothing actually to do with mootness. The argument is wrong as a matter of fact and law and, in significant part, it is completely disingenuous.

At Pages 27-30 of his Brief, Merrill argues that the lower court's opinion is an improper advisory opinion and that it is too broad in that it extends to all

prospective independent candidates, not just Hall, and goes beyond special elections for the U.S. House of Representatives to include state elected office special elections as well. Merrill is wrong in every regard and well knows it.

The lower court clearly found Alabama's 3% signature requirement for independent candidates to get on the ballot for a U.S. House seat facially unconstitutional in the context of a special election which, historically in every recorded instance and for the reasons Appellant himself put in the record for why such a special election must move at an extraordinary pace, is run on a severely truncated schedule (as opposed to the "unlimited" time frame to obtain signatures in a regularly scheduled election for the same office.

The lower court considered enjoining the State from enforcing the 3% signature requirement in this context, but instead, in a show of deference/comity, refrained from imposing an injunction, banking (out of misplaced confidence) on the State to take the appropriate steps to remedy the situation legislatively in light of the Declaratory Judgment. [Doc. 80 at 66-67]

There is nothing in the nature of an advisory opinion about the court's Declaratory Judgment. After finding that imposing the same 3% signature used for regular elections, with an unlimited time to gather them, on a special election with a matter of just days to gather this same number a severe burden on the

candidate and supporting voter, not justified by the unsupported claimed state interests put forward by Merrill, the lower court declared such a requirement unconstitutional when imposed on a special election for U.S. House conducted within a similar or more onerous time frame as occurred in this case. It appropriately declared the statute unconstitutional in the context of the special election in this case, based on the record developed in this case. With its Declaratory Judgment, the court made clear that the signature requirement cannot constitutionally be imposed on similar special elections in the future.

Mr. Hall made a facial challenge to the statute in the context of truncated schedule U.S. House special elections and the fact that the court's ruling applies to others in future special elections is by definition a function of a declaratory judgment on a facial challenge.

As the Court in *Jones v. McGuffage*, 921 F. Supp. 2d 888, 894 (N.D. Ill. 2013) explained, a facial challenge in this context means a challenge to such ballot access laws as they apply to a any prospective independent candidate, not just to these plaintiffs.

"The 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial challenges." *Storer v. Brown*, 415 U.S.

724, 737, n. 8 (1974). A court's review of such ballot access statutes is important for future challenges and for the proper application of the law in future elections, even when the election is "long over, and no effective relief can be provided;" for the laws at issue, as in this instant case, "will persist" and therefore a controversy concerning such statutes is "capable of repetition, yet evading review" and is "not moot." *Id*.; *See also*, *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

Finally, Merrill cannot reasonably be left believing that the lower court intended its Judgment to apply to state race special elections or anything other than what is at issue in this case - a truncated schedule Alabama special election for the U.S. House of Representatives. The lower court pressed for an answer as to the breadth of the relief sought in this case and Mr. Hall advised the Court in no uncertain terms that relief was sought only as to U.S. House special elections. [Doc. 73] Additionally, the lower court repeatedly announced in its Opinion that the relief sought and question under consideration related exclusively to U.S. House special elections. [Doc. 80 at 21, 66]

If Merrill genuinely needed clarification as to which elections the lower court's Declaratory Judgment applied to, he had devices readily available to him to get that clarification; yet he made no effort to do so. *See e.g.*, Rule 59(e) of the Federal Rules of Civil Procedure.

Special elections for U.S. House seats in Alabama historically, without exception, have been conducted on a severely truncated schedule and, based on that history and the reasons Merrill put forward to justify the "extraordinary pace" required for such a special election when he was arguing against a preliminary injunction in this case and even after that, it is unquestionably likely that all U.S. House special elections will be on a severely truncated schedule.

The 3% requirement was unconstitutional when imposed in the instant special election case and it would be unconstitutional to impose it in similar circumstances in the future. That is the absolute essence and intended use of a Declaratory Judgment. Merrill's mootness arguments are completely without merit. [Doc. 54; Doc. 81 at 27-34]

II. The Lower Court Properly Concluded that Alabama's 3% Signature Requirement is Unconstitutional in the Context of a Special Election for the U.S. House of Representatives Held on a Severely Truncated Schedule.

Merrill's Arguments Find No Support in the Facts or the Law

At Pages 30-47 of his Brief, Appellant Merrill argues that Alabama's 3% requirement in the context of a truncated schedule special election is constitutional. There is no merit to Merrill's argument.

