

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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HONORABLE MARK MARTIN,  
IN HIS OFFICIAL CAPACITY AS SECRETARY OF  
STATE FOR THE STATE OF ARKANSAS,

*Petitioner,*

v.

MARK MOORE,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eighth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

This Court often has emphasized the importance of reasonable diligence by prospective candidates asserting claims for First Amendment ballot access. But a split has developed among the Circuits as to whether and to what extent reasonable diligence is required for prospective candidates challenging state-imposed deadlines in suits brought under the First Amendment. Recent developments in the Court's standing jurisprudence also leave the distinct impression that lower courts are deciding important standing issues in a way that conflicts with relevant decisions of this Court. In this case, the United States Court of Appeals for the Eighth Circuit reversed in part and remanded a First Amendment ballot access case where Respondent-Plaintiff had been barred from the ballot because he failed to complete necessary paperwork and failed even to attempt to gather any signatures of registered voters to submit on his independent candidate petition. Petitioner Secretary applies for the Writ pursuant to Rule 10(a) and (c) of the Rules of the Supreme Court, and presents the following questions:

1. Whether the exercise of reasonable diligence in a prospective candidate's attempt to access the ballot is an essential element of the prospective candidate's First Amendment claim of unlawful restrictions upon ballot access, such that failure to present proof of reasonable diligence entitles the defending state to summary judgment.

**QUESTIONS PRESENTED** – Continued

2. Whether Article III standing's injury-in-fact requirement encompasses the exercise of reasonable diligence by a prospective candidate who makes a First Amendment ballot access claim.

## **PARTIES TO THE PROCEEDING**

Petitioner, Honorable Mark Martin, is the elected Secretary of State for the State of Arkansas (Petitioner Secretary), and was the appellee in the court below. He was sued in his official capacity as the Chief Election Official for the State of Arkansas, that is, the person responsible for certifying candidate names to County Election Officials for inclusion on the general election ballot.

Respondent, Mark Moore (Respondent), was the appellant in the court below. He claimed to be a candidate for Lieutenant Governor for the State of Arkansas for the 2014 Election. Michael Harrod and William Chris Johnson were also plaintiffs in the district court, seeking other elected offices, but did not participate in the appeal at the court below.

No corporations are parties to these proceedings.

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## INTRODUCTION

The Honorable Mark Martin, in his official capacity as Secretary of State for the State of Arkansas, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.



## OPINIONS BELOW

The opinion of the court of appeals has been published in the Federal Reporter at 854 F.3d 1021 (8th Cir. 2017) and reprinted in the Petition Appendix (Pet. App. 1). The district court's opinion has not yet been published, but is reported at 2015 WL 13343585 (E.D. Ark. 2015) and reprinted in the Appendix (Pet. App. 21).



## JURISDICTION

The Eighth Circuit issued its April 26, 2017 Opinion and Judgment in the appeal. (Pet. App. 1). The Eighth Circuit had appellate jurisdiction over Respondent's appeal because the district court had entered a final judgment. 28 U.S.C. § 1291.

This Court has jurisdiction to review the judgment of the court below pursuant to 28 U.S.C. § 1254(1). This petition is filed timely within ninety (90) days after the Eighth Circuit Opinion and Judgment.



## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The First Amendment to the United States Constitution provides

congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides

all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983, otherwise known as Section 1983, provides

every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of

any rights, privileges, or immunities secured by the Constitution and laws, shall be liable. . . .

52 U.S.C. § 20302, otherwise known as the Military and Overseas Voter Empowerment Act, or MOVE, provides

each State shall – (1) permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office . . . (3) permit absent uniformed services voters and overseas voters to use Federal write-in absentee ballots (in accordance with section 20303 of this title) in general elections for Federal office . . . (8) transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter – (A) except as provided in subsection (g), in the case in which the request is received at least 45 days before an election for Federal office, not later than 45 days before the election; and (B) in the case in which the request is received less than 45 days before an election for Federal office – (i) in accordance with State law; and (ii) if practicable and as determined appropriate by the State, in a manner that expedites the transmission of such absentee ballot.

Arkansas Code Annotated § 7-7-203(c)(1) provides

the party filing period shall be a one-week period ending at 12:00 noon on the first day in

March and beginning at 12:00 noon one (1) week prior to the first day in March.

Arkansas Code Annotated § 7-7-103(a)(1), as amended by Act 1356 of 2013, provides

a person desiring to have his or her name placed upon the ballot as an independent candidate without political party affiliation for any United States office other than President of the United States or Vice President of the United States or state, county, township, or district office in any general election in this state shall file, during the party filing period for the year in which the election is to be held, a political practices pledge, an affidavit of eligibility, the petition under this section, and a notice of candidacy stating the name and title the candidate proposes to appear on the ballot and identifying the elective office sought, including the position number, if any.

Arkansas Code Annotated § 7-7-103(b)(1)(A), as amended by Act 1356 of 2013, provides

the person shall file petitions signed by not less than three percent (3%) of the qualified electors in the county, township, or district in which the person is seeking office, but in no event shall more than two thousand (2,000) signatures be required for a district, county, or township office.



## STATEMENT OF THE CASE

### A. Factual Background

Respondent Mark Moore claimed to be an independent candidate for Lieutenant Governor of the State of Arkansas for the 2014 general election, i.e., a statewide office. Plaintiff William Chris Johnson claimed to be an independent candidate for White County Judge, a county-level executive office. Plaintiff Michael Harrod claimed to be an independent candidate for a state House of Representative race in District 84. Plaintiffs filed suit February 6, 2014. (Pet. App. 21). Arkansas Code Annotated § 7-7-103(a)(1) requires independent candidates running for office to file with the appropriate office during the one-week party filing period ending March 3, the following: a political practices pledge, an affidavit of eligibility, petition signatures required for various offices, and a notice of candidacy. (Pet. App. 22). On March 3, 2014, after filing suit, Respondent tendered a political practices pledge and an affidavit of eligibility. He also tendered an unsigned notice of candidacy and an acknowledgment to the effect that he did not submit any petition signatures to Petitioner Secretary. (Pet. App. 23). Petitioner notified Respondent that his attempted filing was insufficient on two grounds, failure to sign his notice of candidacy and failure to submit the required number of signatures of registered voters on a petition for certification to the ballot. Petitioner Secretary notified Respondent that he would not certify Respondent's name to the County Boards of Election Commissioners as a candidate for Lieutenant Governor for the 2014 general election ballot.

Neither Plaintiff Johnson, nor Plaintiff Harrod filed or attempted to file any of the required forms to run for office with Petitioner Secretary. (Pet. App. 23).

An individual seeking candidacy as an independent candidate must submit signatures of registered voters in the amount of three percent (3%) of the total votes cast for Governor in the last applicable election, in the jurisdiction where the prospective independent candidate seeks election (e.g., State House, State Senate, County Judge, or statewide, etc.). (Pet. App. 22). After the gubernatorial election in 2010, the three percent (3%) petition signature requirement for a statewide office amounted to 23,440 signatures for the 2014 election cycle.

However, Respondent was only required to submit 10,000 signatures, or 1.28% of the total votes cast for Governor in the 2010 election. The state imposes additional statutory maximums on the number of signatures any prospective candidate would need to collect for various offices. The applicable cap for statewide offices was 10,000 petition signatures. (Pet. App. 22). Petition signatures need to be collected during the ninety (90) days immediately before submission.

Respondent did not tender any petition signatures at any time during the case. Respondent did not gather any signatures and was not aware of any person gathering signatures for a petition on his behalf. Through his own affidavit, Respondent admitted he “refused to comply” with the 2014 petition signature requirement in support of his prospective independent candidacy

for Lieutenant Governor in 2014. (Pet. App. 23). Neither of the other two Plaintiffs, Johnson or Harrod, gathered, filed, or attempted to file any petition signatures with Petitioner Secretary. (Pet. App. 23).

In 2013, the Arkansas General Assembly moved the petition signature deadline from May 1 to March 1, in part to account for changes in federal law (the Uniformed and Overseas Citizens Absentee Voting Act or UOCAVA, and the Military and Overseas Voter Empowerment Act or MOVE), and in part to allow additional time for litigation of petition signature challenges. (Pet. App. 35). Arkansas Act 1356 of the 2013 Regular Session amended portions of Arkansas Code Annotated § 7-7-103, moving the petition signature deadline from May 1 to “the party filing period,” beginning at 12:00 noon one (1) week prior to the first day in March and ending at 12:00 noon on the first day in March. Arkansas Code Annotated §§ 7-7-103, 7-7-203. In 2014, independent candidates had to file petition signatures and other required forms during the party filing period, which ran from February 24, 2014 at noon until March 3, 2014, when the March 1 Saturday deadline was extended to the following business day, Monday, March 3.

Petitioner, as Secretary of State, must certify the names of all candidates to the County Boards of Election Commissioners for all seventy-five counties in the state, seventy-five (75) days prior to the general election. The deadline for Petitioner Secretary’s certification of candidate names for the 2014 cycle was August 21, 2014. To comply with federal requirements

(UOCAVA and MOVE), Petitioner delivered absentee ballots to overseas and military voters by electronic delivery on September 19, 2014. The general election occurred on November 4, 2014, and on November 20, 2014, Petitioner certified the official tabulation of the election results.

