No. 21A408

In the Supreme Court of the United States

LIBERTARIAN PARTY OF ALABAMA,
Petitioner,

v.

JOHN HAROLD MERRILL,
Secretary of State for the State of Alabama,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

David I. Schoen
Counsel of Record
DAVID I. SCHOEN, ATTORNEY AT LAW
2800 Zelda Road, Suite 100-6
Montgomery, AL 36106
(334) 395-6611
schoenlawfirm@gmail.com

Counsel for Petitioner

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

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[ENTERED NOVEMBER 19, 2021]

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 20-13356

LIBERTARIAN PARTY OF ALABAMA,

Plaintiff-Appellant,

versus

JOHN HAROLD MERRILL,
Secretary of State for the State of Alabama,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:19-cv-00069-ECM-JTA

Before JILL PRYOR, LUCK, and BRASHER, Circuit Judges. LUCK, Circuit Judge:

Alabama maintains a list containing the name and registration information of every registered voter in the state. Each political party with ballot access gets a copy of the voter list for free. But political parties without ballot access have to pay for it. The issue before us is whether this distinction—between political parties with ballot access and those without it—unconstitutionally burdens the

Libertarian Party of Alabama's First and Fourteenth Amendment rights.

We hold that it does not. The Libertarian Party has not met its burden to demonstrate that the distinction drawn by Alabama's voter list law is discriminatory or severely burdens the Party's constitutional rights. Rather, it's rationally related to and furthers important state interests in supporting political parties with a modicum of popular support and alleviating administrative burdens. Thus, after careful review and with the benefit of oral argument, we affirm the district court's summary judgment for John Harold Merrill, the Alabama Secretary of State.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Alabama Voter List Law

Under Alabama law, a political party isn't entitled to a spot on the ballot just because it calls itself a political party. Instead, a political party must satisfy the state's ballot access requirements.

There are two ways that a political party can earn a place on the ballot: petition and performance.

Under the first way, a party receives ballot access if it submits a petition with "a list of the signatures of at least three percent of the qualified electors who cast ballots for the office of Governor in the last general election for the state, county, city, district, or other political subdivision in which the political party seeks to qualify candidates for office." Ala. Code § 17-6-22(a)(1). There are slightly over three-and-a-half million registered voters in Alabama, and turnout in the 2018 gubernatorial election was about

fifty percent. Thus, a successful petition for statewide ballot access in 2020 required signatures from 51,588 registered voters.

Under the second way—performance—a political party qualifies for statewide ballot access if it received at least twenty percent of the vote cast for an officer in the most recent statewide election. *Id.* § 17-13-40. The Republican and Democratic parties, for example, both consistently maintain ballot access by getting at least twenty percent of the statewide vote each election.

Now for the state's voter list. Alabama keeps a "computerized statewide voter registration list" containing "the name and registration information of every legally registered voter in the state." *Id.* § 17-4-33(a), (a)(9). This information includes "the name, address, . . . voting location," and "voting history of each registered voter." *Id.* § 17-4-33(a)(2), (4). The voter list is an important tool for effectively locating voters, petitioning for ballot access, and campaigning for elected office.

Several entities get the voter list free of charge. State legislators receive the voter list for free within 90 days of assuming office, which helps them provide services to their constituents. *Id.* § 17-4-38(e). The Alabama Administrative Office of Courts is entitled to the list for free, which it uses to produce the state's master jury list. *Id.* § 17-4-38(f). The chief elections officers from other states are also entitled to a free copy of the list, which helps the states identify voters who have left Alabama. *Id.* § 17-4-38(g). Alabama also sends the voter list to the Electronic Registration Information Center (a non-profit group) for free on a monthly basis. And,

relevant to this appeal, each political party with ballot access gets an electronic copy of the voter list for free:

> Following each state and county election, the Secretary of State shall provide one electronic copy of the computerized voter list free of charge to each political party that satisfied the ballot access requirements for that election. The electronic copy of the computerized voter list shall be provided within 30 days of the certification of the election or upon the completion of the election vote history update following the election, whichever comes first. In addition, upon written request from the chair of a political party, the Secretary of State shall furnish up to two additional electronic copies of the computerized voter file during each calendar year to each political party that satisfied the ballot access requirements during the last statewide election held prior to that calendar year. The electronic copies provided pursuant to this section shall contain the full, editable data as it exists in the computerized voter list maintained by the Secretary of State.

Id. § 17-4-33(a)(10).

Entities that don't fall within these categories—including political parties without ballot access—have to pay "for the production of" the voter list. *Id.* § 17-4-38(b). Because the secretary charges one penny per voter record, in 2020 it would have cost $35,912.76 to buy the records for every registered voter in the state. But purchasing the voter list isn't

all or nothing; one can buy a "subset" of the list for just the voters in a specific county or district.

A person paying for the list out of pocket can request it from an online portal. Each request for a free copy of the list is processed by one of the six employees in the secretary's elections division. It takes about fifty minutes to compile and email the voter list because the file is "very large," and while the employee's computer is processing the file it generally can't be used to perform other tasks.

The Libertarian Party of Alabama

In the 2000 general election, one of the Libertarian Party of Alabama's candidates earned over twenty percent of the vote in a statewide race. As a result, the Party obtained statewide ballot access for the 2002 general election. But the Party failed to replicate this success in the 2002 general election and lost statewide ballot access. It has yet to regain statewide ballot access and its support in elections rarely exceeds single digits. Since 2002, only twenty- eight candidates have run in Alabama under the Party's banner.

In 2012, the Party's then-chair estimated that the Party had between 250 and 300 members, "give or take a dozen." By 2020, the Party had only 134 official members. No one in the Party is formally responsible for candidate recruitment or achieving ballot access. Its candidates are selected at an annual convention—usually attended by about fifty party members—where there are never enough candidates in any given race to force a contested choice. The Party's fundraising is "extremely limited," even when compared to political parties in Alabama other than the Republican and Democratic

parties. The Party currently has about $13,000 in its coffers, and its main expense is the annual convention.

Although the Party hasn't had statewide ballot access for two decades, it achieved ballot access in four local races in 2018 and, with it, free access to the subset of the voter list in those districts and counties.

The Party Sues for Free Voter List Access

In January 2019, the Party sued the secretary in the Middle District of Alabama, bringing First and Fourteenth Amendment claims under 42 U.S.C. section 1983. The Party alleged that sections 17-4-33 and 17-4-38 discriminated between major and minor political parties by giving a free copy of the voter list only to the major parties. (We will sometimes refer to sections 17-4-33 and 174-38, together, as the voter list law). This discrimination, the Libertarian Party alleged, violated its right to associate and advance its political beliefs and therefore violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The Party sought declaratory relief and an injunction requiring the secretary to give it a free copy of the statewide voter list.

Following discovery, the secretary moved for summary judgment, which the district court granted. The district court applied the *Anderson-Burdick* balancing test, which governs challenges to ballot access laws. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). The district court concluded that sections 17-4-33(a)(10) and 17-4-38(b) didn't impose a severe burden on the Party because it could receive the

voter list for free if it had ballot access, which the Party had previously achieved at the statewide level in 2000. Thus, strict scrutiny didn't apply, the district court explained, and Alabama had to show only that using ballot access as the criterion for a free copy of the voter list rationally served important state interests. The secretary had identified in discovery twenty important state interests that justified giving the voter list for free to political parties that had ballot access (by virtue of satisfying the three-percent petition requirement or the twenty-percent performance requirement). The district court grouped these interests into two categories: the state's interest in supporting parties with a modicum of popular support and the state's administrative interests.

As to the state's modicum-of-support interest, the district court said that even the Libertarian Party of Alabama agreed that the state didn't have to give the voter list for free to every entity calling itself a political party. A line had to be drawn somewhere, the district court reasoned, and drawing the line for a free copy of the voter list at having ballot access was the same as the line to get access to the ballot. The district court explained that one of the important interests served by Alabama's ballot access laws was ensuring that only political parties with a modicum of support get a spot on the ballot. This, in turn, minimized voter confusion and frustration of the democratic process. The district court concluded that, similar to the important state interests furthered by the state's ballot access laws, the voter list law also furthered Alabama's important interests in supporting entities which

perform important public functions, stabilizing the political system, and reducing fraud.