Portions of the Appellant's Brief read like they were written on "Opposites Day." The heart of Appellant's argument, found at Pages 30-37 of his Brief is

based entirely on the "litmus test" approach that this Court repeatedly has prohibited.[6] [*See* Doc. 80 at 46 - characterizing Appellant's approach as "precisely the sort of 'litmus-paper test' analysis the Supreme Court prohibits"]

Merrill next assails the case-by-case approach the lower court took - perhaps the most fundamental principle of ballot access analysis - asserting that a "theory" that looks at the facts and circumstances attending the specific election circumstance at issue "finds no support in the Supreme Court's case law." [Appellant's Brief at 38-40]. WHAT? The requirement for case by case analysis, considering the burdens imposed (cumulatively) and the interests claimed in the specific ballot access situation at issue, is the absolute essence of the teaching from *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and its progeny. It is the mandated approach.

Appellant does not and cannot point to any evidence whatsoever that in any way rebutted the showing of a severe burden that Appellees made or to any evidence whatsoever, that supports its claimed interests, demonstrates their strength, legitimacy, or applicability or that in any way indicates that they are related to the burden imposed, let alone the least restrictive means to serve the purported interests. Indeed, Appellant makes no attempt to satisfy this last

[6] *See e.g., Green Party of Ga. v. Georgia*, 551 Fed. Appx. 982 (11th Cir. Ga. 2014)

element, arguing at most that his unsupported interests are "rationally" related and that that should be enough. [Appellant's Brief at 43]

Of course, nothing else should be expected, given that Appellant made the arrogant pronouncement in the lower court that he had no obligation at all to prove or justify any claimed interests supporting its ballot access restrictions, advising the court that, "[T]he State is only required to articulate its interests, and the Secretary did so." [Doc. 28 at 5-6][7]

Merrill also argues that the lower court erred by considering "voter apathy" in an off season election year as adding to the severity of the burden in trying to obtain signatures, asserting that this is not a cognizable factor. [Appellant's Brief at 37-40] Merrill provides no citation to the lower court's decision. He appears to be referring to the discussion at Pages 52-55 [Doc. 81 at 52-55]. Merrill is wrong.

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[7] Appellant's contention on this issue is contrary to all established ballot access jurisprudence from the Supreme Court and from this Circuit. *See e.g., Anderson*, 460 U.S. at 789; *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340, 1355-56, 1366-67 (N.D. Ga. 2016), *affirmed by and Opinion adopted in whole by Green Party of Georgia*, 2017 U.S. App. LEXIS 1769 (11th Cir., February 1, 2017), *rehearing and rehearing en banc denied* (11th Cir., March 31, 2017)(requiring the Secretary of State to prove the strength, legitimacy, and applicability of its claimed interests, consistent with long-standing precedent; reaffirming that a "litmus-test" approach is prohibited);*Green Party of Ga. v. Georgia*, 551 Fed. Appx. 982 (11th Cir. Ga. 2014)(Same); *Fulani v. Krivanek*, 973 F.2d 1539, 1546 (11th Cir. 1992); *Bergland v. Harris*, 767 F.2d 1151, 1554 (11th Cir. 1985) - which Appellant expressly dismisses out of hand. [*See* Doc. 28 at 6].

First, after failing to in any way rebut the burden evidence below, Merrill should be deemed to waive this argument. He had his chance to try to rebut the factual submissions on this issue provided by Mr. Hall, who explained why this was a factor increasing the difficulty in obtaining signatures. [*See e.g.* Doc. 26-1] Similarly, Merrill failed entirely to offer any rebuttal to Mr. Winger's expert affidavit on this subject. [Doc. 25-4; 26-2 at 7] The lower was court was entitled to credit them and it did. [Doc. 81 at 52-55]

Merrill is also wrong on the law. The Supreme Court repeatedly has recognized voter apathy and lack of interest or awareness as a factor that increases the burden of obtaining signatures. *See e.g. Clingman*, 544 U.S. at 607; *Anderson,* 460 U.S. at 791-792. *See also, New Alliance Party v. Hand*, 933 F.2d 1568, 1571-72 (11th Cir. 1991)(citing the testimony of expert witness Lichtman regarding the burden created by lack of voter interest when removed in time from a regularly scheduled election).

In the rest of his Brief, Merrill further ignores fundamental principles of ballot access jurisprudence.