Respondent did not seek any relief in anticipation of the general election. In fact, Respondent did not seek any relief until he filed a motion for summary judgment six (6) months after the general election occurred and results were certified. After the 2014 election took place, Respondent by affidavit claimed he plans to run as an independent candidate for the same office in the 2018 general election.

## **B. Proceedings in the District Court and Court of Appeals**

Respondent and his co-Plaintiffs filed suit in the United States District Court for the Eastern District of Arkansas on February 6, 2014. (Pet. App. 21). Respondent brought an as-applied challenge to Arkansas Code as it pertained to independent candidate deadlines for the 2014 general election and all subsequent general elections. (Pet. App. 25).

After certification of election results for the 2014 election, on November 26, 2014, Petitioner Secretary filed a Motion for Summary Judgment. Respondent had not yet requested or obtained any preliminary relief. In response to Petitioner's Motion, Respondent Moore first claimed by affidavit that he would again be a candidate for 2018.

On May 13, 2015, the final deadline of the scheduling order, six (6) months after the general election, and fifteen (15) months after filing suit, Respondent and his co-Plaintiffs moved for summary judgment.

On November 26, 2014, Petitioner Secretary filed a statement of facts not in dispute, with copies of Plaintiffs' admissions and an affidavit in support of his motion for summary judgment. On December 29, 2014, Respondent filed a statement in response, disputing two facts: that Respondent had not taken any action to move forward with his lawsuit and that no further relief was available for the 2014 election cycle. Respondent's statement in opposition was supported by a purported "expert witness" affidavit that included information not based upon personal knowledge and not admissible in court, as well as Respondent's own affidavit, wherein he claimed that he "refused" to attempt to collect signatures for his independent candidate petition.

The other Plaintiffs did not dispute that they had not filed, or attempted to file, any of the required forms to run for office, nor that they had not gathered, or attempted to gather, any signatures for their required petitions. (Pet. App. 23). The other Plaintiffs also did not dispute Petitioner Secretary's proof that another independent candidate for White County Judge (Jacky Louks) timely filed all necessary paperwork and signature petitions for access to the general election ballot in 2014.

None of the Plaintiffs disputed that an independent candidate, George Pritchett, timely filed all necessary paperwork and signature petitions for access to the general election ballot as a candidate for State Senate in 2014.

On May 13, 2015, Respondent and Plaintiff Harrod filed their own motion for summary judgment with a “new” statement of facts, including duplicates of the two previously-filed affidavits. Plaintiff Johnson filed a motion for voluntary nonsuit. In response to Respondent’s motion for summary judgment, Petitioner Secretary set forth a response and a separate statement of undisputed material facts on May 27, 2015. Petitioner Secretary objected to the speculative testimony of the purported expert witness, and also set forth an additional affidavit by the Director of Elections.

The district court heard oral argument on July 27, 2015. At oral argument, Respondent, through counsel, conceded that the remaining issues were all legal issues. On August 25, 2015, the district court granted Petitioner’s motion for summary judgment in part, but denied Petitioner’s motion in part. The District Court ruled on the merits of the constitutionality of the change in the filing deadline for petition signatures for independent candidates; finding Petitioner did not have enough time to process all of the petitions, and conduct any ensuing litigation, within the previous May 1 deadline. After weighing the burdens and justifications, the district court granted Petitioner’s motion for summary judgment on the merits of the law and

denied Respondent's motion accordingly. The District Court denied Petitioner Secretary's motion for summary judgment on all other bases.

On September 22, 2015, Respondent filed a motion to reconsider or alter judgment pursuant to Federal Rule of Civil Procedure 59. On October 7, 2015, the District Court denied the motion, finding the motion merely restated the arguments already thoroughly considered. (Pet. App. 19). On November 6, 2015, Respondent filed a notice of appeal to challenge both the August 25, 2015 and October 7, 2015 Orders.

On November 9, 2015, the case was docketed in the United States Court of Appeals for the Eighth Circuit. The joint appendix was filed on December 31, 2015. Respondent, as appellant, filed his brief and addendum with the court below on January 7, 2016. Petitioner, as appellee, filed his brief with the court below on February 23, 2016. On March 11, 2016, Respondent filed his corrected reply brief.

Oral arguments were heard by the court below on December 14, 2016. The court below issued its opinion and judgment on April 26, 2017. The court below affirmed the district court in part, reversed in part, and remanded the case to district court, concluding *sua sponte* that there are issues of material fact in dispute concerning Petitioner Secretary's justifications for the change in the signature deadline. (Pet. App. 13-15). On May 10, 2017, Respondent filed a motion for bill of costs. On May 16, 2017, Petitioner filed his response in opposition. On May 17, 2017, the court below issued its

mandate. On May 23, 2017, the court below issued an order denying Respondent's bill of costs. Petitioner now respectfully asks this Court to grant his Petition for Writ of Certiorari.



## **REASONS FOR GRANTING THE PETITION**

### **A. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE EIGHTH CIRCUIT'S DECISION, THIS COURT'S DECISIONS, AND THE OTHER CIRCUIT COURTS OF APPEALS WHICH HAVE RULED IN A DIFFERENT MANNER CONCERNING A PLAINTIFF'S FAILURE TO EXERCISE REASONABLE DILIGENCE IN HIS PURPORTED ATTEMPT TO GAIN ACCESS TO THE GENERAL ELECTION BALLOT AS AN INDEPENDENT CANDIDATE IN 2014.**

Reasonable diligence has been a requirement for independent candidates making a challenge to ballot access restrictions for years. As the Court said, "there will arise the inevitable question for judgment: in the context of [Arkansas] politics, could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Storer v. Brown*, 415 U.S. 724, 742 (1974). The diligence requirement survives through *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (independent candidate) and *Burdick v. Takushi*, 504 U.S. 428 (1992) (write-in candidate).

More recently, the Court stated that ballot access regulations are “subject to scrutiny from the standpoint of a ‘reasonably diligent independent candidate,’ *Storer v. Brown*, 415 U.S. 724, 742 (1974).” *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 210 (2008) (Kennedy, J., concurring). The Court in *Storer* gave an explicit example: “if a candidate is absolutely and validly barred from the ballot by one provision of the laws, he cannot challenge other provisions as applied to other candidates.” *Storer*, 415 U.S. at 737.

The decision below effectively negates *Storer*’s “reasonable diligence” requirement. Given Arkansas’ amendment of the law, first effective in 2014, Petitioner showed that at least two other independent candidates successfully petitioned for access to the 2014 General Election ballot. Plaintiffs and Respondent Moore pled that they attempted to meet the new requirements, but could not due to the weather conditions and lack of daylight. (Pet. App. 37).

Their pleadings did not correspond to their proof as to the elements of their claims, however. In their summary judgment response, Plaintiffs and Respondent Moore showed that they did not meet the “reasonable diligence” requirement of *Storer*. Two Plaintiffs made no attempt at meeting any of the filing requirements. (Pet. App. 23). Respondent Moore met two of the four requirements, but was validly barred from the ballot because he failed to tender a completed Notice of Candidacy. (Pet. App. 23). This is *Storer* on its face.

Respondent Moore also conceded in his summary judgment response that he refused to gather, and made absolutely no attempt at gathering, signatures of registered voters for his petition. *Storer* indicates that this should have been the end of the inquiry on Respondent's as-applied challenge to the new law.

By ignoring the "reasonable diligence" requirement, both the Eighth Circuit Court of Appeals, and the District Court, erroneously treated the matter as a facial challenge, and erroneously shifted the burden of proof to Petitioner Secretary. This is contrary to clearly-established precedent. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008).

A "plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' i.e., that the law is unconstitutional in all of its applications." *Id.*, 552 U.S. at 449, quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987). "Facial challenges are disfavored for several reasons." *Washington State Grange*, 552 U.S. at 450. "Claims of facial invalidity often rest upon speculation. As a consequence, they raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'" *Id.*, quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004) (some quotations omitted). As the *Washington State Grange* Court concluded: facial challenges are based upon speculative harm, unsubstantiated by the record. "In the absence of evidence, we cannot assume that Washington's voters will

be mislead.” *Id.*, 552 U.S. at 457. Factual determinations of harm to the plaintiffs “must await an as-applied challenge.” *Id.*, 552 U.S. 457-58.

Respondent was not diligent when he made no attempt to gather signatures. (Pet. App. 23). Consequently, Respondent had nothing more than speculative harm in the absence of any evidence of harm in his signature gathering efforts. The Eighth Circuit erred in its *sua sponte* discovery of disputed issues of fact which were not put forth by Respondent himself. (Pet. App. 13-15).

The error in analysis of Respondent’s as-applied challenge, combined with the lower court’s evaluation of the law as a facial challenge, led to an error in the allocation of the burden of proof on summary judgment in the Eighth Circuit. The purpose of summary judgment is to pierce the pleadings and to assess the proof to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is designed to isolate and dispose of factually unsupported claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-34 (1986); *see* Fed. R. Civ. P. 56(a) and (c).