As to the state's administrative interests, the district court concluded that they too were rationally served by giving a free copy of the voter list to political parties with ballot access. The district court said that the state had an administrative burden to determine which entities get free access to the voter list. The state also had an administrative burden, the district court said, to provide the voter list for free to anyone that qualified for it, which was a time-consuming task that imposed significant "demands on elections staff." The district court explained that relying on the state's ballot access rules to determine who gets the voter list for free provided a definite, objective, and constitutional standard, which spared election officials from having to spend a significant amount of time figuring out which entities were and weren't entitled to a free copy of the voter list.

The district court concluded that, because Alabama's decision to provide the voter list for free to political parties with ballot access rationally served important state interests and didn't impose a severe and unconstitutional burden on the Libertarian Party, the *Anderson-Burdick* balancing test weighed in the state's favor and the voter list law didn't violate the First and Fourteenth Amendments. The Party now appeals from the district court's summary judgment.

STANDARD OF REVIEW

We review de novo the district court's grant of summary judgment. *Hardigree v. Lofton*, 992 F.3d 1216, 1223 (11th Cir. 2021). Summary judgment is appropriate where "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. P. 56(a). "All evidence and factual inferences are viewed in the light most favorable to the non-moving party, and all reasonable doubts about the facts are resolved in favor of the non-moving party." *Hardigree*, 992 F.3d at 1223.

DISCUSSION

"In our Circuit, the balancing test of *Anderson* and *Burdick* controls challenges to ballot access requirements." *Indep. Party of Fla. v. Sec'y, State of Fla.*, 967 F.3d 1277, 1281 (11th Cir. 2020) (citations and quotation marks omitted). "This test applies whether a plaintiff challenges a ballot-access requirement under the First Amendment or the Equal Protection Clause of the Fourteenth Amendment." *Id.* But this isn't a ballot access case. The Libertarian Party hasn't challenged either of Alabama's two ways of achieving ballot access. It doesn't argue that the three-percent signature requirement in section 17-6-22(a)(1) is unconstitutional. And it doesn't argue that the twenty-percent performance requirement in section 17-13-40 is unconstitutional. The Party only challenges sections 17-4-33(a)(10) and 17-4-38(b), which give each political party with ballot access a free copy of the voter list but require a political party without ballot access to pay for it.

Whether the *Anderson-Burdick* test applies to a challenge to a voter list law is an issue of first impression for us. But we can resolve this appeal without resolving that question. This case has been litigated from the beginning under the assumption that the *Anderson-Burdick* test applies to the voter

list law. Both the Party and the secretary argued to the district court, and to us on appeal, that the *Anderson-Burdick* test applies. The district court agreed and applied that test. We will do the same and assume that the *Anderson-Burdick* test applies to the Party's challenge to Alabama's voter list law. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (explaining that under the party presentation principle, "we rely on the parties to frame the issues for decision"). We now apply that test.

The Anderson-Burdick *Test*

Under the *Anderson-Burdick* test, "the level of scrutiny we apply to a ballot-access law depends on the severity of the burdens it imposes." *Indep. Party of Fla.*, 967 F.3d at 1281. Severe restrictions on ballot access must be narrowly tailored to advance a compelling state interest. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). "But reasonable, nondiscriminatory restrictions are usually justified by a state's important regulatory interests in conducting orderly elections." *Indep. Party of Fla.*, 967 F.3d at 1281 (cleaned up). "However severe the burden, we must ensure it is warranted by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Id.* at 1281–82 (quotation marks omitted). We can only decide whether the challenged law is constitutional after "weigh[ing] all these factors." *Swanson v. Worley*, 490 F.3d 894, 903 (11th Cir. 2007).

Our analysis follows these three steps. We first examine the burdens imposed by sections 17-4-33(a)(10) and 17-4-38(b) on the Libertarian Party's constitutional rights. We then examine the state's

regulatory interests advanced by these statutes. Finally, we weigh the burdens on the Libertarian Party's rights against the legitimate interests identified by the state.

The burden on the Libertarian Party's constitutional rights

We begin by "consider[ing] the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Anderson*, 460 U.S. at 789. The Libertarian Party maintains that Alabama's voter list law is discriminatory—"expressly" and in "practice"—and therefore subject to strict scrutiny because it "clearly discriminate[s] against minor parties . . . in favor of major parties by definition." The Party also argues that denying it unfettered access to the voter registration list "severely burdens" its First and Fourteenth Amendment rights by impairing its ability to get ballot access signatures, educate voters, and campaign effectively.

The key statutory text refutes the claim that the voter list law expressly discriminates against minor political parties. Section 17-4-33(a)(10) doesn't include the words "minor party," "major party," "Republican Party," or "Democratic Party." Rather, it provides that the state will provide the voter list for free "to *each* political party that satisfied the ballot access requirements for that election," and "to *each* political party that satisfied the ballot access requirements during the last statewide election held prior to that calendar year." Ala. Code § 17-4-33(a)(10) (emphases added). Because "each" political party with ballot access is treated the same, section

17-4-33(a)(10) doesn't expressly discriminate against minor parties. All political parties have an equal right to get a free copy of the list if they meet the standard provided by the voter list law— not just the Republican and Democratic parties.

The voter list law is also not discriminatory in practice. True, the Republican and Democratic parties get ballot access every election, while the Libertarian Party of Alabama has lacked statewide ballot access since 2002. But disparate outcomes aren't necessarily the result of discrimination. "Discrimination," in a general sense "is the failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 286 (2011) (quotation marks omitted); *see also Lofton v. Sec'y of Dep't of Child. & Fam. Servs.*, 358 F.3d 804, 817–18 (11th Cir. 2004) ("Equal protection . . . does not forbid legislative classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." (citation and quotation marks omitted)). That the major parties consistently get ballot access—and therefore the voter list for free—is easily explained by the popular support the major parties receive from voters; the Libertarian Party of Alabama does not have the same degree of popular support. The voter list law isn't discriminatory in practice just because there are differences between the major and minor political parties. *Cf. Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike[.]").

In any event, in practice, minor political parties in Alabama, like the Republican and Democratic parties, have achieved ballot access in local races and at the statewide level. In 2018, four Libertarian Party candidates secured ballot access in local races and therefore received free access to the portion of the voter list corresponding to those races. Two other political parties—the Constitution Party and the Independence Party—achieved ballot access in local races in 2010 and 2014, satisfying the standard to get free access to the voter list for those districts. A third political party, the Freedom Party, got ballot access in two local races in 2006 but one of its candidates withdrew from the race. And in 2002, the Libertarian Party enjoyed statewide ballot access because one of its candidates obtained over twenty percent of the vote in a statewide race in the 2000 general election.

We also conclude, for two reasons, that the voter list law doesn't severely burden the Party's constitutional rights. First, in determining whether a ballot access law severely burdens a plaintiff's constitutional rights, the Supreme Court has asked whether the regulation "freeze[s] the political status quo." *Jenness*, 403 U.S. at 438. We have said that a ballot access law does not "severely" burden a political party's constitutional rights where it "does not pose an insurmountable barrier" to the party getting on the ballot. *Stein v. Ala. Sec'y of State*, 774 F.3d 689, 698–98 (11th Cir. 2014). Alabama's voter list law does neither of these things: it does not freeze the political status quo, nor does it provide an insurmountable barrier to ballot access.

We know that the voter list law does not freeze the political status quo or pose an insurmountable

barrier to ballot access because minor parties have successfully obtained ballot access. As we have already explained, in 2018 four Libertarian Party candidates achieved ballot access in local races; three other minor political parties obtained ballot access in local races in 2006, 2010, and 2014; and the Libertarian Party had statewide ballot access during the 2002 general election. The minor parties' success in gaining ballot access indicates that the barrier is not insurmountable. *See id.* at 698.

Second, we have held that Alabama's ballot access petition law—requiring a candidate to get "signatures of at least three percent of qualified electors" who voted in the last gubernatorial election—is not a severe burden on the rights of independent or minor party candidates. *Swanson*, 490 F.3d at 896. Instead, we concluded that this ballot access law is "a reasonable, nondiscriminatory restriction." *Id.* at 903. If the state's nondiscriminatory restriction on ballot access doesn't severely burden the Party's rights, then a restriction one step removed from ballot access that also uses the same criterion is also reasonable and nondiscriminatory.