The Court Correctly Analyzed and Decided All Arguments

The lower court thoroughly, carefully, and authoritatively rejected Appellant's arguments on the merits at Pages 35-68 of its Opinion. [Doc. 81 at 35-

68; *Hall v. Merrill*, 2016 U.S. Dist. LEXIS 135446, *28-*58 (M.D. Ala., September 30, 2016)(Thompson, J.)[*See* Doc. 81 at 41-59, analyzing the burden imposed and concluding it is "severe;" Doc. 81 at 46, finding the Appellant's approach is "precisely the sort of 'litmus-paper test" analysis the Supreme Court prohibits"; Doc. 81 at 57, noting that Appellant failed to in any way rebut the severe burden evidence; Doc. 81 at 59-61, analyzing the State's claimed interests; and Doc. 81 at 60, finding that Appellant "failed to provide any evidence or explanation" as to how the claimed interests are served by the 3% requirement in the context of a special election, let alone how the 3% requirement is "narrowly tailored to advance these interests."].

Analytic Framework in Ballot Access Cases

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

The constitutional rights at issue here, including the rights to be a political candidate and to cast one's vote for a political candidate are fundamental rights guaranteed by the First and Fourteenth Amendments. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Eu v. San*

Francisco County Democratic Central Committee, 489 U.S. 214, 224 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983).

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

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

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

legitimacy and strength of each asserted state interest, and determine whether and to what extent those interests required burdening the plaintiffs' rights. *Id*. *Bergland v. Harris*, 767 F.2d 1551 1553-54 (11th Cir. 1985); *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340, 1355-56, 1366-67 (N.D. Ga. 20160, *affirmed by and Opinion adopted in whole by Green Party of Georgia*, 2017 U.S. App. LEXIS 1769 (11th Cir., February 1, 2017), *rehearing and rehearing en banc denied* (11th Cir., March 31, 2017)(requiring the Secretary of State to prove the strength, legitimacy, and applicability of its claimed interests, consistent with long-standing precedent; reaffirming that a "litmus-test" approach is prohibited);*Green Party of Ga. v. Georgia*, 551 Fed. Appx. 982 (11th Cir. Ga. 2014)(Same).

In order to permit the required evaluation of competing interests, "[t]he State must introduce evidence to justify both the interests the State asserts and the burdens the State imposes on those seeking ballot access." *Id. Bergland*, 767 F.2d at 1554. *See also*, *Mandel v. Bradley*, 432 U.S. 173, 178 (1977)(Court must sift through conflicting evidence and make findings of fact as to the difficulty of obtaining signatures in time to meet the deadline); *Storer v. Brown*, 415 U.S. 724

(1974)(a court is required to examine the facts and circumstances of each case individually and may not apply a "litmus test").[8]

The Court Must Analyze the Burden Based on Case Specific Factors

In analyzing a particular burden to First and Fourteenth Amendment rights in the ballot access context, "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992). Regulations imposing severe burdens on associational rights must be narrowly tailored to advance a compelling government interest. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997). Regulations imposing lesser burdens are subject to less intensive scrutiny, and reasonable, nondiscriminatory restrictions ordinarily will be sustained if they serve important regulatory interests. *Ibid.*

Where the State imposes only reasonable and genuinely neutral restrictions on associational rights, there is no threat to the integrity of the electoral process and no apparent reason for judicial intervention. As such restrictions become more

[8] The Court in *Storer* also makes clear that in analyzing a ballot access regulation, the reviewing court should look at past experience in qualifying to determine the severity of the obstacle and the Court also looked to other States for guidance. *See e.g Storer*, 415 U.S. 740, n.10 & 742. The lower court in this case did so and found it to further support the conclusion that there is a severe burden here. [Doc. 81 at 55-56]

severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions." *Clingman*, 544 U.S. at 603 (O'Connor, concurring); *See also*, *Clingman*, 544 U.S. at 596-87 ("Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest).

"[W]hat is demanded (by the State) may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot. The Constitution requires that access to the electorate be real, not 'merely theoretical.'" *Party of Texas v. White*, 415 U.S. 767, 783, 94S. Ct. 1296 (1974).