In *Celotex*, the Court held that Defendant prevails on summary judgment by showing that there is no evidence to support an essential element of Plaintiff’s claim. *Celotex*, 477 U.S. at 325; *see* Fed. R. Civ. P. 56(a). It is not necessary for Defendant to introduce evidence that negates Plaintiff’s claim. *Celotex*, 477 U.S. at 323; *Modrowski v. Pigatto*, 712 F.3d 1166, 1169 (7th Cir.

2013); *J. Geils Band Empl. Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1251 (1st Cir. 1996). Contrary to these precedents, the Eighth Circuit opinion ascribes to Petitioner the burden of proof.

The Ninth Circuit disagrees with the effect of the Eighth Circuit’s analysis. In a series of ballot access cases, the Ninth Circuit has consistently indicated that the “relevant inquiry is whether ‘[the state]’s ballot access requirements seriously restrict the availability of political opportunity.’” *Arizona Green Party v. Reagan*, 838 F.3d 983, slip op. at 12-13 (9th Cir. 2016), *quoting Libertarian Party of Wash. v. Munro*, 31 F.3d 759, 762 (9th Cir. 1994). “The Green Party bears the initial burden of showing such restrictions.” *Id.* “In *Munro*, we made clear that parties alleging a severe burden must provide evidence of the specific burdens imposed by the law at issue.” *Id.* “In challenging ballot access regulations, parties must articulate the nature of the burden, which ‘should be measured by whether, in light of the entire statutory scheme regulating ballot access, “reasonably diligent” [parties] can normally gain a place on the ballot, or whether they will rarely succeed in doing so.’” *Id.*, *quoting Nader v. Brewer*, 521 F.3d 1028, 1035 (9th Cir. 2008) (citation omitted).

*Arizona Green Party* challenged an Arizona requirement that new political parties file recognition petitions 180 days before the party primary. The Green Party alleged that a February deadline “greatly increased costs faced by third parties, was not designed to allow a reasonably diligent minor party to qualify for ballot access, and requires minor parties to gather

signatures when ‘the mind of the general public and the attention of the media is not focused on the general elections.’” *Arizona Green Party, id.* In this sense, the challenge was almost identical to the complaint filed by Respondent Moore.

The Ninth Circuit resolved the matter differently than the Eighth Circuit. “These may well be legitimate complaints, but the Green Party did not submit any supporting evidence with its motion for summary judgment.” *Id.*

Instead, the Party chose to argue that the deadline was unconstitutional as a matter of law. As a result, “[a]ny effort to apply the balancing standard to this case is hamstrung by a lack of evidence. . . . Without any evidence regarding the practical consequences of the [deadline], we find ourselves in the position of Lady Justice: blindfolded and stuck holding empty scales.” *Arizona Libertarian Party*, 798 F.3d [723] at 736 [(9th Cir. 2015), *cert. denied*, 136 S. Ct. 823 (2016)] (McKeown, J., concurring) (internal citations omitted).

*Id.* “Without evidence, the burdens identified in the Green Party’s complaint are purely speculative.” *Id.*, slip op. at 14.

The Eleventh Circuit also had a different view of similar facts. *Swanson v. Worley* is a challenge to a change in the deadline for filing independent and minor party petition signatures, and the number of petition signatures required, in Alabama in 2002. 490 F.3d 894 (11th Cir. 2007). Two plaintiffs “attempted to file

their registration petitions with the required number of verified signatures” while a third plaintiff, had submitted just under 11,000 signatures to be verified by the Alabama Secretary of State. In other words, all three plaintiffs in *Swanson* met the “reasonable diligence” standard.

The Eleventh Circuit articulated the relevant test: “a court must ***first consider ‘the character and magnitude of the asserted injury*** to the rights protected by the First and Fourteenth Amendments that the [candidate] seeks to vindicate.’” *Swanson*, 490 F.3d at 902, *citing Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (emphasis added). It is this “first” element of the balancing test that is missing from the District Court’s opinion and from the Eighth Circuit opinion as a result of Respondent’s failure to exercise reasonable diligence.

The *Swanson* Court also indicated that the successes of several independent candidates, and minor party candidates, albeit not statewide candidates, “demonstrates that Alabama’s election scheme does not ‘completely insulate the two-party system from minor parties’ or independent candidates’ competition and influence. . . .” *Swanson*, 490 F.3d at 910, *citing Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (status quo not frozen). “All we say here is that the evidence in this particular record does not establish any severe burden on rights. . . .” *Swanson*, *id.* The Eighth Circuit, on similar facts, had a different result.

Most importantly, the failure to hold Respondent to the “reasonable diligence” requirement resulted in the imposition of an improper burden of proof in the Eighth Circuit’s erroneous holdings. Respondent, who makes a facial challenge to Arkansas’ ballot access deadline, “bears a heavy burden of persuasion in seeking to invalidate” the Act changing the deadline in all of its applications. *Crawford v. Marion County Election Board*, 553 U.S. 181, 182, slip op. at 16 (2008), citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008). Contrary to this law, the opinion in the Eighth Circuit wrongly shifts the burden to Petitioner Secretary to show how the change in the law is “narrowly construed.” (Pet. App. 13-15).

**B. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE EIGHTH CIRCUIT DECISION AND THE MANY DECISIONS OF THIS COURT CONCERNING WHETHER ARTICLE III STANDING REQUIRES THE EXERCISE OF REASONABLE DILIGENCE BY RESPONDENT CHALLENGING ARKANSAS BALLOT ACCESS DEADLINE**

Respondent, like his co-Plaintiffs, did not meet the Article III constitutional minimum requirements for standing to sue Petitioner Secretary. There are three “irreducible constitutional minimum” requirements for standing: that plaintiff must have (a) suffered an injury in fact, (b) that is fairly traceable to the challenged conduct of the defendant, and (c) that is likely

to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Spokeo Inc. v. Robins*, 578 U.S. \_\_\_, 136 S.Ct. 1540, 1547, slip op. at 6 (2016). The District Court wrongly concluded that Respondent met the standing requirements; the Eighth Circuit failed to consider that Respondent’s injury was not concrete.

To establish injury in fact, Respondent had to show that he suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). Respondent failed to show this; the Eighth Circuit failed to raise this issue.

Respondent was required to prove that the change in the petition deadline was “particularized,” that is, that the change affected him in a personal and individual way. *Id.*; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). “Particularization is necessary to establish injury in fact, but it is not sufficient.” *Spokeo, Inc.*, 578 U.S. \_\_\_, 136 S.Ct. at 1548, slip op. at 8.

“A ‘concrete’ injury must be ‘*de facto*’; that is, it must actually exist.” *Spokeo, Inc.*, 578 U.S. \_\_\_, 136 S.Ct. at 1548, slip op. at 8. It must be “real” and not merely “abstract.” *Id.* “A plaintiff seeking to vindicate a public right embodied in a federal statute, however, must demonstrate that the violation of that public right has caused him a concrete, individual harm distinct from the general population.” *Id.*, 578 U.S. \_\_\_, 136 S.Ct. at 1553, slip op. at 6 (Thomas, J., concurring).

*Lujan* notes that whatever the scope of Congress' power to create new legal rights, "it is clear that in suits against the Government, at least, the concrete injury requirement must remain." *Lujan*, 504 U.S. at 578.

Respondent did not have a concrete injury. He failed to file all of the required paperwork on time; he refused to collect or attempt to collect signatures. As the *Storer* Court stated: "if a candidate is absolutely and validly barred from the ballot by one provision of the laws, he cannot challenge other provisions as applied to other candidates." *Storer*, 415 U.S. at 737. The District Court erroneously excused Respondent's failure to meet the requirements of Arkansas law by asserting that plaintiffs "had standing to bring this ballot access case," citing *McLain v. Meier*, 851 F.2d 1045, 1048 (8th Cir. 1988) (standing as voters). Pet. App. 29. Respondent lacked the diligence shown by the plaintiffs in *Swanson*, 490 F.3d 894.

Plaintiffs Michael Harrod and William Chris Johnson had the good sense to abandon this case since they had no particularized and concrete harm to themselves. Respondent, through counsel, somehow persists, although he also lacks the concrete and particularized injury necessary to establish Article III standing. If he is truly set on running for office, he has multiple avenues to access the ballot in Arkansas, including filing as a member of the Libertarian Party (recently re-certified as a political party for the fourth consecutive cycle in Arkansas) without having to gather petition signatures. Until then, however, the

Court should grant the Writ of Certiorari, vacate and remand to the Eighth Circuit for lack of standing to sue. *Spokeo, Inc.*, 578 U.S. \_\_\_, 136 S.Ct. 1540.

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### CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted; alternatively, the Court should summarily reverse and remand to the Eighth Circuit for further proceedings consistent with summary reversal.

Respectfully submitted,

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July 25, 2017

App. 1

**United States Court of Appeals  
For the Eighth Circuit**

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No. 15-3558

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Mark Moore

*Plaintiff-Appellant*

Michael Harrod; William Chris Johnson

*Plaintiffs*

v.

Mark Martin, in his official capacity as  
Secretary of State for the State of Arkansas

*Defendant-Appellee*

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Appeal from United States District Court  
for the Eastern District of Arkansas – Little Rock

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Submitted: December 14, 2016

Filed: April 26, 2017

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Before WOLLMAN, SMITH,<sup>1</sup> and BENTON, Circuit  
Judges.