The state's important regulatory interests

We next turn to the "important regulatory interests" proffered by the secretary to justify Alabama's voter list law. *See Anderson*, 460 U.S. at 788. The Libertarian Party argues that because the state's claimed regulatory interests—supporting only political parties with a "modicum of support" and "administrative interests"—are "baseless," the district court erred by crediting them. We disagree.

In examining the state's regulatory justifications, we must "determine the legitimacy and strength of the state's interests and consider the extent to which those interests make it necessary to burden the [plaintiff's] rights." *Swanson*, 490 F.3d at 903 (cleaned up). But where, like here, the burden on the plaintiff's rights isn't severe, "the test is not whether the regulations are necessary"; it's whether "they rationally serve important state interests." *Id.* at 912.

As a threshold matter, the Party complains that the secretary "never explains the source" of the state interests justifying the decision to give a free copy of the voter list to political parties with ballot access. But we don't "require elaborate, empirical verification of the weightiness of the [s]tate's asserted justifications." *Timmons*, 520 U.S. at 364; *see also Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009) ("*Anderson* does not require any evidentiary showing or burden of proof to be satisfied by the state government."). Rather, the *Anderson-Burdick* test only asks a court to "identify and evaluate the interests put forward by the [s]tate as justifications for the burden imposed by its rule[.]" *Common Cause/Ga.*, 554 F.3d at 1352 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008)). That is what the district court did based on the summary judgment record developed by the parties. That is what we will do too.

As to the state's interest in supporting political parties with a modicum of popular support, we have long recognized that this is an important state interest rationally served by ballot access laws. We previously considered a challenge to a Florida law requiring minor political parties seeking ballot

access to submit a petition "signed by [three percent] of the state's registered voters." *Libertarian Party of Fla. v. Florida*, 710 F.2d 790, 792 (11th Cir. 1983). The Libertarian Party of Florida "concede[d]" that "the state ha[d] an interest in regulating the election process and avoiding voter confusion." *Id.* We agreed with this concession. "That these, and the other interests asserted, are compelling," we explained, "has been well established under decided cases." *Id.* (citing three Supreme Court cases). We said that "a state has an important interest 'in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.'" *Id.* at 793 (quoting *Jenness*, 403 U.S. at 442).

In *Swanson*, we concluded that Alabama's ballot access petition law rationally served the state's important interest "in requiring independent candidates to show they had a significant modicum of support before printing their names on the ballot." 490 F.3d at 911 (citation omitted). "[R]equiring candidates to demonstrate a modicum of support," we said, "discourages frivolous candidacies" and "ensur[es] that only bona fide independent candidates with a measure of support gain ballot access," preventing the ballot from being "clogg[ed]." *Id.* We also concluded that "reasonable ballot access regulations promote important state interests in preserving political stability by 'temper[ing] the destabilizing effects of party-splintering and excessive factionalism.'" *Id.* (quoting *Timmons*, 520 U.S. at 367). Thus, it is now "beyond dispute that

Alabama has an important interest in requiring minor parties to demonstrate some 'modicum of support' before they are entitled to a spot on the ballot." *Stein*, 774 F.3d at 700.

Just like we did in the ballot access law context, we conclude that Alabama's voter list law is rationally related to and furthers the state's important interest in supporting political parties with a modicum of popular support. The voter list law furthers this important interest by ensuring that only political parties with ballot access— in other words, a modicum of support—get the voter list for free. This, in turn, "discourages frivolous candidacies," ensures that "only bona fide" candidates "with a measure of support" get the list, and promotes the state's important interest in "preserving political stability" by tempering the destabilizing effects of party-splintering and excessive factionalism. *See Swanson*, 490 F.3d at 911. Because free access to the voter list depends on ballot access, it follows that the voter list law serves the same important regulatory interests served by the state's ballot access requirements.

The district court also identified two other important state interests subsumed within the modicum-of-support category of interests: Alabama's interest in "preventing access" to the voter list "by groups intent on fraud," and its interest "in supporting political entities which perform important public functions" like "nominating candidates, contesting elections, and putting forward a platform of proposed policies for consideration by voters." As to fraud- deterrence, a state has an important regulatory interest in "deterring" election fraud. *Crawford*, 553 U.S. at 191; *see also Greater*

Birmingham Ministries v. Sec'y of State for State of Ala., 992 F.3d 1299, 1327 (11th Cir. 2021) (explaining that "combatting voter fraud" was a valid neutral justification for a voter ID law). The voter list law serves this important interest because the standard used to determine who gets a copy of it for free—ballot access— helps ensure that the list will go to groups who will use it for legitimate political purposes.

As to the State's interest in supporting political entities that perform public functions, we conclude that a state has an important interest in supporting political parties that perform valuable public functions like assisting in the conduct of elections, partnering with the state in primaries, recruiting candidates for public office, registering voters, and encouraging public engagement. All of these functions help the state run efficient and reliable elections. And Alabama's voter list law furthers this important interest by rewarding political parties that perform these functions.

The Libertarian Party of Alabama maintains that we shouldn't import the "modicum of support" interest from the ballot access cases into this case because doing so amounts to "circular" reasoning. The voter list is "the most valuable tool to gain ballot access" and attain a modicum of popular support, the Party argues, and so the voter list law "makes it impossible" for minor parties to achieve statewide ballot access. But the results don't bear this out. The Party's success in the 2000 election, which earned it statewide ballot access in 2002, shows that it is not "impossible" for a minor party to get statewide ballot access without free access to the voter list. Likewise, the Party's success in local races in 2018 (as well as

the Freedom Party, Constitution Party, and Independence Party's successes in local races in 2006, 2010, and 2014) shows that it is not "impossible" to get ballot access without free access to the voter list.

The Party also argues that in *Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992), we "expressly condemned" tying an election related fee "to the concept of a modicum of support." This too is wrong. *Fulani* involved the intersection of two Florida election laws. Florida's ballot access law required a minor-party candidate running for President to submit a petition signed by one percent of registered voters to get ballot access. *Id.* at 1540. The minor party was also required to have the supervisor of elections from each county where signatures were collected certify the signatures, at a cost of ten cents per signature. *Id.* Although the verification statute allowed a candidate to obtain a fee waiver by showing an undue financial burden, the statute forbade a "minor party" from getting the fee waiver. *Id.* We held that this "discriminatory classification" was a "significant burden" on the plaintiff that "the state has failed to justify." *Id.* at 1547. We rejected Florida's claim that it had an "interest of avoiding voter confusion by ensuring that a party has a significant modicum of support." *Id.* This was because "discriminating as to which financially burdened candidates may waive the verification fee is not necessary to demonstrating a modicum of support," which was already met when a minor-party candidate submitted a petition signed by one percent of registered voters. *Id.* We explained that "it is constitutionally impermissible for a state to

measure a party's level of support by the state of its finances." *Id.*

Fulani doesn't apply here for three reasons. First, that case involved a discriminatory statute that explicitly singled out minor political parties. But, as we explained above, Alabama's voter list law does not single out minor political parties. Second, we concluded in *Fulani* that Florida's certification law imposed "a significant burden" on the plaintiffs' First and Fourteenth Amendment rights. *Id.* Here, as we explained above, the voter list law doesn't significantly burden the Libertarian Party's rights. And third, the candidate in *Fulani* had secured "the requisite number of signatures" to obtain ballot access—one percent of registered voters— and therefore had already established a modicum of popular support but was still subject to the discriminatory fee. *Id.* at 1540. A state obviously can't use the "modicum of support" interest to justify a discriminatory regulation burdening a minor party that has already established a modicum of support. That's not the situation here. Conditioning free voter list access on showing popular support isn't analogous to refusing to waive a certification fee for a candidate that's already met the popular support requirements for ballot access.

As to the state's "administrative interests," we conclude that they too are important regulatory justifications rationally served by the voter list law in two ways. First, providing the voter list for free to each political party with ballot access gives the state an objective standard that is easy to apply. When a political party requests a free copy of the voter list, the state has to confirm that the entity is eligible for a free copy. Linking eligibility to ballot access makes

this a simple task. Under the voter list law, all the state has to do is check whether or not the political party has ballot access. This brightline standard is straightforward, leaves no room for guesswork, and relies on a criteria that we have already upheld as constitutional. *See Swanson*, 490 F.3d at 912 ("Alabama has articulated important interests justifying its reasonable, nondiscriminatory ballot access restrictions. Accordingly, we conclude that Alabama's election scheme, with a three-percent signature requirement and filing deadline on the primary election date, does not abridge plaintiffs' First and Fourteenth Amendment rights.").