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

Mr. Hall Clearly Demonstrated a Severe Burden

In the instant case, the lower court correctly concluded, based on all of the factual evidence before it and the application of the relevant principles of law that

the burden is severe, [Doc. 81 at 41-59; Doc. 25-1 thru Doc. 25-4; 73; 75] Strict scrutiny applies and so, in addition to demonstrating an articulated compelling interest to justify the regulation, states must "adopt the least drastic means to achieve their ends." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979). [Doc. 81 at 59]

It is the 3% signature requirement and the truncated schedule which reduces the time to collect signatures from an unlimited time frame to under two months, in **combination** that creates the severe burden and any suggestion that either factor should be analyzed in isolation is simply contrary to the mandated analysis. *See Nader v. Keith*, 385 F.3d 729, 731 (7th Cir. 2004)("Restrictions on candidacy must . . .be considered together rather than separately."); *See also Williams*, 393 U.S. at 34 (ballot access laws should be viewed in their totality, not in isolation); *Pilcher v. Rains*, 853 F.2d 334, 336 (5th Cir. 1988)[9](facially valid provisions may

[9] "[A]s the Supreme Court has observed, 'The concept of "totality" is applicable only in the sense that a number of facially valid provisions of the election laws may operate in tandem to produce impermissible barriers to constitutional rights.' *Storer* [*v. Brown*], 415 U.S. [724], at 737, 94 S. Ct. [1274], at 1282. Several requirements of an election code may combine to make ballot access excessively burdensome, or a single requirement may do so. For example, if [Alabama] required only one percent of one percent of gubernatorial votes for ballot access, but also imposed another, frankly impossible requirement, the fact that the first requirement was easy would not validate the second. A single unreasonable barrier would suffice to prevent access." *Pilcher v. Rains*, 853 F.2d 334, 336 (5th Cir. 1988) (emphasis added).

operate in tandem to produce impermissible barriers to ballot access - for example, if a state had a 1% signature requirement, but imposed a single other unreasonable barrier, it would still effectively deny ballot access and would be unconstitutional, *citing Storer* and *Anderson*).[10] *Gill v. Scholz*, 2016 U.S. Dist. LEXIS 113702, *10-*12 (C.D. Ill., August 25, 2016),*citing, Green Party of Georgia v. Georgia*, 551 Appx. 982 (11th Cir. 2014)(circumstances affect the burden and the interests; recognizing that a signature requirement within one time frame can be more burdensome in a shorter one).

Mr. Hall's submissions demonstrating the severe burden have not been rebutted by even a shred of competence evidence or argument and the burden has not been justified by any compelling or even important state interest.

Merrill's arguments, boiled down to their essence ignore the factual evidence of the actual burdens faced by the candidate and ignores the complete lack of evidence in support of the State's purported interests justifying the burden.

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

Instead, Secretary Merrill's argument is the epitome of the "litmus test" that the Supreme Court consistently has said for at least 30 years must never be used and that this Court expressly has emphasized;[11] yet that is exactly the approach urged on the lower court and now asserts in this Court. [Doc. 81 at 46]

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

1. **Mr. Hall's Declarations** [Docs. 25-1; 26-1; 48-1]:

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

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[11] *See Green Party of Georgia v. Georgia Secretary of State*, 551 Fed. Appx. 982 (11th Cir. 2014)

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

Mr. Hall also declared his intention to run again as an independent candidate in any future Alabama special election for U.S. House and to cast his vote for an independent. [Doc. 48-1]

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

2. **Mr. Moser's Declaration** [Docs. 25-2; 48-2]:

Moser's Declaration set out his experience in organizing political campaigns and in running signature drives. He also has experience running as a candidate in a major party primary, garnering 74,147 votes in the 2010 Republican U.S. Senate race primary election (some 15.6% of the vote) and in running as an independent. In the race at issue in this case, Moser enlisted the support of a seasoned ballot access petition gatherer who had been the Alabama coordinator for Presidential Candidate Ron Paul's signature drive in Alabama. They contacted over 100 experienced signature gatherers from around the State with whom they had worked in the past and most found the idea of raising 6000 signatures in such a short time frame too

daunting to even try. He tried seeking signature support through a Facebook post, to no avail. At the end of the day, even with help, he was only able to gather 750 signatures (difficult to say this reflects an inability of this candidate to get even a modicum of support when over 74,000 voters actually cast a vote for him when he ran in a major party primary) and abandoned the effort.

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

Defendant offered no competent rebuttal.

3. **Cassity's Declaration** [Doc 25-3]:

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

He is intimately familiar with the 1st District. As the leader of a minor political party in Alabama, He successfully assisted in mounting a 3% signature drive campaign in a regular election cycle for a candidate who successfully

obtained ballot access to this exact same seat in 2010 and that candidate received 26,357 votes in that election. Cassity details how difficult and expensive it was to successfully obtain the 3% level of signatures, even in a regular election cycle with unlimited advance time, and with the necessary planning months ahead of the campaign. Even after paying a great deal of money for paid signature gatherers, they only obtained the requisite number at the last moment.