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<sup>1</sup> The Honorable Lavenski R. Smith became Chief Judge of the United States Court of Appeals for the Eighth Circuit on March 11, 2017.

WOLLMAN, Circuit Judge.

This appeal concerns certain Arkansas statutes that set the filing deadline for individuals who wish to appear on the general election ballot as independent candidates. Mark Moore, along with two other individuals, filed suit in federal district court against Mark Martin, in his official capacity as Arkansas Secretary of State, seeking a declaratory judgment that the filing deadline is unnecessarily early and thus violates the First and Fourteenth Amendments and 42 U.S.C. § 1983. The suit seeks to enjoin Martin from enforcing this deadline against Moore.<sup>2</sup> Moore appeals from the district court's orders that denied his motion for summary judgment, granted Martin's motion for summary judgment, and denied Moore's motion for reconsideration. We affirm in part and reverse in part.

## I. Background

Under Arkansas law, a person seeking to include his or her name on the general election ballot as an independent candidate for any office other than President or Vice President of the United States must submit a petition to the Arkansas Secretary of State. Ark. Code Ann. § 7-7-103(a)(1). Petitions for statewide office must be signed by the lesser of three percent of the qualified electors of the state or ten thousand qualified electors. *Id.* § 7-7-103(b)(1)(B). Independent candidate

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<sup>2</sup> Plaintiff William Chris Johnson was voluntarily dismissed from the case, and Plaintiff Michael Harrod did not appeal from the district court's judgment.

petitions must be submitted during the same period as political party candidate petitions. This “party filing period” begins one week prior to the first day in March and ends the first day in March.<sup>3</sup> *Id.* §§ 7-7-103(a)(1), 7-7-203(c)(1). Petitions may not be circulated for signatures earlier than ninety days prior to the March 1 deadline. *Id.* § 7-7-103(b)(3)(B). The general election is held on the Tuesday following the first Monday in November. *Id.* § 7-5-102. For political party candidates, the general primary election is held on the second Tuesday in June and the preferential primary election is held three weeks earlier. *Id.* § 7-7-203(a)-(b). The Secretary and county clerks must certify to the county boards of election commissioners the names of all candidates to be placed on the general election ballot not less than seventy-five days before the general election. *Id.* § 7-5-203. Upon timely request, states must transmit absentee ballots to absent military voters and overseas voters at least forty-five days before an election for federal office. 52 U.S.C. § 20302(a)(8).

The Secretary must also process requests for inclusion on the ballot for nonpartisan offices, including judges and prosecuting attorneys. The general election for nonpartisan offices is held on the same day as the preferential primary election for partisan offices, and any runoff election is held on the same day as the November general election. Ark. Code Ann. § 7-10-102. A

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<sup>3</sup> Prior to being amended in 2013, section 7-7-103(b)(1)(A) provided a May 1 deadline for an independent candidate to submit a petition with the requisite number of signatures. H.R. 2036, 89th Gen. Assemb., Gen. Sess., 2013 Ark. Acts 1356.

person may have his or her name placed on the ballot for nonpartisan office by paying a filing fee during the party filing period or by submitting a petition, signed by a requisite number of electors, during a period beginning fifty-three days before the first day of the party filing period and ending forty-six days before the first day of the party filing period. *Id.* § 7-10-103(a)-(c). The Secretary must verify the sufficiency of a petition for nonpartisan office within forty-five days of its filing.<sup>4</sup> *Id.* § 7-10-103(c)(1)(C).

Additionally, Arkansas election officials must process petitions for ballot initiatives. Eight percent of the qualified electors in Arkansas may propose a law, and ten percent may propose an amendment to the state's constitution. Ark. Const. art. V, § 1. To appear on the November general election ballot, an initiative petition signed by the requisite number of voters must be filed with the Secretary not less than four months before the general election is to be held. *Id.* The Secretary must verify the sufficiency of an initiative petition within thirty days after it is filed and may contract with county clerks for assistance in verifying the petition signatures. Ark. Code. Ann. § 7-9-111(a). If the Secretary finds a petition insufficient, within thirty

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<sup>4</sup> Prior to being amended in 2013, § 7-10-103(c) provided a later period for filing of petitions for nonpartisan office – beginning forty-six days before the first day of the party filing period and ending thirty-two days before the first day of the party filing period – and provided that the “Secretary of State, or the county clerk, as the case may be,” must verify the sufficiency of a petition for nonpartisan office within thirty days of its filing. H.R. 2065, 89th Gen. Assemb., Gen. Sess., 2013 Ark. Acts 1286.

days the petition sponsors must cure the deficiency (by gathering additional signatures, proving the validity of rejected signatures, or making the petition more definite) and submit a supplemental petition, the sufficiency of which the Secretary must verify within thirty days. *Id.* § 7-9-111(d). The Secretary must certify each verified initiative proposal to the county boards of election commissioners for inclusion on the ballot not less than seventy-five days before the general election. *Id.* § 7-5-204(a). If the Secretary has not verified the sufficiency of an initiative petition at least seventy-five days before the general election, or if an initiative petition is legally challenged, the Secretary must nevertheless transmit it to the county boards of election commissioners for inclusion on the ballot. *Id.* § 7-5-204(c)(1). If the Secretary subsequently declares the petition insufficient or if the initiative proposal is held to be legally invalid, no votes regarding the initiative proposal are counted or certified. *Id.* § 7-5-204(c)(2).

Moore is a registered Arkansas voter and claims that he was an independent candidate for Lieutenant Governor of Arkansas in the 2014 election.<sup>5</sup> He sued Martin, alleging, as mentioned above, that the filing deadline for independent candidates violates the First and Fourteenth Amendments.

The parties filed cross-motions for summary judgment. The district court granted Martin's motion and

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<sup>5</sup> Moore also alleged, in his affidavit opposing Martin's motion for summary judgment, that he intends to run for Lieutenant Governor as an independent candidate in the 2018 general election.

denied Moore's motion. It rejected Martin's arguments that the case was moot or unripe for review and that Moore lacked standing. It found that the March deadline for filing as an independent candidate placed a substantial burden on Moore's rights; that Arkansas has a compelling interest in timely certifying candidates and initiatives to the general election ballot; and that the March deadline is narrowly tailored to serve this interest. In determining that the March deadline is narrowly tailored, the court relied on an affidavit submitted by the Arkansas Director of Elections, which states that the increased number of initiative petitions and candidates petitioning for inclusion on the ballot for nonpartisan office leaves Arkansas election officials with insufficient time to process the petitions using the previous May 1 submission deadline.

## II. Discussion

We review *de novo* the district court's order granting Martin's motion for summary judgment and denying Moore's motion for summary judgment. *See Green Party of Ark. v. Martin*, 649 F.3d 675, 679 (8th Cir. 2011). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(a). The party moving for summary judgment bears the initial burden to "bring up the fact that the record does not contain" a genuine dispute of material fact "and to identify that part of the record which bears out his assertion." *Counts v. MK-Ferguson Co.*, 862 F.2d 1338,

1339 (8th Cir. 1988) (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-74 (8th Cir. 1988)). “[I]f the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent’s burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue.” *Id.* “A party asserting that a fact cannot be or is genuinely disputed must support the assertion by” either “citing to particular parts of materials in the record” or “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. Proc. 56(c)(1).

Ballot access restrictions implicate not only the rights of potential candidates for public office, but also the First and Fourteenth Amendment rights of voters to cast their ballots for a candidate of their choice and to associate for the purpose of advancing their political beliefs. *Anderson v. Celebrezze*, 460 U.S. 780, 786-88 (1983).<sup>6</sup> “Constitutional challenges to specific provisions of a State’s election laws [] cannot be resolved by any ‘litmus-paper test’ that will separate valid from invalid restrictions.” *Id.* at 789 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Instead, we “must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth

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<sup>6</sup> We confine our analysis to Moore’s First Amendment rights and due process rights under the Fourteenth Amendment and do not separately consider his claim of an equal protection violation. See *Anderson v. Celebrezze*, 460 U.S. 780, 786 n.7 (1983).

Amendments that the plaintiff seeks to vindicate,” then we “must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule,” determining not only “the legitimacy and strength of each of those interests” but also “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.* “[W]e review the statute under a form of strict scrutiny referred to as the ‘compelling state interest test’ by first determining whether the challenged statute causes a burden of some substance on a plaintiff’s rights, and if so, upholding the statute only if it is ‘narrowly drawn to serve a compelling state interest.’” *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 693 (8th Cir. 2011) (quoting *McLain v. Meier*, 851 F.2d 1045, 1049 (8th Cir. 1988)). In such cases, the State bears the burden of showing that the challenged statute is narrowly drawn to serve the State’s compelling interest. See *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989).