Even the Party has conceded, before the district court and on appeal, that it's "not claiming [that] every requestor must get" the voter list "for free." If everyone doesn't get the list for free, where's the line? A line has to be drawn somewhere and any line will be "necessarily arbitrary." *See Libertarian Party*, 710 F.2d at 793. We cannot say that the clear-cut line the state has drawn— the line of ballot access which we upheld in *Swanson*—is an irrational one.

Second, limiting free access to the voter list only to political parties with ballot access rationally furthers the state's administrative interests because it eases the logistical burdens on the secretary's office. Giving the voter list for free only to political parties with ballot access cuts down on the number of requests the state gets for a free copy, which reduces how much time the state has to spend on complying with those requests. The Party maintains that the state's interest in reducing administrative hardship is "dramatically undercut" because it already provides the voter list to other groups for free. The "only extra time required to provide" the

list "free of charge," the Party claims, "would be the amount of time required to send" one more e-mail. But the summary judgment evidence says otherwise. The secretary explained that every single time the state gets a request for a free copy of the voter list, one of the six employees in the elections division of the secretary's office has to export the list from a program called PowerProfile; import the data into Microsoft Access; export the data from Access to a text file; and then email the list to the party requesting it. This process takes about fifty minutes and, because of the demands of processing this very large file, prevents the employee's computer from doing other tasks. That is the uncontested summary judgment evidence in this case. The voter list law rationally serves an important state administrative interest by reducing the burdens on the secretary that come with complying with a request for a free copy of the list.

Weighing the *Anderson-Burdick* factors

The third and final step of the *Anderson-Burdick* balancing test requires us to "weigh" the above "factors"—the character and magnitude of the asserted injury to the Libertarian Party's constitutional rights weighed against the state's regulatory justifications—"to determine if the statute is constitutional." *Swanson*, 490 F.3d at 902–03. When a state ballot access law imposes only "reasonable, nondiscriminatory restrictions" upon a plaintiff's First and Fourteenth Amendment rights, a state's "important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons*, 520 U.S. at 358 (cleaned up); *Swanson*, 490 F.3d at 903. That is the case here. As we explained above, Alabama's voter list law doesn't

severely burden the Party's rights, and the secretary has offered important, nondiscriminatory reasons justifying the line the state has drawn—complying with the ballot access requirements—for a free copy of the voter list. Thus, "Alabama has articulated important interests justifying its reasonable, nondiscriminatory [voter list] access restrictions," and the voter list law "does not abridge [the Party's] First and Fourteenth Amendment rights." *See Swanson*, 490 F.3d at 912.

The Party argues that the district court erred by failing to consider, "in combination," "all of Alabama's onerous ballot access burdens on minor parties." In other words, the Party maintains that the district court should have examined the "cumulative burdens" imposed on it by the state's voter list law and the ballot access laws. This argument fails for two reasons.

First, in its opposition to summary judgment, the Party didn't argue that the district court should conduct a cumulative analysis. The Party likewise didn't argue that, even if sections 174-33(a)(10) and 17-4-38(b) were constitutional in a vacuum, their combined effect with Alabama's ballot access laws rendered them a severe burden on the Party's First and Fourteenth Amendments rights. Because the Party failed to present this argument to the district court, it can't raise it now for the first time. *See, e.g., Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) (refusing to consider issue "raised for the first time" on appeal).

Second, unlike the plaintiffs in *Swanson* who challenged two election regulations (the three-percent signature requirement *and* the filing

deadline for ballot access), here the Party challenged only a single election regulation in its complaint: Alabama's voter list law. Having attacked only a single statutory scheme, the Party cannot argue now that the cumulative effect of other, unchallenged ballot access regulations renders the voter list law constitutionally infirm.

Ultimately, the test we apply here—the test the parties have asked us to apply—"is one of 'reasonableness, i.e., whether the statute unreasonably encroaches on ballot access.'" *Swanson*, 490 F.3d at 904 (quoting *Libertarian Party*, 710 F.2d at 793). Alabama has passed the test. Because the *Anderson-Burdick* weighing comes out in the state's favor, the voter list law does not violate the First Amendment or the Equal Protection Clause of the Fourteenth Amendment.

Socialist Workers Party *Does Not Control*

Finally, the Party argues that the Supreme Court's summary affirmance in *Rockefeller v. Socialist Workers Party*, 400 U.S. 806 (1970) is "dispositive" and "binding" precedent that resolves this case. Not so. *Socialist Workers Party* involved different facts and a different state's voter list law. Because that case didn't involve the precise issue that we address here—whether a voter list law like Alabama's violates the First and Fourteenth Amendments under the *Anderson-Burdick* balancing test—the Supreme Court's summary affirmance isn't dispositive or binding.

In *Socialist Workers Party v. Rockefeller*, a three-judge district court panel heard challenges to New York's election laws brought by two "minority parties." 314 F. Supp. 984, 986–88 (S.D.N.Y. 1970).

One law provided that a voter list would "be sent free of charge to those parties which polled more than 50,000 votes in the last gubernatorial election." *Id.* at 987. Political parties that didn't meet this threshold had to pay for the list. *Id.* at 995. This law was unconstitutional, the three-judge panel held, because it "den[ied] independent or minority parties *which have succeeded in gaining a position on the ballot* but which have not polled 50,000 votes for governor in the last preceding gubernatorial election an equal opportunity to win the votes of the electorate." *Id.* (emphasis added). The Supreme Court summarily affirmed. *Socialist Workers Party*, 400 U.S. at 806.

We aren't bound by this summary affirmance. Although the "Supreme Court's summary dispositions are of course entitled to full precedential respect," *Picou v. Gillum*, 874 F.2d 1519, 1521 n.3 (11th Cir. 1989), the "Court has cautioned that we must not overread its summary affirmances," *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1267 (11th Cir. 2020). "[T]he precedential effect of a summary affirmance extends no further than the precise issues presented and necessarily decided by those actions. A summary disposition affirms only the judgment of the court below, and no more may be read into [the Supreme Court's] action than was essential to sustain that judgment." *Id.* (quoting *Anderson*, 460 U.S. at 784–85 n.5).

The precise issue in *Socialist Workers Party* that the Supreme Court summarily affirmed is different than the issue here. The voter list law in that case was unconstitutional because it denied minor political parties free access to the voter list even if they had "succeeded in gaining a position on the

ballot." 314 F. Supp. at 995. But here, "each" political party in Alabama with ballot access gets a copy of the voter list for free. Ala. Code. § 17-4-33(a)(10). Thus, the New York law imposed burdens on political parties beyond simply obtaining ballot access. The Alabama law does not impose this burden; rather, it gives "each" political party with ballot access—major and minor alike—a free copy of the voter list. *Id.*

In other words, Alabama's voter list law gives minor parties "the same benefit granted to major political parties." *Socialist Workers Party*, 314 F. Supp. at 996. Because *Socialist Workers Party* does not involve the "precise issues presented" here, it doesn't control this case. *See Jacobson*, 974 F.3d at 1267. We decline to read more into *Socialist Workers Party* than what "was essential to sustain that judgment." *Anderson*, 460 U.S. at 784 n.5.

CONCLUSION

The district court did not err in its application of the *Anderson-Burdick* test to the Libertarian Party's challenge to Alabama's voter list law. The voter list law did not discriminate against the Party or severely burden its constitutional rights. It rationally served two categories of important state interests—Alabama's interest in supporting political parties with a modicum of popular support and its administrative interests. And the non-severe burdens on the Party's rights did not outweigh the state's regulatory interests. The district court's summary judgment for the secretary is therefore **AFFIRMED.**

[ENTERED AUGUST 5, 2020]

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

CIV. ACT. NO. 2:1 9-cv-69-ECM [WO]

LIBERTARIAN PARTY OF ALABAMA)
)
Plaintiff,)
)
v.)
)
JOHN HAROLD MERRILL,)
Secretary of State for the State of Alabama,)
)
Defendant.)

MEMORANDUM OPINION AND ORDER

This case is before the Court on objections to the expert reports of William Redpath and Richard Winger (doc. 18), a motion for summary judgment (doc. 29), a *Daubert* motion to exclude the testimony of William Redpath (doc. 31), and a *Daubert* motion to exclude the testimony of Richard Winger (doc. 32), all filed by Defendant John Merrill, Secretary of State for the State of Alabama ("the Secretary").