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

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

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

4. **Richard Winger's Expert Declarations** [Docs. 25-4; 26-2; 29-1; 63-1]

Ballot Access expert witness Richard Winger has provided Declarations on many of the subjects that are directly relevant here. Appellant provided no

rebuttal witness or competent evidence of any sort to in any way rebut his instructive expert testimony.

Mr. Winger been deemed qualified as an expert witness in a ballot access in the Middle District of Alabama (a case in which Alabama's Secretary of State also was a Defendant of course) and he also was the expert witness relied upon by the Court in the recent published decision that quite thoroughly analyzes the issue presented here - what to do about the additional burden a truncated election scheduled places on an independent candidate facing the same level of support requirement that applies in a regular election cycle. *See Jones v. McGuffage*, 921 F. Supp. 2d 888, 893 (N.D. Ill. 2013)(citing Richard Winger as the expert witness on ballot access); *See also, Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340, 1374 (N.D. Ga. 2016)(relying on expert affidavit of Richard Winger), *adopted in whole and affirmed by Green Party of Georgia v. Kemp*, 2017 U.S. App. LEXIS 1769 (11th Cir., February 1, 2017, *rehearing and rehearing en banc denied* (11th Cir., March 31, 2017). [Doc. 81 at 53, N.10]

In addition to the two earlier Declarations submitted by Mr. Winger, Mr. Winger's Second Supplemental Declaration provided an important historic dimension. It reflects the history of Special Elections for U.S. Congress in Alabama since ballots were first printed by the State in 1893 and, as noted, it

demonstrates that there has never been a single independent candidate who ever has appeared on the ballot for Congress in a Special Election. It also reflects the wide variance in what Alabama has deemed to be a necessary "modicum of support" for an independent candidate for such office over the years. [Doc. 29-1]

This is relevant because case after case has directed an analyzing court to look to past experience as a factor in determining the burden imposed. *See e.g., Mandel v. Bradley*, 432 U.S. 173, 177 (1977)("Past experience will be a helpful, if not always unerring guide; it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not."), *quoting from*, *Storer v. Brown*, 415 U.S. 724, 742 (1974); *Lee v. Keith*, 463 F.3d 763, 769 (7th Cir. 2006)("ballot access history" is an "important factor in determining whether restrictions impermissibly burden the freedom of political association.).

In *Lee v. Keith*, 463 F. 763, 769 (7th Cir. 2006), the court noted that three independent candidates were actually able to qualify for ballot access in the first year the stringent restrictions at issue became effective, but that in the 12 election cycles since, not one independent candidate had qualified.

Without any inquiry as to how many had tried and failed during that period, the Court found this effectively made independent candidacies "nonexistent" over

a 25 year period and this was a critically important factor in its conclusion that the ballot access restrictions at issue constituted a "severe burden." *Id*.

Similarly, neither the *Mandel* Court nor the *Storer* Court looked to how many had tried; rather it was simply the absence of independent candidates from the ballot that constituted the relevant "past experience" and relevant "ballot access history" to which the Courts have looked.

In the 18 special elections for Congress held historically in Alabama, there has never been a single independent candidate on the ballot. [Doc. 25-4][Doc. 81 at 55-58]

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

As he wrote, in contrast to Alabama's requirement for 3% or approximately 6000 signatures for an independent in a U.S. House race for the 1st District seat, in Tennessee, only a total of 25 signatures are required for an independent candidate to get on the ballot for a U.S. House seat, in Mississippi, only 200 signatures, and in Florida no signatures at all are required.[12] In Georgia, significantly, while there

[12] Notwithstanding the lower court's decision to ignore relevant information from the neighboring states, [Doc. 81 at 56-57, n.11], this Court has recognized the direct relevance of ballot access restrictions in other states to, among other things, evaluate

still is a 5% level of support required in a regular election cycle, after *Citizens Party*, there is no signature requirement at all. This distinction in the signature requirement between regularly scheduled and general elections recognizes the burden the truncated time frame attending a Special Election creates and the lower voter numbers in special elections, such that state interests that traditionally might apply to a regularly scheduled election are not of similar concern in a special election. [DE 29-1] *See e.g. Jenness v. Fortson*, 403 U.S. 431, 439, notes 15-20 (1971)(Comparing other States' provisions with respect to the ballot access at issue); *Williams v. Rhodes*, 393 U.S. 23, 47, n.10 (1968)(Harlan, J., concurring)(comparing "size" of "barriers" to third-party candidates for each State and comparing ballot history among the States for third-party candidates); *New*