Arkansas’s ballot access requirements for independent candidates have been repeatedly challenged. In *Lendall v. Bryant*, 387 F. Supp. 397, 400-03 (E.D. Ark. 1975) (per curiam) (*Lendall I*), a three-judge district court held unconstitutional the combined requirements that an independent candidate’s petition be filed by the first Tuesday in April, which was also the filing deadline for political party candidate petitions, and be signed by fifteen percent of the qualified electors for the office. After Arkansas reduced that requirement to ten percent, and not more than two thousand

signatures for district office or ten thousand signatures for statewide office, a three-judge district court held that the filing deadline, still the first Tuesday in April, was unconstitutional standing on its own. *Lendall v. Jernigan*, No. LR-76-C-184 (E.D. Ark. Aug. 20, 1976), *aff'd mem.*, 433 U.S. 901 (1977) (*Lendall II*). Then in *Lendall v. Jernigan*, 424 F. Supp. 951, 958 (E.D. Ark. 1977) (*Lendall III*), the district court held that the petition requirement of ten percent of qualified electors, standing alone, was unconstitutional.<sup>7</sup> In *Lendall v. McCuen*, No. LR-C-88-311 (E.D. Ark. Aug. 16, 1988) (*Lendall IV*), the court held that a one-time January 5 filing deadline, which accompanied a one-time March 8 date for the preferential primary, was unconstitutional in light of *Lendall II*'s disapproval of an April deadline. Finally, in *Langguth v. McCuen*, 30 F.3d 138 (unpublished table decision), No. 93-3413, 1994 WL 411736, at \*1-2 (8th Cir. Aug. 9, 1994) (unpublished per curiam), our court upheld a deadline that required filing thirty days before the primary election, a signature requirement for statewide office of the lesser of three percent of qualified electors or ten thousand signatures, and a sixty-day period in which to gather signatures. Although we are mindful that these cases do not provide a “litmus-paper test,”<sup>8</sup> *Anderson*,

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<sup>7</sup> The court also discussed the requirement that the signatures be gathered within a sixty-day period, but did not appear to base its holding on this requirement. *Lendall v. Jernigan*, 424 F. Supp. 951, 958 (E.D. Ark. 1977) (*Lendall III*).

<sup>8</sup> Similarly, we perceive no error in the fact that the district court's order did not mention the affidavit of Moore's purported expert witness, Richard Winger, which detailed the history and

460 U.S. at 789, we note that a filing deadline earlier than the first Tuesday in April would require additional justifications to distinguish this case from *Len-dall II*.

The district court correctly noted that the March 1 filing deadline for independent candidates imposes a burden “of some substance” on Moore’s First and Fourteenth Amendment rights and that Arkansas has a compelling interest in timely certifying independent candidates for inclusion on the general election ballot. We believe that the district court erred, however, in concluding that there was no genuine dispute of material fact whether the March 1 deadline is narrowly drawn to serve that compelling interest. The district court reasoned:

[I]n light of the increase in [candidates for nonpartisan offices] (mostly judges) filing petitions instead of paying filing fees as before and the increased number of initiative petitions[,] there is simply not enough time to process all of the petitions within the May 1st deadline. This fact coupled with the time consumed by ever increasing litigation over petitions has necessitated the [advancement] of the deadline to March 1st.

Secretary Martin’s evidence shows an increase in the number of candidates who petitioned for inclusion

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judicial treatment of ballot access requirements for independent candidates and new political parties, because it would not have informed the district court’s analysis in weighing Arkansas’s interests against the burden on Moore’s rights.

on the ballot for nonpartisan offices, resulting in an increase in the number of signatures that required verification. Those signatures were required to be verified by the end of February: in 2014, the deadline for submission of signature petitions for nonpartisan office was January 9, and thus, presumably, these petitions were verified by February 24, 2014. *See* Ark. Code Ann. § 7-10-103(c)(1)(C) (forty-five-day deadline for Secretary's verification of signature petitions for nonpartisan office). Although advancing the deadline from May 1 to March 1 gives the Secretary two additional months in which to review independent candidate petitions, we question whether the increase in the number of nonpartisan petitions necessitated that change in dates in light of the fact that the Secretary is statutorily required to verify the nonpartisan petitions prior to the independent candidate petitions' due date. The increase in nonpartisan petitions may have resulted in an increase in litigation regarding those petitions, which might interfere with the processing of independent candidate petitions, but the record is unclear as to any such effect. Accordingly, the increase in the number of nonpartisan petitions does not by itself establish the existence of a compelling interest that the March 1 deadline is narrowly tailored to serve.

Stronger evidence exists to suggest that the processing of initiative petition signatures might conflict with the processing of independent candidate petition signatures. The Director of Elections' affidavit states, in part:

The deadlines for filing petition signatures [for candidates for nonpartisan offices, independent candidates, and new political parties] [were] “moved up” on the calendar – to earlier in the year – in order to facilitate election administration necessities, including the processing of so many initiative petition signatures during the 2012 election cycle that it was nearly impossible to finish the process within the statutory and constitutional guidelines, resulting in preliminary certification of [initiative petitions] that were later determined to be “stricken” from the ballot for one reason or another (after considerable litigation). Given the constitutional deadline for submission of initiative petition signatures, and the necessities of UOCAVA and MOVE compliance,<sup>9</sup> all other petition signature requirements were advanced to earlier in the year so as to clear the calendar of petition signature processing and subsequent litigation, in advance of the constitutional initiative petition signature deadlines (which normally fall just before or just after the July 4 holiday).

Arkansas Code Annotated § 7-9-111 allows thirty days for the Secretary to verify initiative petitions, thirty days for petition sponsors to cure any deficiencies, and thirty days for the Secretary to review a thus-cured petition. Martin argues that the thirty-day cure period

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<sup>9</sup> This refers to the earlier-mentioned requirement, upon timely request, to transmit absentee ballots to absent military voters and overseas voters at least forty-five days before an election. 52 U.S.C. § 20302(a)(8).

for defective petitions during which his office is required to meet the deadline for sending absentee ballots in practice means that he is left with only “a week to ten days to evaluate every single petition that comes in, many of them 50 or 60 or 70,000 signatures,” which “becomes nearly impossible, [as] it was in 2012.”

Moore contends that because independent candidates do not appear on the ballot until the November general election and because there are relatively few independent candidates, the former May 1 deadline did not create conflicts between the processing of independent candidate petitions and other signature petitions. He also argues that even if Arkansas were required to hire additional election workers to meet the statutory deadline, the cost increase would not justify the burden on independent candidates’ and voters’ constitutional rights. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 218 (1986) (holding that the possibility of increased administrative costs would not justify a statute prohibiting a political party from opening its primary to voting by independents).

Notwithstanding the district court’s and the parties’ description of the issue for decision as being purely legal, we conclude that there exists a genuine factual dispute whether the verification of independent candidate petitions would conflict with the processing of other signature petitions under the former May 1 deadline. As mentioned earlier, it appears that the processing of nonpartisan-office petitions would not conflict with the processing of independent candidate petitions because the nonpartisan-office petition

signatures are statutorily required to be verified before the end of February. The Director of Elections' affidavit establishes that the processing of initiative petitions consumes a great deal of time between early July and late August. But on this record a number of other relevant facts are unclear. The record does not establish what periods of time, between the former May 1 deadline for independent candidate petitions and the early July deadline for initiative petitions, were available for the state to process independent candidate petitions. It does not establish when independent candidate petitions were in fact processed in the past, nor does it reveal whether during the 2014 election, following the move of the deadline from May 1 to March 1, independent candidate petitions were processed between those two dates. Also unclear are the amount of time required to process independent candidate petitions and the feasibility of temporarily hiring additional election workers. We conclude that the lack of a record establishing such underlying facts demonstrates the existence of a genuine dispute of material fact that precluded summary judgment.<sup>10</sup>

Accordingly, the district court erred in granting Martin's motion for summary judgment. It did not err

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<sup>10</sup> Martin and the district court noted that Moore presented no affirmative evidence to persuade the district court of his position. Because the record did not "in fact bear[] out [Martin's] claim that no genuine dispute exist[ed]," however, Moore was not required to provide affirmative evidence. *See Counts v. MK-Ferguson Co.*, 862 F.2d 1338, 1339 (8th Cir. 1988) (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-74 (8th Cir. 1988)).

in denying Moore’s motion for summary judgment, however, because of the existence of a factual dispute, which renders moot Moore’s motion for reconsideration. We thus affirm in part, reverse in part, and remand the case for further proceedings consistent with the views set forth in this opinion.

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SMITH, Circuit Judge, dissenting.

I respectfully dissent. Arkansas’s election scheme requires independent candidates to file for candidacy at the same time political parties are required to file to be included in the general election. Ark. Code Ann. § 7-7-103(a)(1). Because the party-filing deadline shifts at the discretion of the General Assembly, the independent-candidate filing deadline shifts accordingly. For example, in 2014, this filing date was March 3, 2014 – 246 days before the general election. In 2016, this filing date was November 9, 2015 – 365 days before the general election. In *McLain*, we were troubled by a third-party filing deadline “more than 200 days before the November election.” 851 F.2d at 1049. The deadline here – 246 to 365 days before the general election – is even more troubling.

“The Constitution requires that the access requirements as to both party-backed and independent candidates be reasonable.” *McLain v. Meier*, 637 F.2d 1159, 1165 (8th Cir. 1980). Restrictions on ballot access “may not go beyond what the state’s compelling interests actually require,” *id.* at 1163, and must be

“narrowly drawn to serve [that] compelling state interest,” *Jaeger*, 659 F.3d at 693 (quoting *McLain*, 851 F.2d at 1049). The Arkansas independent-candidate filing deadline fails to meet these constitutional standards – it is neither actually required nor narrowly drawn.

