No. 18-___

IN THE

Supreme Court of the United States

JAMES HALL,

Petitioner,

v.

SECRETARY, STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Jeffrey L. Fisher
Brian H. Fletcher
Pamela S. Karlan
Leah M. Litman
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

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

QUESTION PRESENTED

This Court has long recognized an exception to the mootness doctrine for a controversy that is "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). The courts of appeals are split over how this exception applies to cases involving elections. This case presents the following question:

Under what circumstances can a candidate continue to challenge a ballot-access rule after the election over which he originally sued has passed?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT CONSTITUTIONAL PROVISION 1
INTRODUCTION 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 11
I. There is a three-way split among the courts of appeals over the question presented. 11
II. It is important that this Court resolve the question presented. 19
III. This case is the right vehicle for resolving the question presented. 23
IV. The Eleventh Circuit's decision is wrong. 24
A. The Eleventh Circuit misconstrues this Court's precedent governing the "capable of repetition" requirement. 25
B. The class action device cannot solve the mootness problem the Eleventh Circuit's decision creates. 31
CONCLUSION 33
APPENDIX
Appendix A, Opinion (published) of the U.S. Court of Appeals for the Eleventh Circuit, dated August 29, 2018 ..... 1a

Appendix B, Opinion (published) of the U.S. District Court, Middle District of Alabama, dated September 30, 2016..... 45a

Appendix C, Memorandum Opinion and Order (published) of the U.S. District Court, Middle District of Alabama, dated March 3, 2014..... 89a

Appendix D, Order of the U.S. Court of Appeals for the Eleventh Circuit, denying petition for rehearing and rehearing en banc, dated December 13, 2018 ..... 104a

TABLE OF AUTHORITIES

Page(s)

Cases

ACLU of Ohio, Inc. v. Taft,
385 F.3d 641 (6th Cir. 2004) 31

Acosta v. Democratic City Comm.,
288 F. Supp. 3d 597 (E.D. Pa. 2018)..... 31

Anderson v. Celebrezze,
460 U.S. 780 (1983) 20, 21, 28

Barr v. Galvin,
626 F.3d 99 (1st Cir. 2010)..... 16, 18

Belitskus v. Pizzingrilli,
343 F.3d 632 (3d Cir. 2003)..... 16, 22

Burdick v. Takushi,
504 U.S. 428 (1992) 31

Caruso v. Yamhill Cty.,
422 F.3d 848 (9th Cir. 2005) 14

Constitution Party of Mo. v. St. Louis Cty.,
No. 4:15-CV-207 RLW, 2015 WL 3908377
(E.D. Mo. June 25, 2015)..... 31

Ctr. for Individual Freedom v. Carmouche,
449 F.3d 655 (5th Cir. 2006) 13

Cty. of Riverside v. McLaughlin,
500 U.S. 44 (1991) 32

Davis v. FEC,
554 U.S. 724 (2008) 2, 19, 27

Dekom v. New York,
No. 12-CV-1318 (JS)(ARL), 2013 WL
3095010 (E.D.N.Y. June 18, 2013), *aff'd*,
583 Fed. Appx. 15 (2d Cir. 2014) 15

Dennin v. Conn. Interscholastic Athletic Conference, Inc.,
94 F.3d 96 (2d Cir. 1996) 15

Dunn v. Blumstein,
405 U.S. 330 (1972) 14, 25

FEC v. Wisc. Right to Life, Inc.,
551 U.S. 449 (2007) 19, 27

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000) 22

Gerstein v. Pugh,
420 U.S. 103 (1975) 32, 33

Gill v. Galvin,
No. 16-11720-DJC, 2017 WL 2221185
(D. Mass. May 19, 2017) 31

Honig v. Doe,
484 U.S. 305 (1988) 12, 19, 28

Int'l Org. of Masters, Mates & Pilots v. Brown,
498 U.S. 466 (1991) 17

Krislov v. Rednour,
226 F.3d 851 (7th Cir. 2000) 17

Kucinich v. Tex. Democratic Party,
563 F.3d 161 (5th Cir. 2009) 2, 8, 12, 19

LaRouche v. Fowler,
152 F.3d 974 (D.C. Cir. 1998) 18

Lawrence v. Blackwell,
430 F.3d 368 (6th Cir. 2005) 8, 13, 17

Libertarian Party of Ill. v. Ill. State Bd. of Elections,
164 F. Supp. 3d 1023 (N.D. Ill. 2016), *aff'd sub nom. Libertarian Party of Ill. v. Scholz*,
872 F.3d 518 (7th Cir. 2017) 22

Libertarian Party of N.H. v. Gardner,
843 F.3d 20 (1st Cir. 2016) 16

Lux v. Judd,
651 F.3d 396 (4th Cir. 2011) 16

Majors v. Abell,
317 F.3d 719 (7th Cir. 2003) 17

McLain v. Meier,
637 F.2d 1159 (8th Cir. 1980) 17

Merle v. United States,
351 F.3d 92 (3d Cir. 2003) 16

Meyer v. Grant,
486 U.S. 414 (1988) 26, 27

Montano v. Lefkowitz,
575 F.2d 378 (2d Cir. 1978) 29

Moore v. Hosemann,
591 F.3d 741 (5th Cir. 2009) 13

Moore v. Ogilvie,
394 U.S. 814 (1969) 25

N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake,
524 F.3d 427 (4th Cir. 2008) 17