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whether the least restrictive means are being employed. *See e.g.*, *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1348-51; 1369 (N.D. Ga. 2016), *affirmed*, 2017 U.S. App. LEXIS 1769 (11th Cir., February 1, 2017), *rehearing en banc denied* (11th Cir., March 31, 2017)(Comparison with other states is relevant for assessing the burden imposed and for least restrictive means analysis); *See also, Jenness v. Fortson*, 403 U.S. 431, 439, notes 15-20 (1971)(Comparing other States' provisions with respect to the ballot access at issue); *Williams v. Rhodes*, 393 U.S. 23, 47, n.10 (1968)(Harlan, J., concurring)(comparing "size" of "barriers" to third-party candidates for each State and comparing ballot history among the States for third-party candidates); *New Alliance Party v. Hand*, 933 F.2d 1568, 1571-1572 (11th Cir. 1991)(Citing expert witness Allen J. Lichtman's testimony comparing other States' signature filing deadlines and number of signature requirements relative to Alabama's). *See also, Libertarian Party of Ill. v. Ill. State Bd of Elections*, 2016 U.S. Dist. LEXIS 22176, 20 (N.D. Ill., February 24, 2016)(striking down Illinois ballot access law and noting it was the only state in the country with such a law).

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

Mr. Winger also pointed to a recent development in the State of Ohio as instructive as well. [Doc 29-2; 29-3].

Mr. Winger also advised that in any political campaign for public office, especially one covering a significant territory and number of voters, there is necessarily a "start-up" period that must pass before a candidate's campaign can even *begin* to mount a serious petition drive of this magnitude. Funds have to be raised. A campaign organization must be created and major responsibilities assigned to staff. Volunteers must be recruited to do the petitioning, or, alternatively, enough funds raised to hire paid petitioners. If the campaign must rely on volunteers, they have to be trained. And this is a far from exhaustive list of the myriad tasks that must be performed before a petition drive can really get off the ground. For a independent candidate, getting through this start-up period – and into the starting gate for a petition drive – is necessarily a more cumbersome and time-consuming process than it is for most candidates of the two established parties, who generally have far greater resources at their disposal. The truncated

schedule here, with the high signature requirement within that truncated period, left no start-up or organizing time. [Doc. 25-4]; [Doc. 81 at 52]

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

Finally, Mr. Winger provided data that demonstrated that far fewer voters are engaged in and participate in special elections in an off-season year than in the regularly scheduled election for the same office. [Doc. 63-1]

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

The State Must Put Forward Evidence in Support of Its Claimed Interests

Once the burden imposed by the regulations is established, [Doc. 81 at 41-59, finding the burden here to be severe], the Court must then consider the interests claimed by the State to justify that burden, just as the lower court did. [Doc. 81 at 37; 59-61]; *Anderson*, 460 U.S. at 789.

Merrill Failed to Meet His Burden Regarding the Claimed State Interests

Appellant offered nothing more than generalized interests below, which surely do not and cannot suffice to justify the severe burden imposed by the truncated schedule. [Doc. 81 at 60]

As noted, instead of meeting his burden with respect to his claimed state interests, Appellant made a most extraordinary assertion with respect to purported state interests in this case - an assertion which flies in the face of long settled authority from this Court and the Supreme Court. In Doc. 28 at 5-6, he asserted that the State has no obligation to prove or justify any claimed interests supporting its ballot access restrictions - "The State is only required to articulate its interests, and the Secretary did so.[13]" Merrill's position is contrary to well settled law with

[13] Before this Court Merrill just lists his purported boilerplate interests and argues that the interests are "strong" and are "rationally served" by the restrictions. [Appellant's Brief at 43-47] Of course Appellant's whole argument with respect to his purported interests depends on a conclusion that the burden imposed in this case is a most minor one, rather than a severe one as the district court found it to be. Further, the argument wholly ignores the fact that despite being provided a fully opportunity to provide some support for its claimed interests to demonstrate their legitimacy, strength, and applicability, Merrill put in no evidence whatsoever to meet the factors required under the *Anderson* framework. [Doc. 81 at 60](finding that the Secretary "failed to provide any evidence or explanation as to why applying the 3% signature requirement in the context of special elections as presented here is necessary to achieve the interests articulated.).

respect to the burden he bears regarding the claimed State interests, as explained earlier herein.