Secretary Martin contends that this filing deadline is “actually required” because his office gets overwhelmed with the number of petitions for nonpartisan candidates and ballot initiatives. Yet, the nonpartisan petitions are certified in February, and the ballot initiatives are not due until July. Five months for certifying independent candidates is a substantial time period. The record reflects that no more than two independent candidates ran for state-wide office in Arkansas per election cycle in recent years. Using the former May 1 deadline, Secretary Martin would have two full months to process at most 20,000 signatures for independent candidates.<sup>11</sup> See Ark. Code Ann. § 7-7-103(b)(1). Because the record does not demonstrate a legitimate conflict in the months of May and June for processing independent-candidate filings and other petitions, Secretary Martin has not shown that such an early filing deadline is actually required.

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<sup>11</sup> The evidence on the record suggests that Secretary Martin’s office is more than capable of handling such a task. In 2014, Secretary Martin processed 92 nonpartisan candidate petitions, containing 103,578 signatures, before the end of February. Further, Arkansas ballot initiatives must be processed within a period of 30 days, and these petitions can include up to 70,000 signatures.

Additionally, Secretary Martin has not demonstrated how attaching the independent-candidate filing deadline to the party-filing deadline is “narrowly drawn.” See *Jaeger*, 659 F.3d at 693. In *Council of Alternative Political Parties v. Hooks*, the Third Circuit rejected a less-restrictive scheme in New Jersey that required third-party and independent candidates to file candidacy petitions in early April – the same day as the party-affiliated candidates. 121 F.3d 876, 879 (3d Cir. 1997). Alternative candidates had to file up to 800 signatures seven months before the general election. *Id.* at 878-79. In balancing the interests, the court determined that “requiring [independent candidates] to file their nominating petitions at the same early date as Democratic and Republican candidates” was unjustified. *Id.* at 881. “Requiring party candidates to comply with a March filing deadline permits a ‘reasonable time for processing the documents submitted by candidates and preparing the ballot’ for a June primary. . . . [But] ‘[n]either the administrative justification nor the benefit of an early filing deadline is applicable to an independent candidate.’” *Wood v. Meadows*, 207 F.3d 708, 711 (4th Cir. 2000) (citations omitted) (quoting *Anderson*, 460 U.S. at 800). “[A]lthough such laws appear to treat independent and party candidates similarly, they actually disadvantage independent candidates.” *Id.* Secretary Martin presents no justification for statutorily attaching the independent-candidate filing deadline to that of the political parties. Thus, this connection fails to be “narrowly drawn.”

The majority holds that we must remand because there is insufficient evidence regarding Secretary Martin's inability to process independent-candidate petitions concurrently with the ballot initiatives. On summary judgment, however, if the nonmoving party fails to make a sufficient showing of an element of his case that he has the burden of proving, then the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Secretary Martin had the burden of proving a genuine conflict existed between the processing of independent-candidate petitions and petitions for ballot initiatives. Because no evidence exists on the record that such an early deadline is necessary to process the independent-candidate petitions, Moore is entitled to judgment as a matter of law. *See Gometz v. Culwell*, 850 F.2d 461, 464 (8th Cir. 1988).

I respectfully dissent.

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**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION**

**MARK MOORE, MICHAEL      PLAINTIFFS  
HARROD, and WILLIAM  
CHRIS JOHNSON**

**V.                              4:14cv00065 JM**

**MARK MARTIN in his official      DEFENDANT  
capacity as Arkansas Secretary  
of State**

**ORDER**

(Filed Oct. 7, 2015)

On August 25, 2015, the Court granted the Defendant's Motion for Summary Judgment, denied the Plaintiffs' Motion for Summary Judgment and closed the case. Plaintiffs have filed a Motion to Reconsider and Alter or Amend Judgment Pursuant to Rule 59(e) of Federal Rules of Civil Procedure. "Rule 59(e) motions serve a limited function of correcting manifest errors of law or fact or to present newly discovered evidence." *Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998) (internal quotations omitted). Plaintiffs' Rule 59(e) Motion essentially restates the arguments thoroughly considered and rejected by this Court in its previous consideration of Plaintiff's Motion for Summary Judgment. The Court finds no manifest errors of law or fact and no newly discovered evidence. Accordingly, the Motion (ECF No. 39) is DENIED.

App. 20

IT IS SO ORDERED this 7th day of October, 2015.

/s/ James M. Moody, Jr.  
James M. Moody, Jr.  
United States District Judge

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**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION**

**MARK MOORE,  
MICHAEL HARROD, and  
WILLIAM CHRIS JOHNSON      PLAINTIFFS**

**V.                                      4:14CV00065 JM**

**MARK MARTIN in his official  
capacity as Arkansas  
Secretary of State                                      DEFENDANT**

**ORDER**

(Filed Aug. 25, 2015)

Pending are the cross motions for summary judgment filed by the Plaintiffs and the Defendant. The Court has reviewed the motions, responses and replies. Argument on both motions was heard on July 27, 2015.

**I.    Facts**

Plaintiffs are registered voters in the State of Arkansas. Plaintiff Moore claims that he was an independent candidate for Lieutenant Governor of Arkansas in the 2014 General Election. Plaintiff Harrod claims to have been an independent candidate for the Arkansas House of Representatives in the 2014 election. Plaintiffs filed suit on February 6, 2014, seeking a declaratory judgment from the Court that Arkansas Code Ann §§7-7-101, 7-7-103, and 7-7-203(c)(1) is [sic] unconstitutional because the statutes violate the First

and Fourteenth Amendments to the United States Constitution by way of 42 U.S.C. §1983. Plaintiffs also asked the Court to enjoin the Defendant from enforcing these particular statutes.

Plaintiffs claim that these statutes implement deadlines for filings by independent candidates which are too early, vague, restrictive, drastic and demanding in their requirements. Arkansas Code section 7-7-101 states that all candidates for office in any election must be certified as a nominee. Section 7-7-103 provides the specific requirements for filing as an independent. An independent candidate must file a political practices pledge, an affidavit of eligibility, a petition signed by 3%<sup>1</sup> of qualified electors of the place where the person is seeking office, and a notice of candidacy stating the name and title of the elective office the candidate seeks. The statute states that “[p]etitions shall be circulated not earlier than ninety (90) calendar days before the deadline for filing petitions. . . .” Section 7-7-203(c)(1) provides the filing period of “12:00 noon on the first day in March and beginning at 12:00 noon one (1) week prior to the first day in March.” Ark. Code Ann. § 7-7-203 (West). This

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<sup>1</sup> The statute specifies that petitions for persons seeking district, county, or township office must contain signatures of no less than [sic] 3% and no more than 2000 qualified electors. Ark. Code Ann. § 7-7-103(b)(1)(A). If the candidate is seeking office as a United States Senator or a candidate for state office, he or she must submit signatures of no less than 3% and no more than 10,000 qualified electors. Ark. Code Ann. § 7-7-103(b)(1)(B).

March deadline is the same for party candidates and independent candidates.

It is undisputed that Plaintiff Moore did not file, and did not attempt to file, a signature petition with the Defendant Secretary of State and did not sign the Notice of Candidacy in order to be placed on the ballot for Lieutenant Governor of Arkansas. Plaintiff Harrod did not file, or attempt to file, a signature petition, a Notice of Candidacy, a Political Practices pledge, or an affidavit of eligibility with the Defendant Secretary of State in order to be placed on the ballot as a candidate for the Arkansas State House of Representatives [sic]

The filing period for all offices for the November 2014 General Election ended at noon on March 3, 2014. The General Primary Election was held on May 20, 2014. The General Primary Runoff election was held on June 10, 2014. The General Election for 2014 in the State of Arkansas began with absentee ballots being delivered to military and overseas citizen voters on September 19, 2014, by electronic delivery to meet federal requirements of the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”)<sup>2</sup> and the General Election was held on November 4, 2014.

## **II. Standard for Summary Judgment**

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the

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<sup>2</sup> 52 U.S.C. §§ 20301 *et seq.*

dispute may be decided solely on legal grounds. *Holway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); Fed. R. Civ. P. 56. The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

The inquiry is the threshold inquiry of determining whether there is a need for trial – whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

The Eighth Circuit Court of Appeals has cautioned that summary judgment should be invoked carefully so that no person will be improperly deprived of a trial of disputed factual issues. *Inland Oil & Transport Co. v. United States*, 600 F.2d 725 (8th Cir. 1979. [sic] The Eighth Circuit set out the burden of the parties in connection with a summary judgment motion in *Counts v. MK Ferguson Co.*, 862 F.2d 1338 (8th Cir. 1988):

[T]he burden on the moving party for summary judgment is only to demonstrate, *i.e.*, ‘[to] point out to the District Court,’ that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no

genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.

*Id.* at 1339. (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-274 (8th Cir. 1988) (citations omitted) (brackets in original)). Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 248.

### **III. Analysis**

Defendant argues that Plaintiffs lack standing to bring this action, that the action is moot, and that it is not ripe for adjudication. Plaintiffs argue that they have standing as citizens if not candidates, that ballot access suits are capable of repetition but evade review and, therefore, are not moot. The Defendant also argues that Plaintiffs' Complaint states an as applied challenge to the Arkansas statutes and now they have included a facial challenge to the statutes without amending their pleadings.