The Libertarian Party of Alabama ("the Libertarian Party") filed this action challenging the State of Alabama's law pursuant to which some political parties obtain a free copy of the Alabama voter registration list while other parties are charged a fee per voter record. The Libertarian Party argues that this law violates its right to equal protection under the Fourteenth Amendment and its

free speech rights under the First Amendment of the United States Constitution.[1]

The Secretary has objected to and moved to exclude the expert testimony offered by the Libertarian Party in opposition to the motion for summary judgment.

Upon consideration of all of the submissions of the parties, and for reasons to be discussed, the Secretary's motion for summary judgment is due to be GRANTED, the objections are due to be OVERRULED as moot, and the motions to exclude are due to be DENIED as moot.[2]

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[1] At various points in its opposition to summary judgment, *see e.g.* (doc. 38 at 5), the Libertarian Party urges this Court to deny the Secretary's motion and to grant summary judgment on behalf of the Libertarian Party pursuant to Rule 56(f)(1) of the *Federal Rules of Civil Procedure*. This request is not a properly filed cross-motion for summary judgment and the Court does not find warranted a *sua sponte* grant of summary judgment in the Plaintiff's favor. *See Artistic Entm't, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1202 (11th Cir. 2003).

[2] In response to the motion to exclude the testimony of William Redpath, the Libertarian Party states that it withdraws the designation of Redpath as an expert and offers his declaration simply as lay opinion. (Doc. 39 at 1). Therefore, the motion to exclude his testimony as expert testimony is due to be DENIED as moot and the objection to his expert report is due to be OVERRULED as moot. With regard to the objections to the report of Richard Winger and the motion to exclude Richard Winger's testimony, because, as will be discussed below, the Court finds summary judgment is due to be GRANTED even considering this evidence, the objection is due to be OVERRULED as moot and the motion DENIED as moot.

I. JURISDICTION

The Court exercises subject matter jurisdiction over this dispute pursuant to 28 U.S.C. § 1331. Personal jurisdiction and venue are uncontested.

II. SUMMARY JUDGMENT STANDARD

"Summary judgment is proper if the evidence shows 'that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Hornsby-Culpepper v. Ware*, 906 F.3d 1302, 1311 (11th Cir. 2018) (quoting FED.R.CIV.P. 56(a)). "[A] court generally must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Fla. Int'l Univ. Bd. of Trs. v. Fla. Nat'l Univ., Inc.*, 830 F.3d 1242, 1252 (11th Cir. 2016). However, "conclusory allegations without specific supporting facts have no probative value." *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 924–25 (11th Cir. 2018). If the record, taken as a whole, "could not lead a rational trier of fact to find for the non-moving party," then there is no genuine dispute as to any material fact. *Hornsby-Culpepper*, 906 F.3d at 1311 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

The movant bears the initial burden of demonstrating that there is no genuine dispute as to any material fact, and the movant must identify the portions of the record which support this proposition. *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The movant may carry this burden "by demonstrating that the nonmoving party has failed to present sufficient evidence to support an essential element of the case." *Id.* The burden then shifts to the non-moving party to establish, by going beyond

the pleadings, that a genuine issue of material fact exists. *Id.* at 1311–12.

III. FACTS

The facts, viewed in a light most favorable to the non-movant, are as follows:

Pursuant to state law, Alabama maintains a computerized voter registration list that contains the name, address, voting location, and voting history of every legally registered voter in the state. ALA. CODE § 17-4-33.

Alabama Code section 17-4-33(10) provides

> Following each state and county election, the Secretary of State shall provide one electronic copy of the computerized voter list free of charge to each political party that satisfied the ballot access requirements for that election. The electronic copy of the computerized voter list shall be provided within 30 days of the certification of the election or upon the completion of the election vote history update following the election, whichever comes first. In addition, upon written request from the chair of a political party, the Secretary of State shall furnish up to two additional electronic copies of the computerized voter file during each calendar year to each political party that satisfied the ballot access requirements during the last statewide election held prior to that calendar year. The electronic copies provided pursuant to this section shall contain the full, editable data as it exists in the computerized voter list maintained by the Secretary of State.

ALA. CODE § 17-4-33 (10).

A political party may attain ballot access by either (1) performance or (2) petition. A party may qualify if it achieved at least 20% of the entire vote cast for a state officer in the prior General Election. ALA. CODE § 17-13-40. This qualification is only good for the next election, so a party must repeatedly get 20% of the vote for at least one state officer to qualify under § 17-13-40 for the next cycle. Or, if a party does not secure 20% of the vote for a state official, it can gain ballot access by filing a petition by the date of the first primary election for the next election with signatures of at least 3% of the qualified voters who cast a ballot for the governor in the last election. ALA. CODE § 17-6-22(a). A party which qualifies for ballot access under either method can receive the voter registration list without cost. ALA. CODE § 17-4-33 (10).

Entities which do not qualify for a free voter registration list can purchase the Alabama voter registration list by paying $.01 per voter record, which in 2020 means a cost of $35,912.76 for the records of all active and inactive registered voters in Alabama. (Doc. 28-3 ¶¶9 & 38).

In 2000, the Libertarian Party achieved statewide ballot access and fielded candidates in the 2002 election. (Doc. 28-1 at 26). It is undisputed that the Libertarian Party gained ballot access for the 2002 election because one candidate received more than 20% of the vote in a statewide race. (Doc. 1 ¶3). The Libertarian Party candidates won an average of 2.3 percent of the vote for statewide offices in 2002. (Doc. 28-1 at 26). The Libertarian Party lost statewide ballot access in 2002 and, therefore, no

longer qualified for a free voter registration list. Currently, the Libertarian Party does not qualify for statewide ballot access and is not entitled a free copy of the statewide voter registration list. The Libertarian Party provides expert and lay opinion evidence that voter registration lists are important to it in the ballot access petitioning process, the education and advocacy process, and for campaigning and getting votes. (Doc. 38-5 & 38-6).[3]

The Libertarian Party also has qualified to receive voter registration lists for local races. In 2019, the Libertarian Party was provided the copy of voter registration lists based on the ballot access of Libertarian Party candidates in 2018, including Elijah Boyd, Alabama House District 10 (doc. 28-3 ¶31); Matt Shelby, Alabama House District 96 (doc. 28-3 ¶31); Frank Dillman, Macon County Commission, District 4 (doc. 28-3 ¶32); and Michael Reeves, Baldwin County Board of Education, District 2 (doc. 28-3 ¶32). Other minor parties also have qualified for ballot access, including the Independence Party which qualified a candidate for the Alabama House of Representatives in 2014 (doc. 28-9) and the Constitution Party which qualified a candidate for the United States House of Representatives and one for the Alabama House in 2010 (doc. 28-8).

In addition to political parties which satisfy the ballot access requirements, the Alabama

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[3] The Libertarian Party cites this evidence without citation to a specific page. (Doc. 38 at 12, 20- 22). The Court has considered the documents, even though its Uniform Scheduling Order requires page-specific citations (doc. 14 at 2), but has not cited specific pages as none were cited to the Court.

Administrative Office of Courts, chiefs of elections of other states, as well as others, are provided free computerized lists. (Doc. 28-3 at 4-5).

When requests for a voter registration list are made to the online portal of the Secretary's office, the lists are automatically generated, but the online portal is not designed to provide free lists, so requests for free copies of voter registration lists must be processed by Clay Helms ("Helms"), Deputy Chief of Staff and Director of Elections for the Secretary of State of Alabama, or an employee in the Secretary of State's office. (Doc. 28-3 ¶17). Helms states in a declaration that if voter registration lists were provided to more entities for free, it could become difficult for the Secretary of State's office to keep up with demand and to perform other elections responsibilities. (Doc. 28-3 ¶21).

The Libertarian Party states that it is undisputed that the lists are kept electronically and that a data file is sent to the Electronic Registration Information Center on a monthly basis. (Doc. 28-2 at 149).

IV. DISCUSSION

The Libertarian Party seeks a declaratory judgment and injunctive relief for a claimed violation of its First and Fourteenth Amendment rights. It is the Libertarian Party's position that Alabama law, which only allows political entities to receive the statewide voter registration list without charge if they qualify for ballot access, violates its constitutional rights. In moving for summary judgment, the Secretary maintains that the Alabama law at issue is constitutional because the burden on the Libertarian Party's rights is minimal and the State's interests are sufficiently strong to justify the

burden imposed. (Doc. 30 at 41). In resolving the pending motion for summary judgment, this Court turns first to the analytical test which applies to the constitutional challenge and then the analysis under that test.