The Secretary's position seems to provide a true raison d'etre for Justice O'Connor's admonition in *Clingman v. Beaver*, 544 U.S. 581, 603 (2005), that courts must be very leery of proffered interests and consider whether they are really offered to advance compelling/important State interests applicable to the underlying situation and justifying the burden created or interests intended instead to serve the goals of the dominant political parties.[14]

In *Fulani v. Krivanek*, 973 F.2d 1539, 1546 (11th Cir. 1992), this Court characterized the second step in the Court's analytical process to be to "'identify **and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.'** determining '**the legitimacy and strength of each of those interests**.'" (Emphasis added), *quoting from Anderson*, 460 U.S. at 789 (Emphasis added). The Court in *Fulani* lambasted the State for "plucking" its purported interests "from other cases without attempting to explain how they

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

justify" the burden the underlying restrictions imposed. *Id*. at 1546. *See also*, *Green Party of Georgia v. Kemp*, 171 F. Supp. 3d 1340, 1355-56; 1366-67 (N.D. Ga. 2016)(noting that in ballot access cases the State is required to prove with evidence the legitimacy, strength, and applicability of the interests it claims supports the ballot access restrictions at issue the corresponding burden).[15] That is just what Merrill has done here.

The very case from this Circuit to which Appellant cites as his "litmus test" guidepost, *Swanson v. Worley*, 490 F.3d 894, 902-903 (11th Cir. 2007)[Doc. 28 at 6], also makes it abundantly clear when read *in toto* that the selected quote does not in any way give Appellant the license he claims to have.

The Court in *Swanson v. Worley* wrote that after considering the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the [candidate] seeks to vindicate," "[the court] then must identify and **evaluate the precise interests put forward by the State as justification for the burden imposed by its rule." "In making this evaluation, a court must 'determine the legitimacy and strength of [the State's] interests**

[15] Recently, this Court affirmed the district court's decision and adopted in whole as its own the "well-reasoned" district court opinion. *Green Party of Georgia v. Kemp*, 2017 U.S. App. LEXIS 1769 (11th Cir., February 1, 2017), *rehearing and rehearing en banc denied* (11th Cir., March 31, 2017).

[and] consider the extent to which those interests make it necessary to burden the [candidate's] rights." "A court then must weigh all these factors to determine if the statute is constitutional." *Swanson*, 490 F.3d at 902-903 (citations omitted)(Emphasis added).

The Court then goes further and expresses the well known principle that "if the state election scheme imposes "severe burdens" on the plaintiffs' constitutional rights, it may survive only if it is "narrowly tailored and advance[s] a **compelling state interest**." *Id*. at 903 (citations omitted). This is a far cry from the Secretary's assertion that he need only "articulate" the State's interests and the inquiry ends there. *See also, Norman v. Reed*, 502 U.S. 279 (1992)(Applying strict scrutiny to State's purported interests and requiring least restrictive means to advance any legitimate interests).

The Supreme Court has made it clear that a court in no way is to merely be satisfied simply by the State's articulation of its purported interests and go no further. In *Clingman v. Beaver*, 544 U.S. 581, 603 (2005)(O'Connor, J., concurring), at least 5 Justices subscribe to the principle that as a ballot access restriction increases in the burden it imposes on the candidate or voter's constitutional rights, scrutiny of the purported state interests supporting the restriction are subjected to increasingly heightened scrutiny to insure "... that the

State's asserted interests are not merely a pretext for exclusionary or anti-competitive restrictions."

Special Elections Require Special Rules

Each and every case cited below that has considered the impact of shortening the time frame from a regular election cycle for obtaining signatures has concluded that the increased burden, whether "severe" or something less than that, required either that the signature filing deadline be extended or that the number of signatures be reduced in proportion to the degree to which the petitioning period was shortened, or both. Context matters in analyzing any given restriction. *Gill v. Scholz*, *Supra*.

Courts which have upheld such ballot access signature requirements as apply here (e.g. 3%) for independent or minor party candidates in a regular election cycle, consistently have held that the application of those same requirements to such candidates in a Special Election with a truncated schedule for gathering signatures violates the First and Fourteenth Amendments. Courts across the board have held in such situations that the number of signatures to be required must be dramatically reduced or the deadline for gathering them must be extended or both. *See e.g.*, *Jones v. McGuffage*, 921 F. Supp. 2d 888 (N.D. Ill. 2013); *Parker v. Barnes*, Case No. 1:02-cv-1883-BBM (N.D. Ga., July 30, 2002)