#### **1. As Applied versus Facial Challenge**

"[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a

constitutional challenge.” *Iowa Right To Life Comm., Inc. v. Tooker*, 717 F.3d 576, 587 (8th Cir. 2013). The important inquiry is whether the “claim and the relief that would follow . . . reach beyond the particular circumstances of the [] plaintiffs.” *Id.*

An as-applied challenge consists of a challenge to the statute’s application only as applied to the party before the court. If an as-applied challenge is successful, the statute may not be applied to the challenger, but is otherwise enforceable. *Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785, 790 (8th Cir. 2004).

A statute that is void for overbreadth, or facially invalid, is one that “offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.” *Olmer v. City of Lincoln*, 23 F. Supp. 2d 1091, 1105 (D. Neb. 1998) aff’d, 192 F.3d 1176 (8th Cir. 1999) (quoting *Zwickler v. Koota*, 389 U.S. 241, 250 (1967)). Facial challenges are not limited to a plaintiffs particular case, but challenges application of the law more broadly. *Tooker*, 717 F.3d at 588. “[A] state statute should be deemed facially invalid only if (1) it is not readily subject to a narrowing construction by the state courts and (2) its deterrent effect on legitimate expression is both real and substantial.” *Kirkeby v. Furness*, 52 F.3d 772, 775 (8th Cir.1995).

Secretary argues that judicial estoppel bars Plaintiffs from changing their challenge from an “as applied” challenge to a facial challenge. The Court finds it unnecessary to analyze whether judicial estoppel bars Plaintiff from bringing a facial challenge in addition to an as applied challenge because under either theory the result remains the same.

## 2. Mootness

The Secretary argues that the Plaintiffs’ case is moot because the 2014 election is over. Plaintiffs argue that the case is not moot because it presents an issue which is “capable of repetition yet evading review.” *Van Bergen v. State of Minn.*, 59 F.3d 1541, 1547 (8th Cir. 1995). “Election issues are among those most frequently saved from mootness by the capable of repetition yet evading review exception to the mootness doctrine. *Id.* “Elections, including the preelection campaign period, are almost invariably of too short a duration in which to complete litigation and, of course, recur at regular intervals.” *Id.* “The Court believes that the situation presented in this case is likely to present itself again, given that Plaintiffs are involved in politics and their continued involvement is far from merely theoretical.” *Constitution Party of Missouri v. St. Louis Cnty., Mo.*, 2015 WL 3908377, at \*3 (E.D. Mo. June 25, 2015). The Court finds that the capable of repetition yet evading review exception to the mootness doctrine applies to this ballot access case.

### 3. Standing

The Secretary argues that Plaintiffs lack standing because there has been no harm to Plaintiffs caused by the Secretary. Plaintiff's [sic] petitions were not denied by the Secretary because they never submitted signatures on or before the March 3rd date. Plaintiffs contend they have standing as voters to challenge the statutes.

"The purpose of the standing requirement is to ensure that the parties have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *McLain v. Meier*, 851 F.2d 1045, 1048 (8th Cir. 1988) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962)). "Although the primary impact of restrictive ballot access laws is on the candidates, 'the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.'" *Id.* (quoting *Bullock v. Carter*, 405 U.S. 134, 143, 92 S.Ct. 849, 855-56, 31 L.Ed.2d 92 (1972)). "The impact of candidate eligibility requirements on voters implicates basic constitutional rights." *Anderson v. Celebrezze*, 460 U.S. 780, 786, 103 S. Ct. 1564, 1569, 75 L. Ed. 2d 547 (1983). Courts must protect the rights of voters against unconstitutional ballot access restrictions "limit[ing] the field of candidates from which voters might choose." *Anderson*, 460 U.S. at 786.

In his affidavit, Plaintiff Moore states that in addition to the increased difficulty of running as an independent candidate, the March 1, 2018 deadline for the submission of petition signatures “will also impact [his] ability to cast [his] vote effectively as an Arkansas voter who supports potential independent candidates for elective office in Arkansas.” (ECF No. 28-4, p.3). Further, the Secretary of State has admitted in his Answer that Plaintiffs Moore and Harrod are registered Arkansas voters. (ECF No. 14). Based upon Plaintiffs’ status as Arkansas voters and the alleged injury to their rights which can be fairly traced to the Arkansas ballot access restrictions, the Court finds that they have standing to bring this ballot access case. *See McLain*, 851 F.2d at 1048 (“Plaintiff has standing as a voter to assert his claim that the North Dakota ballot access laws are unduly restrictive.”)

### **3. Ripeness**

The basic rationale of the ripeness doctrine is “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

The Secretary briefly argues that Plaintiffs’ claims to be a candidate in the 2018 election cycle are

too speculative and premature for the Court to review. However, since the Court is analyzing Plaintiffs' claims as voters this argument is without merit. Plaintiffs have felt the effect of a March 3rd petition deadline for independent candidates. The issues are not abstract and government agencies will not be injured by judicial interference because the agency would have plenty of time to reassess their options for the 2018 election cycle.

#### 4. Merits

"The States possess a 'broad power to prescribe the Times, Places and Manner of holding Elections for Senators and Representatives, Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Green Party of Arkansas v. Martin*, 649 F.3d 675, 680 (8th Cir. 2011) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (internal quotations omitted)). "Restrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively, *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968), and may not survive scrutiny under the First and Fourteenth Amendments." *Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 107 S. Ct. 533, 536, 93 L. Ed. 2d 499 (1986). "These associational rights, however, are not absolute and are necessarily subject to qualification if elections are to be run fairly and effectively." *Id.*

The Court must weigh ‘the character and magnitude’ of Plaintiffs’ alleged First and Fourteenth Amendment injuries against the precise interests put forward by the Secretary of State as justification for imposing its rule, taking into consideration the extent to which those interests make it necessary to burden constitutional rights. *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983)). This standard, as the Supreme Court has recognized, provides no bright lines. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359, 117 S.Ct. 1364 (1997). Instead, this Court must discern where this case falls on a sliding scale of scrutiny. “Regulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.” *Green Party of Arkansas v. Daniels*, 733 F. Supp. 2d 1055, 1059 (E.D. Ark. 2010) *aff’d sub nom. Green Party of Arkansas v. Martin*, 649 F.3d 675 (8th Cir. 2011) (citing *Timmons*, 520 U.S. at 358) [sic]

First, Plaintiffs argue that the March petition deadline for independent candidates, Ark. Code Ann. § 7-7-203(c)(1) is unconstitutional based upon previous decisions of this Court: *Lendall v. Bryant*, 387 F. Supp. 397 (E.D. Ark. 1975) (*Lendall I*); *Lendall v. Jernigan*, Case No. LR-76-CV-185 (*Lendall II*); *Lendall v. Jernigan*, 424 F.Supp. 951 (E.D. Ark 1977) (*Lendall III*); and *Rock v. Bryant*, 459 F.Supp. 64 (E.D. Ark. 1978) *aff’d*, 590 F.2d 340 (8th Cir. 1978). The Court disagrees.

This case, as well as the previous cases ruling on Arkansas ballot access laws, deal with several variables: the filing deadline, the number of signatures required on the petition, and the circulation time of the petition. In *Lendall I*, the filing deadline was the first Tuesday in March but required petitions to include signatures of 15% of qualified voters. The Court found this combination to be unconstitutional. In *Lendall II*, the petition filing deadline remained on the first Tuesday in March but petitions required signatures of only 10% of qualified voters. The court found this combination to be unconstitutional. In *Lendall III*, the court discussed only the number of signatures required, 10% of qualified voters, and the circulation time of 60 days. Again, this combination was found to be unconstitutional. In *Rock v. Bryant*, the winning combination was 3% of qualified voters, a circulation time of 60 days, and a filing deadline of noon on the Monday preceding the preferential primary.

Arkansas's current statutory scheme requires signatures of 3% of the qualified electors of the state, a 90 day circulation time, and a filing deadline of the first day in March. While it would be easy to say precedent clearly dictates that the current statutory scheme is unconstitutional because the court in *Lendall II* stated that it doubted any filing deadline before April could be constitutional, it would not be accurate. The Court must weigh the variables of the legislative scheme with the burdens and administrative issues of today in order to determine the constitutionality of these statutes.

As to these issues, Plaintiffs argue that the March 1st petition filing deadline makes petitioning more difficult by setting a petitioning deadline farther away from the date of the Arkansas General Election when political interest among the voting public is less and by placing the ninety (90) day petitioning time during the months of December, January and February when the conditions are not optimal due to daylight savings time, holiday travel, and weather issues. Plaintiffs claim the petition deadline coupled with the signature requirement, lowered public interest, and inconvenient petitioning time is unconstitutional. Plaintiffs argue that the State has no compelling interest which justifies these requirements and it unequally and unfairly impacts independent candidates. In other words, Plaintiffs do not object to the fact that there is a petition filing deadline but rather the movement of the deadline from May 1st to March 1st coupled with the number of signatures required.