A. Test for the First and Fourteenth Amendment Challenges

The parties both take the position (doc. 30 at 16 & doc. 38 at 32) that even though this case does not present a challenge to a ballot access law, in evaluating the constitutionality of the challenged law, the Court should apply the *Anderson-Burdick* test generally applied in ballot access cases. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). This Court agrees. *See Libertarian Party of Alabama v. Merrill*, 2019 WL 4072355, at *2 (M.D. Ala. 2019) (denying motion to dismiss); *see also Fusaro v. Cogan,* 930 F.3d 241, 257 (4th Cir. 2019)(*Fusaro I*)(applying *Anderson-Burdick* to a First Amendment challenge to denial of access to a voter registration list).

Pursuant to the *Anderson-Burdick* test, courts "weigh the character and magnitude of the asserted First and Fourteenth Amendment injury against the state's proffered justifications for the burdens imposed by the rule, taking into consideration the extent to which those justifications require the burden to the plaintiffs' rights." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019). Regulations that impose "severe burdens" on a plaintiff's rights "must be narrowly tailored and advance a compelling state interest." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358

(1997). Regulations that impose lesser burdens trigger "less exacting review" and a state's "important regulatory interests" will usually be enough to justify "reasonable, nondiscriminatory restrictions." *Burdick*, 504 U.S. at 434. The Supreme Court has explained that "no bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Timmons*, 520 U.S. at 359; *see also Storer v. Brown*, 415 U.S. 724, 730 (1974) ("no litmus-paper test . . . separate[es] those restrictions that are valid from those that are invidious . . . The rule is not self-executing and is no substitute for the hard judgments that must be made"). The more a challenged law burdens a right, the stricter the scrutiny applied to that law. *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1319.

Under *Anderson-Burdick*, therefore, a court must (1) consider the character and magnitude of the injury to First and Fourteenth Amendment rights the plaintiff identifies, identify and evaluate the precise interests put forward by the State as justifications for the burden on the plaintiff's rights, and (3) weigh all of these factors and decide whether the challenged provision is unconstitutional. *Cowen v. Buckely,* 960 F.3d 1339, 1342 (11th Cir. 2020) (quotations and citations omitted). In its analysis, a court must both "determine the legitimacy and strength of each of [the State's] interests" and "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*

B. Application of *Anderson-Burdick* Test

1. The Character and Magnitude of the Injury to First and Fourteenth Amendment Rights

The Libertarian Party argues that the Secretary's actions in this case constitute a severe burden on First and Fourteenth Amendment rights because the requirement of ballot access for a free voter registration list discriminates against minor political parties and, therefore, is outside of the realm of regulations that might justify lessened scrutiny. In so arguing, the Libertarian Party relies on multiple cases from outside of this circuit. None of those cases are binding on this Court.[4] This Court also does not find the cases persuasive on the issue of the magnitude of the burden placed on the plaintiffs' rights because the statutes at issue in those cases are significantly distinguishable from the statute challenged in this case.[5]

For example, in *Libertarian Party of Indiana v. Marion Cty. Bd. of Voter Registration*, 778 F. Supp.

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[4] One of the cases relied on is a three-judge court case affirmed by the United States Supreme Court, but the Supreme Court's decision is a summary affirmance. *See Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 995–96 (S.D. N.Y. 1970), *aff'd*, 400 U.S. 806 (1970); *see also Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979)(stating "the precedential effect of a summary affirmance can extend no farther than 'the precise issues presented and necessarily decided by those actions.'").

[5] The similarity of statute is also an important consideration because a "court is no more free to impose the legislative judgments of other states on a sister state than it is free to substitute its own judgment for that of the state legislature." *Libertarian Party of Fla. v. State of Fla.*, 710 F.2d 790, 794 (11th Cir. 1983).

1458, 1459 (S.D. Ind. 1991), the court found unconstitutional a voter registration list statute which provided that a "copy of the list shall be furnished to each of the county chairmen of the major political parties of the county as soon as the lists are prepared," and the major political parties were defined as the Democratic and Republican parties. Similarly, in a case challenging a Michigan law, the unconstitutional statute provided only "participating parties" with party preference information, and the state used a measurement that is stricter than Alabama's statute in defining "participating parties." *See Green Party of Mich. v. Land*, 541 F. Supp. 2d 912, 914 (E.D. Mich. 2008)("participating parties" were only those receiving 20% of the presidential vote which no party other than the Democratic and Republican parties had achieved since 1912). In *Socialist Workers Party*, the court found a state statute unconstitutional which denied minor parties access to voter registration lists, but in doing so, pointed out that "plaintiffs have acknowledged that these lists should not be furnished indiscriminately at government expense to anyone requesting them. What they seek bestowed upon any party which complies with State requirements for placing its candidates before the electorate, is the same benefit granted to major political parties of not having to purchase such lists at considerable expense." 314 F. Supp. 984, 996.

Under Alabama law, a political party which qualifies for ballot access is entitled to a free copy of the voter registration list. ALA. CODE § 17-4-33(10). Therefore, any party which complies with State requirements for placing its candidates before the electorate is given the same benefit of not having to

purchase the voter registration list. Consequently, the cases from other jurisdictions cited by the Libertarian Party do not establish that the magnitude of the burden placed by the Alabama statute is severe.

Cases binding on this Court have identified a "severe" burden as an "insurmountable" one where the state operates to "freeze the status quo" by completely preventing minor party access to the ballot. *See Jenness v. Fortson*, 403 U.S. 431, 438 (1971); *see also New All. Party of Alabama v. Hand*, 933 F.2d 1568, 1576 (11th Cir. 1991)(characterizing a severe burden as "insurmountable").

Although the Libertarian Party characterizes the Alabama statute as discriminating between major and minor political parties, the statute does not expressly differentiate among minor and major political groups, but requires ballot access of any party to receive the voter registration list without charge. ALA. CODE § 17-4-33(10). Requiring minor party candidates to obtain sufficient numbers for ballot access has been held by the Eleventh Circuit to be a non-discriminatory restriction. *See Swanson v. Worley*, 490 F.3d 894, 904 (11th Cir. 2007)(holding that "Alabama's three-percent signature requirement for ballot access is a reasonable, nondiscriminatory restriction that imposes a minimal burden on plaintiffs' rights."). Therefore, this Court concludes that the Alabama statute which allows for voter registration lists to be provided without charge to parties which achieve ballot access and does not completely prevent minor party access is not "severe." *See Jenness*, 403 U.S. at 438.

Further consideration of the magnitude of the burden on the Libertarian Party's rights under binding caselaw is not straightforward because the rule at issue is a waiver of fee requirement for a voter registration list, not a ballot access requirement. While the Eleventh Circuit does not appear to have addressed a challenge to a denial of access to free registration lists, it has addressed a denial of a waiver of the fee for signature verification needed to gain ballot access. *See Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992).

The state statute at issue in *Fulani* required political candidates to pay supervisors of elections 10 cents per signature to verify the validity of signatures which were needed to gain access to the ballot. *Id.* at 1540. That aspect of the rule was not challenged in *Fulani*, and in fact had been determined by the Eleventh Circuit in an earlier case to be constitutional. *See Libertarian Party of Fla. v. State of Fla.*, 710 F.2d 790, 794-95 (11th Cir. 1983)(stating that the plaintiffs had cited no cases holding that states must provide free access to the ballot in all circumstances and noted that "minor parties must incur some expenses in accumulating the necessary signatures to qualify for the ballot does not constitute an equal protection violation."); *see also Indep. Party of Fla. v. Sec'y, State of Fla.*, 2020 WL 4435080, at *4 (11th Cir. 2020). At issue in *Fulani* was a statutory exemption from the fee requirement that was expressly denied to a "minor party." 973 F.2d at 1545. *Fulani* held that the statute pursuant to which minor parties were expressly prohibited from receiving an exemption from the costs imposed a "significant" burden. *Id.* at 1547. The Alabama statute, by contrast, allows any

party to avoid the fee for the voter registration list if it achieves ballot access. ALA. CODE § 17-4-33 (10). The magnitude of the burden on the plaintiff's rights in *Fulani*, therefore, was greater than that imposed in this case.