(Unpublished)(Holding the application of the 5% regular election cycle signature requirement to a truncated Special Election schedule to be unconstitutional; reducing the signature requirement by 1/3 because the signature gathering period for Special Election was reduced from 180 days in regular election cycle to 120 days)(Martin, J.)[Doc. 25-5]; *Migala v. Martinez*, Case No. 89-40168-MMP (N.D. Fla., August 7, 1989)(Unpublished)[Doc. 25-6](Holding the application of regular election cycle signature requirement to truncated schedule Special Election unconstitutional; extending deadline for submitting signatures by 60 days and reducing signature requirement from 3% to 1%)[Doc. 25-1; 25-6];[16] *Citizens Party of Georgia v. Polythress*, 683 F.2d 418 (11th Cir. 1982)(Table), Docket No. 82-8411 (11th Cir., July 14, 1982)(vacating district court decision that dismissed constitutional claim over reduction of signature gathering period from 180 days in regular election cycle to 50 days in Special Election cycle); *Citizens Party of Georgia v. Polythress*, Case No. C82-1260A (N.D. Ga., July 26, 1982)(Unpublished)(On Remand from 11th Circuit, extending signature

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

submission date by 30 days)[Collectively Doc. 25-7]; *Puerto Rican Legal Defense & Education Fund, Inc. v. The City of New York*, CV-91-2026 (Oral Order of July 31, 1991, E.D.N.Y)(Unpublished)[Doc. 25-8]; *Blomquist v. Thomson*, 739 F.2d 525 (10th Cir. 1984), a truncated time period led the Court to reduce the number of signatures. *Libertarian Party of Oklahoma v. Oklahoma State Election Board*, 593 F. Supp. 118 (W.D. Okla. 1984)(Accord).

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

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

In *Swanson v. Worley*, 490 F.3d 894, 904 (11th Cir. 2007), tellingly, this Court upheld Alabama's 3% signature requirement in a regular election cycle, persuaded in large part by purported "alleviating factors" that attend the signature requirement in a regular election cycle. The single "alleviating factor" that this Court found most significant was "unlimited time" Alabama allows for a petitioning candidate "to conduct the petitioning effort" in a regular election cycle.

This Court explained that, based on this factor, "while there is a deadline for collecting signatures, there is no required start date or limited period for collecting signatures." *Id*. The Court chose to add its own emphasis to this factor by italicizing it. *Id*. Obviously, this "alleviating factor" does not exist at all for a truncated schedule special election and, in fact, the converse applies. There is a severely limited time frame for collecting signatures and no advance start-up time to organize a signature drive. [Doc. 81 at 43-48]

In other cases, Appellant regularly has emphasized this "unlimited" time frame for petitioning in a regular cycle as a major "alleviating factor" in the burden otherwise created by Alabama's ballot access legislative scheme. In the instant case, however, Appellant never mentioned it - not even to at least acknowledge the increased burden the very limited time frame attending a Special

Election causes, in contrast to a regular election cycle. In his Brief, he criticizes the lower court for its focus on this factor. [Appellant's Brief at 33]

The logical conclusion of the Secretary's argument, in contradiction of every truncated schedule election case cited, is that it makes no constitutionally cognizable difference if one is required to collect over 6,000 signatures in 2 years or in 2 months and while the legislature intended for there to be no start time, there need be no accommodation made when a start time is imposed severely limiting the collection period.

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

Additionally, the severe nature of the burden imposed by the 3% requirement in the context of a special election for U.S. House was demonstrated by the submission of abundant unrebutted historical evidence that the district court relied on and found relevant in concluding that the burden is severe. [Doc. 81 at 55-56] Mr. Hall commends that historical evidence to the Court's attention. [Docs. 29-1; 63-1; 73 and exhibits; 75].

The fact that there has never been an independent candidate on the ballot in a Special Election in Alabama for a seat in the U.S. House is the factually and legally

relevant "ballot access history" in this case to be considered in the analytical framework. It is impossible to know how many have been deterred from even trying because of the severe, indeed, historically insurmountable burden on gathering signatures posed by the dramatically truncated time period that has attended and will by definition attend every Special Election for a seat in the U.S. House in Alabama.

CONCLUSION

All remaining arguments by Merrill are completely without merit as well and find no support in either the record or the law and need not be addressed in any detail.

Judge Thompson's careful, thorough, and well reasoned decision, fully and correctly analyzes, addresses and resolves all issues raised in this case, based on the record and the applicable principles of law and should be affirmed and, indeed, adopted by this Court as its own in affirming the Judgment.

Respectfully submitted,

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Dated: April 6, 2017

/s/ David I. Schoen
David I. Schoen (SCHO036)

Counsel for Appellees

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I hereby certify that, on this 6th day of April 2017, I caused the foregoing to be filed with the Clerk of the Court, via the CM/ECF System, which will send notice of such filing to all registered users.

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

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