The Secretary of State has articulated a laundry list of reasons for the petition filing deadline and the number of signatures required for the petition to be successful. While most of the reasons are valid in a general sense, only a few of the reasons apply to the earlier date set for the petition deadline. For example, the Secretary of State contends that the independent candidate requirements “provide the electorate with a ballot that will eliminate or reduce voter confusion.” The fact that independent candidates have to get signatures on a petition within a certain time frame to be eligible for inclusion on the ballot reduces the risk that

candidates who are not supported by the community or who are not serious about their candidacy will be included on the ballot. As the Supreme Court held in *Lubin v. Panish*, “[t]he means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not.” 415 U.S. 709, 715, 94 S.Ct. 1315 (1974). However, there is no evidence that the Arkansas Legislature’s decision to move the filing deadline from May 1st to March 1st furthers this specific goal. The same can be said for the Secretary’s goal of protecting the integrity of the ballot process, encouraging compromise and political stability, and ensuring that the general election winner will represent a majority of the community.

More to the point, the Secretary explains that the filing deadline was moved in 2013 based upon “the election administration experiences of the 2010 election cycle (when MOVE had been enacted, but before the Arkansas General Assembly met in a general session), and the 2012 election cycle.” (ECF No. 31). MOVE, or the Military and Overseas Voter Empowerment Act, was enacted by Congress in 2009. It mandated that states “transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter . . . at least 45 days before an election for Federal office . . . ” 52 U.S.C. § 20302(a)(8). Before MOVE, states were required to send absentee ballots but the timing was left to the states’ discretion. (UOCAVA 52 U.S.C § 20301, *et seq.*). Before MOVE,

presumably the Secretary of State needed twenty to thirty day [sic] before the election to account for time to mail out ballots and for their return.

As further explanation, the Secretary states:

The deadlines for filing petition signatures was “moved up” on the calendar – to earlier in the year – in order to facilitate election administration necessities, including the processing of so many initiative petition signatures during the 2012 election cycle that it was nearly impossible to finish the process within the statutory and constitutional guidelines, resulting in preliminary certification of ballot titles that were later determined to be “stricken” from the ballot for one reason or another (after considerable litigation). Given the constitutional deadline for submission of initiative petition signatures, and the necessities of UOVACA [sic] and MOVE compliance, all other petition signature requirements were advanced to earlier in the year so as to clear the calendar of petition signature processing and subsequent litigation, in advance of the constitutional initiative petition signature deadlines (which normally fall just before or just after the July 4 holiday).

(ECF No. 31).

Because the Court finds the March 1st filing deadline to be “a burden of some substance” on an independent candidate’s right to ballot access and a voter’s right to support a candidate of her choice, the Court must determine whether the Secretary of State has provided

a compelling reason for the deadline. “To survive constitutional scrutiny, the statute’s restrictions must be necessary to serve these compelling state interests, and must not go beyond what Arkansas’s interests actually require.” *Langguth v. McCuen*, 30 F.3d 138 (8th Cir. 1994).

While touched on in the Secretary’s briefs, the Court finds that the most legitimate argument for the extension articulated by the Secretary was made during the hearing on summary judgment. The reason being that in light of the increase in non-independent candidates (mostly judges) filing petitions instead of paying filing fees as before and the increased number of initiative petitions there is simply not enough time to process all of the petitions within the May 1st deadline. This fact coupled with the time consumed by ever increasing litigation over petitions has necessitated the extension of the deadline to March 1st.

When weighing the character and magnitude of Plaintiff’s injury against the Secretary’s precise interest put forward as justification for the extension, the Court finds that the regulations, Ark. Code Annotated §§ 7-7-101, 7-7-103, and 7-7-203(c)(1) are narrowly tailored to advance the State’s interest in timely certifying independent candidates who wish to be placed on the ballot, as well as candidates who wish to qualify for election by petition and those who seek to promote ballot initiatives. The Court finds that the restrictions required by these statutes appear necessary to meet Arkansas’s compelling interests in timely certifying

candidates and interests for the ballot. Given the year-round interest in all things political and the fact that Arkansas weather may be equally oppressive in the spring as in the winter, the Court does not find the requirements to be unreasonable. Moreover, Plaintiffs have failed to present evidence persuading the Court otherwise.

For these reasons, Plaintiffs' motion for summary judgment (ECF No. 28) is DENIED. Defendant's motion for summary judgment (ECF No. 16) is GRANTED.

IT IS SO ORDERED this 25th day of August, 2015.

/s/ James Moody Jr.  
James M. Moody, Jr.  
United States District Judge

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**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION**

**MARK MOORE,  
MICHAEL HARROD, and  
WILLIAM CHRIS JOHNSON      PLAINTIFFS**

**V. 4:14CV00065 JM**

**HONORABLE MARK MARTIN**  
**in his official capacity as**  
**Arkansas Secretary of State**                      **DEFENDANT**

## ORDER

(Filed Aug. 4, 2014)

After review of the Motion to Dismiss and the briefs filed by the parties, the Court finds that the motion to dismiss should be, and hereby is, denied. Dismissal of a complaint pursuant to Rule 12(b)(6) is appropriate only when “it appears beyond doubt that the plaintiff can prove no set of facts in support of [the plaintiff’s] claim which would entitle [the plaintiff] to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A complaint should not be dismissed simply because a court is doubtful that the plaintiff will be able to prove all of the factual allegations contained therein. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1965 (2007). Accordingly, a well-pleaded complaint will survive a motion to dismiss even where the likelihood of recovery appears remote. *Id.*

Although, “[a] party invoking federal jurisdiction must support each of the standing requirements with

the same kind and degree of evidence at the successive stages of litigation as any other matter on which a plaintiff bears the burden of proof. . . . '[G]eneral factual allegations of injury resulting from the defendant's conduct' will suffice to establish Article III standing at the pleading stage, 'for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support [a contested] claim.'" *Constitution Party of South Dakota v. Nelson*, 639 F.3d 417, 420-421 (8th Cir. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed. 2d 351 (1992)).

Applying this standard, the Court cannot say from the information in the record at this time that the Plaintiffs can prove no set of facts which would entitle them to relief. Therefore, Defendant's motion (ECF No. 6) must be DENIED.

IT IS SO ORDERED this 4th day of August, 2014.

/s/ James Moody Jr.  
James M. Moody, Jr.  
United States District Judge

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UNITED STATES CONSTITUTIONAL  
PROVISIONS

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. XIV. § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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FEDERAL STATUTES

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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52 U.S.C. § 20302

State responsibilities

MOVE – Military and Overseas Voter Empowerment Act

(a) In general

Each State shall –

(1) permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office;

. . .

(3) permit absent uniformed services voters and overseas voters to use Federal write-in absentee ballots (in accordance with section 20303 of this title) in general elections for Federal office;

. . .

(8) transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter –

(A) except as provided in subsection (g), in the case in which the request is received at least 45 days before an election for Federal office, not later than 45 days before the election; and

(B) in the case in which the request is received less than 45 days before an election for Federal office –

(i) in accordance with State law; and

(ii) if practicable and as determined appropriate by the State, in a manner that expedites the transmission of such absentee ballot;

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ARKANSAS STATUTES

Ark. Code Ann. § 7-7-203.

Dates.

(c)(1) The party filing period shall be a one-week period ending at 12:00 noon on the first day in March and beginning at 12:00 noon one (1) week prior to the first day in March.

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ARK. CODE ANN. § 7-7-103  
PRIOR TO ACT 1356 OF 2013

Ark. Code Ann. § 7-7-103(a)(1)

Filing as an independent – Petitions – Disqualification.

(a)(1) A person desiring to have his or her name placed upon the ballot as an independent candidate without political party affiliation for any United States office other than President of the United States or Vice President of the United States or state, county, township, or district office in any general election in this state shall file, during the party filing period for the year in which the election is to be held, a political practices pledge, an affidavit of eligibility, and a notice of candidacy stating the name and title the candidate proposes to appear on the ballot and identifying the elective office sought, including the position number, if any.

Ark. Code Ann. § 7-7-103(b)(1)(A)

Filing as an independent – Petitions – Disqualification.

(b)(1)(A) The person shall furnish by 12:00 noon on May 1 of the year in which the election is to be held petitions signed by not less than three percent (3%) of the qualified electors in the county, township, or district in which the person is seeking office, but in no event shall more than two thousand (2,000) signatures be required for a district, county, or township office.

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ARK. CODE ANN. § 7-7-103  
AS AMENDED BY ACT 1356 OF 2013

Ark. Code Ann. § 7-7-103(a)(1)

Filing as an independent – Petitions – Disqualification.

(a)(1) A person desiring to have his or her name placed upon the ballot as an independent candidate without political party affiliation for any United States office other than President of the United States or Vice President of the United States or state, county, township, or district office in any general election in this state shall file, during the party filing period for the year in which the election is to be held, a political practices pledge, an affidavit of eligibility, the petition under this section, and a notice of candidacy stating the name and title the candidate proposes to appear on the ballot and identifying the elective office sought, including the position number, if any.

Ark. Code Ann. § 7-7-103(b)(1)(A)

Filing as an independent – Petitions– Disqualification.

(b)(1)(A) The person shall file petitions signed by not less than three percent (3%) of the qualified electors in the county, township, or district in which the person is seeking office, but in no event shall more than two thousand (2,000) signatures be required for a district, county, or township office.

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