In its analysis, the *Fulani* court rejected an argument that is similar to one raised here by the Secretary to demonstrate that the burden on the Libertarian Party is minimal. Specifically, the court rejected an argument that the possibility of a reduction of the verification expense under an alternative method of verification meant that the burden on the plaintiff was not great. *Id.* at 1545. The court reasoned that the very existence of the exemption from the fee was an acknowledgement that the remaining expense under the alternative method was still high. *Id.* Here, the Secretary has argued that although the cost of the statewide voter list is approximately $36,000, the Libertarian Party's burden is not severe because the party is not required to purchase the entire statewide voter registration list. The Secretary points to evidence, for example, that Frank Dillman, a Libertarian Party candidate for the Macon County Commission, District 4, who achieved ballot access in 2018, would only have to pay $178.02 for the Macon County registered voter list in 2020. (Doc. 28-3 at ¶32, 39). The reduced costs pointed to by the Secretary would not reduce the cost for the statewide list, however, and that cost still remains high. *See Fulani*, 973 F.2d at 1545. Furthermore, because limiting the cost inquiry to local races ignores the cost of the statewide list, the Court finds that this argument by the Secretary does not bear on the magnitude of the injury to First and Fourteenth Amendment rights

the plaintiff seeks to vindicate. *See Cowen,* 960 F.3d at 1342.

Of great significance to determining the magnitude of the burden on the Libertarian Party's rights in this case, however, is the Libertarian Party's ability to achieve ballot access. It is undisputed that the Libertarian Party achieved statewide ballot access in 2000.[6] The Eleventh Circuit has concluded in ballot access cases that a party's ability to meet a ballot access rule demonstrates that the state's "requirement does not hinder diligent independent and minor party candidates." *Swanson*, 490 F.3d at 905 (11th Cir. 2007); *see also Libertarian Party of Fla.*, 710 F.2d at 794 (stating that the fact that a minor party qualified its slate of candidates for the ballot shows that that the state law did not "freeze the status quo"). The achievement of ballot access demonstrates that diligent minor parties can obtain ballot access and, therefore, qualify for free voter registration lists. *Swanson*, 490 F.3d at 905.

Because the Alabama statute does not prohibit minor parties from receiving the benefit of a free voter registration list if they achieve ballot access, and because the Libertarian Party has achieved statewide ballot access previously, the magnitude of the burden under Alabama law, while not minimal, is not severe or significant, and strict scrutiny does not apply. *See Stein v. Ala. Sec'y of State,* 774 F.3d 689, 700 (11th Cir. 2014)(stating "[b]ecause

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[6] The Libertarian Party also offers evidence through William Redpath that another minor party achieved ballot access after the Libertarian Party did, but did not put a candidate on the ballot. (Doc. 38-5 at 3).

Plaintiffs have not established a 'severe' burden on any of their constitutional rights, Alabama need only show that its deadline for ballot-access petitions 'rationally serves important state interests.'").

2. Identification and Evaluation of the Precise Interests Put Forward by the Secretary

The Secretary has put forward interests as justifications for the burden imposed by the Alabama rule. This Court must examine whether the requirement of ballot access for a political party to be excused from paying the fee for a voter registration list rationally serves important state interests. *Stein*, 774 F.3d at 700. *Fulani* instructs that a statute regarding a waiver of a fee for information should be analyzed in the same way that a ballot access requirement is analyzed; namely, the burden on constitutional rights imposed by denial of a fee waiver must be justified by a sufficient State interest in the fee waiver. 973 F.3d at 1545-47.

In examining the State's proffered interests, the Court notes that the information at issue in this case is a government record which this Court is persuaded generally requires a degree of deference to the State's decisions regarding dissemination of that information. *See Fusaro I*, 930 F.3d at 252 (noting that because a voter registration list is a government record, "regulations on its distribution reflect policy judgments to which courts must ordinarily defer.").

The Secretary points to several state interests in imposing reasonable restrictions on subsidized access to the voter registration list. The Secretary states that during discovery in this case he identified

lengthy state interests in controlling the registration list which included obligations under state law to provide the lists to entities such as local election officials, but that in addition to those interests, the State has interests in drawing the line for subsidized access to the voter registration lists at political parties that have achieved ballot access. It is the articulation of the latter group of interests, that is, those tied to ballot access as a requirement for political parties to receive a free list, which are significant under *Fulani*.

The Libertarian Party argues, however, that under any standard there is no constitutionally cognizable rational basis for the waiver-of-payment rule. The Libertarian Party argues that the interests the Secretary has identified in his motion for summary judgment are newly articulated solely for purposes of the motion and that the burden is on the Secretary to prove that the source of those interests. (Doc. 38 at 38).[7]

The State's reasons for a rule do not have to be empirically proven. *See Timmons*, 520 U.S. at 364 (stating "[n]or do we require elaborate, empirical verification of the weightiness of the State's asserted justifications."). A court, however, cannot simply apply a "litmus-paper test," and evidence may be

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[7] The Libertarian Party points out that Helms provided a declaration in support of the motion for summary judgment that points to interests not pointed to in his declaration provided with the motion to dismiss. The Libertarian Party does not, however, move to exclude this evidence on any basis. Helms' declarations are consistent as to the administrative interests identified in both. *Compare* (doc. 5-1 ¶¶34,35) & (doc. 28-3 ¶21). Therefore, the Court finds it appropriate to consider Helms' declaration offered in support of summary judgment.

needed to consider the extent to which proffered interests make it necessary to burden the plaintiff's rights. *Storer*, 415 U.S. at 730. But, there is no requirement that the State prove its reliance on the reasons pointed to by the State. *See Democratic Exec. Comm. of Fla.*, 915 F.3d at 1321 (examining "identified interests" to determine whether they justify the burden on the plaintiff's rights).

The interests the Secretary points to in drawing the line at ballot access for free voter registration lists include a proprietary interest in receiving compensation for taxpayers, distinguishing parties with a modicum of support before turning over propriety information, administrative ease of determining which groups are entitled to the list, maintaining stability of the political system by only providing lists to parties with support in the electorate, not subsidizing entities that consider themselves to be political parties but are more like interest groups, limiting demands on the Elections Divisions staff, increasing the number of entitles required to pay for proprietary information, not subsidizing groups engaged in political satire, and not facilitating fraud. (Doc. 30 at 29-41).[8] This Court will examine these interests in two major categories: modicum of support in the public and administrative interests.[9] *See Democratic Exec. Comm. of Fla.*, 915

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[8] As to the proprietary interest in receiving compensation for taxpayers and the related interest of increasing the number of entities required to pay for proprietary information, the Court concludes that it has not been shown why providing lists for free to those with ballot access is necessary to achieve those interests. *Fulani*. 973 F.2d at 1547.

[9] Stabilizing the political system, not subsidizing interest groups, preventing fraud, and not subsidizing satire are interests subsumed in the interest in supporting parties with a

F.3d at 1321 (identifying general categories of state interests).

a. Modicum of Support in the Public

The Secretary has pointed to an interest in supporting parties with a modicum of support in the public through ballot access, arguing that the State has an interest in providing the lists to parties which achieve ballot access because the State has an interest in supporting the political parties which perform important public functions of nominating candidates, contesting elections, and putting forward a platform of proposed policies for consideration by voters. (Doc. 28-1 at 6). The Secretary has presented expert evidence regarding political groups which have held meetings and sponsored candidates in state elections to show that there are numerous groups which consider themselves to be political entities. (Doc. 28-1 at 16-17). The Secretary explains that the line-drawing at ballot access does not completely insulate major parties, but allows taxpayer funds to pay for access to the voter registration list only if a party has shown sufficient support in the public.

The Libertarian Party does not appear to argue that voter registration lists must be given without

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modicum of support in the public to the extent that the interest draws a distinction between political entities and other groups. (Doc. 28-2 at 145) (stating "[d]rawing a line at ballot access distinguishes political parties with a significant modicum of support among the electorate and all other entities— whether it be an organization that claims to be a political party but lacks ballot access or another politically driven organization or any other kind of enterprise—before turning over valuable State resources in the form of proprietary information without compensation for the taxpayers.").

charge to every entity requesting a list. (Doc. 38 at 27 & n.11) (stating that the Libertarian Party "is not claiming every requestor must get a list for free - that might be fair; but it is beyond this case."). The Libertarian Party instead argues that even if there were evidence that multiple minor parties wanted copies of the voter registration lists, none of those parties are as established as the Libertarian Party so as to require any meaningful line drawing. (Doc. 38 at 38).

The Court finds no authority for the proposition that a state is required to give, at taxpayers' expense, a voter registration list to every entity that calls itself a political party. Instead, even in the cases relied on by the Libertarian Party to support its claims, the courts have acknowledged that states are allowed to draw a line to determine which entities receive a free list. *See Socialist Workers Party*, 314 F. Supp. at 996 (noting that "plaintiffs have acknowledged that these lists should not be furnished indiscriminately at government expense to anyone requesting them); *Libertarian Party of Indiana*, 778 F. Supp. at 1464 (stating "the state has an interest in not being required to distribute Registration Lists to everyone who might request them.").

Line-drawing for access to voter registration lists by using the ballot access rule is like the line-drawing the State engages in by setting a deadline for submitting the necessary signatures or in setting a percentage of votes for ballot access by petition. "Obviously any percentage or numerical requirement is necessarily arbitrary." *Libertarian Party of Fla.*., 710 F.2d at 793 (quotation and citation omitted). The issue is not the fact that a line has been drawn, but

whether the State can show that its line-drawing adequately serves the State's interest. *Id.* (stating that "the test is whether the legislative requirement is a rational way to meet this compelling state interest."); *see also Stein,* 774 F.3d at 700 (stating that a filing "deadline must rationally serves its administrative interests."). The test is one of reasonableness. *Libertarian Party of Fla.*, 710 F.2d at 793. Consequently, reasonable ballot access rules requiring a certain number of signatures by a certain date have been found constitutional. *See Stein,* 774 F.3d at 701.

One of the interests which ballot access rules serve is an interest in only putting parties on the ballot which have a modicum of support in the public. *Id.* at 700 (stating "it is beyond dispute that Alabama has an important interest in requiring minor parties to demonstrate some 'modicum of support' before they are entitled to a spot on the ballot.")(citation omitted). Modicum of support in the public, in the context of ballot access, has been determined to be an important interest because the state can minimize confusion, deception, and frustration of the democratic process by limiting the people listed on a ballot to those with public support. *Swanson*, 490 F.3d at 903. The same reasoning underlying the recognition of modicum of support in the public as an interest supporting ballot access rules also applies to the rule allowing for free registration lists upon a showing of a modicum of support through ballot access.[10]

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[10] The line drawn at ballot access to show a modicum of support distinguishes this case from the interest alluded to in *Fulani*,

Upon remand from the Fourth Circuit, the district court in *Fusaro v. Howard*, 2020 WL 3971767, at *20 (D. Md. 2020)(*Fusaro II*), in a case discussed in supplemental briefing in this case and persuasive in its analysis of the State's interest, examined the State's articulated interest in a statute which limited access to voter registration lists to entities using the lists for electoral purposes. The court concluded that a "modest burden" advanced the interest the State had identified in promoting voter registration while also minimizing abuse of the list. *Id.*

In this case, the Secretary's interest in supporting entities with a modicum of support in the public is an important interest like the interest recognized in *Fusaro II*. The State of Alabama has determined that important interests are served by providing voter registration lists without charge to political entities, (doc. 28-2 at 144), but a line has been drawn at political entities which achieve ballot access. Alabama's interests in supporting political entities which perform important public functions, in stabilizing the political system, in limiting access to the list by interest groups, and preventing access by groups intent on fraud, (doc. 28-2 at 144-45), are important interests rationally served by limiting entities which receive voters' personal information without charge by drawing a line at entities with a modicum of support in the electorate. *Stein*, 774 F.3d at 700.

Additionally, the past success of the Libertarian Party in achieving ballot access, which has been a

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where the court rejected an argument that the ability to pay money is an adequate measure of support. 973 F.2d at 1547.

factor in the Eleventh Circuit's approval of the rules regarding ballot access in Alabama, *see Swanson*, 490 F.3d at 905, also demonstrates that the law providing free access to the voter registration lists by using the same ballot access rule serves recognized, important state interests in a reasonable way.

The Court notes that the Libertarian Party has argued that the ballot access standard is unfair because the voter registration lists are needed to obtain the signatures required for ballot access in the first place. The fact that the Libertarian Party has achieved statewide ballot access in the past, however, undermines that argument. Furthermore, the fact that the Libertarian Party may have a more difficult time obtaining ballot access than the Democratic or Republican Party is not a basis for rejecting the State's rule as unreasonable because, as the Supreme Court has explained, the states have "a strong interest in the stability of their political systems" which they can choose to advance "through election regulations that may, in practice, favor the traditional two-party system," as long as they do not "completely insulate the two-party system from minor parties' or independent candidates' competition and influence." *Timmons*, 520 U.S. at 367.

b. Administrative Interests

The Secretary states that determining which parties can have access to a free voter registration list by drawing a line at ballot access is administratively useful both because the line is objective and does not require additional investigation and also because it limits the demands on elections staff. The Secretary explains that ballot

access is something state and county election officials already determine in order to print ballots, so drawing the line there for free registration lists requires no new investigation into the legitimacy of an organization requesting a list. The Secretary points to evidence that some smaller parties, such as the Constitution Party, have qualified for ballot access for particular races (doc. 28- 8), and argues that it makes sense to draw the line for free voter registration lists to be provided to those parties in those races.

The Secretary also provides evidence that requests for voter registration lists at no charge cannot be processed through the Secretary's on-line portal, but must be processed by Helms, Deputy Chief of Staff and Director of Elections, or another employee in the Secretary's office. (Doc. 28-3 ¶17). According to Helms, if the voter registration list were provided to more entities for free, it could become difficult for the Elections Division of the Secretary's office to keep up with that demand as well as meet other elections responsibilities. (Doc. 28-3 ¶21).

The Libertarian Party maintains that any claim of hardship or undue burden is undercut by the fact that the Secretary provides a free statewide voter registration list each month through an electronic format so that the only extra time required to provide the same list to the Libertarian Party would be the amount of time required to send an additional e- mail.

The administrative burden identified by the Secretary is in determining to whom the information should be provided without charge. The evidence

pointed to demonstrates that relying on ballot access rules to make that determination would provide an objective, defined standard that has been held to be constitutional against other challenges. *See Swanson*, 490 F.3d at 905. Drawing the line at ballot access also would not require substantial additional time on the part of elections officials to determine which entities are entitled to the list without charge, which advances a regulatory interest. *See, e.g., Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016)(identifying as important regulatory interests "easing administrative burdens on boards of elections."). Therefore, because Alabama already draws a line with its ballot access rules in determining which parties are placed on the ballot, relying on that same line in determining which parties receive a free voter registration list rationally serves administrative interests.

3. Weighing the Interests

After considering the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the Libertarian Party seeks to vindicate, and the legitimacy and strength of the State's interests and the extent to which those interests make it necessary to burden the plaintiff's rights, this Court must weigh those factors to determine whether the challenged rule is constitutional. *Anderson*, 460 U.S. at 789.

In this case, the burden on Libertarian Party's Fourteenth and First Amendment rights imposed by the ballot access requirement for obtaining a free voter registration list is not minimal, but also is neither severe nor significant. Weighing that burden

against the State's important interest in providing the list to political entities with a modicum of support in the public and its interest in administrative ease, this Court finds that the requirement that political entities be provided the voter registration list without charge only if they qualify for ballot access under the State's ballot access rules rationally serves important State interests and is not unconstitutionally burdensome. The motion for summary judgment, therefore, is due to be GRANTED.

V. CONCLUSION

For the reasons discussed, it is hereby ORDERED as follows:

1. The Motion for Summary Judgment (doc. 29) is GRANTED and final judgment will be entered in favor of the Defendant and against the Plaintiff.
2. The objections to the expert reports of William Redpath and Richard Winger (doc. 18) are OVERRULED as moot.
3. The Daubert Motion to Exclude the Testimony of William Redpath (doc. 31), and the Daubert Motion to Exclude the Testimony of Richard Winger (doc. 32) are DENIED as moot.

A separate Final Judgment will be entered in accordance with this Memorandum Opinion and Order.

DONE this 5th day of August, 2020.

/s/ Emily C. Marks
EMILY C. MARKS
CHIEF UNITED STATES DISTRICT JUDGE