Norman v. Reed,
502 U.S. 279 (1992) 27

Parker v. Winter,
645 Fed. Appx. 632 (10th Cir. 2016) 17

Pearlman v. Vigil-Giron,
71 Fed. Appx. 11 (10th Cir. 2003) 17

Purcell v. Gonzalez,
549 U.S. 1 (2006) (per curiam) 5, 21, 22

Richardson v. Ramirez,
418 U.S. 24 (1974) 25

Rosario v. Rockefeller,
410 U.S. 752 (1973) 25

S. Pac. Terminal Co. v. ICC,
219 U.S. 498 (1911) 2

Schaefer v. Townsend,
215 F.3d 1031 (9th Cir. 2000) .....*passim*

Sloan v. Caruso,
566 Fed. Appx. 98 (2d Cir. 2014) 15

Sosna v. Iowa,
419 U.S. 393 (1975) 32

Stop Reckless Econ. Instability Caused by Democrats v. FEC,
814 F.3d 221 (4th Cir. 2016) 11, 19

Storer v. Brown,
415 U.S. 724 (1974) .....*passim*

U.S. Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 32, 33

United States v. Sanchez-Gomez,
138 S. Ct. 1532 (2018) 2

Van Bergen v. Minnesota,
59 F.3d 1541 (8th Cir. 1995) 17

Van Wie v. Pataki,
267 F.3d 109 (2d Cir. 2001)..... 2, 12, 14, 15

Vote Choice, Inc. v. DiStefano,
4 F.3d 26 (1st Cir. 1993)..... 16

Warner-Jenkinson Co. v. Hilton Davis Chem. Co.,
520 U.S. 17 (1997) 18

Weinstein v. Bradford,
423 U.S. 147 (1975) (per curiam).....*passim*

Williams v. Rhodes,
393 U.S. 23 (1968) 20

Constitutional Provisions

U.S. Const., Art. I, § 2, cl. 2 29
U.S. Const., Art. III, § 2 ..... 1, 13, 24
U.S. Const., amend. I 6, 7, 24
U.S. Const., amend. XIV 7, 24

Statutes

28 U.S.C. § 1254(1) 1
Ala. Code § 17-9-3 ..... 14, 26
Ala. Code § 17-9-3(a)(3) 4

Rules and Regulations

Fed. R. Civ. P. 23 10

Other Authorities

Ballotpedia, *Ballot Access for Major and Minor Party Candidates*, https://bit.ly/2ryJ8op 20
Ballotpedia, *Current Third-Party and Independent State Officeholders*, https://bit.ly/2qNkJuB 21
Ballotpedia, *Special Elections to the 113th United States Congress (2013-2014)*, https://bit.ly/2EveQv5 30
Ballotpedia, *Special Elections to the 114th United States Congress (2015-2016)*, https://bit.ly/2RSsJXn 30

Ballotpedia, *Special Elections to the 115th United States Congress (2017-2018)*, https://bit.ly/2oxVeP2 ..... 28, 29-30

Constitution Party, *Current Officeholders*, https://bit.ly/2BNM4TN 21

Green Party, *Officeholders*, https://bit.ly/2amhdjn 21

Libertarian Party, *Elected Officials*, https://bit.ly/2AJVIVK 21

Moore's Federal Practice (2018) 9

U.S. Courts, Statistics and Reports, *U.S. District Courts–Civil Federal Judicial Caseload Statistics* (Mar. 31, 2018), https://bit.ly/2Cbfonv 30

U.S. House of Representatives, History, Art & Archives, *Party Divisions of the House of Representatives*, https://bit.ly/2GrTNeX 21

U.S. Senate, *Senators Representing Third or Minor Parties*, https://bit.ly/2PcceTT 21

Willging, Thomas E. & Emery G. Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003–2007*, 80 U. Cin. L. Rev. 315 (2011) 32

Wright, Charles A., Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* (3d ed. 2008) 9

Zitter, Jay M., Annotation, *Validity, Construction, and Application of State Statutes Governing "Minor Political Parties,"* 120 A.L.R.5th 1 (2004) 20

PETITION FOR A WRIT OF CERTIORARI

Petitioner James Hall respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a) is published at 902 F.3d 1294. The district court's opinion (Pet. App. 45a) is published at 212 F. Supp. 3d 1148. The district court's memorandum opinion and order denying the State's motion to dismiss (Pet. App. 89a) is published at 999 F. Supp. 2d 1266.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2018. Pet. App. 1a. A timely petition for rehearing and rehearing en banc was denied on December 13, 2018. *Id.* 104a. On March 8, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including May 12, 2019. *See* 18A909. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

Article III, Section 2 of the United States Constitution provides in pertinent part: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, [and] the laws of the United States . . . ."

---

[1] Respondent in this case is the Secretary of State of Alabama, sued in his official capacity. *See* Pet. App. 46a. For ease of exposition, petitioner refers to respondent as "the State."

INTRODUCTION

For over a century, this Court has recognized an exception to mootness for controversies that are "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *see also United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018). And it has repeatedly applied that exception to permit lawsuits challenging election laws to proceed even after the election that initially prompted the lawsuit is over. *See, e.g.*, *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Davis v. FEC*, 554 U.S. 724, 735-36 (2008). As this Court has explained, election-law challenges often evade review because election season is simply "too short" to permit cases "to be fully litigated prior to its cessation or expiration," *Sanchez-Gomez*, 138 S. Ct. at 1540.

But courts of appeals disagree over how to determine whether a particular election-law controversy is sufficiently "capable of repetition" to escape mootness. Some have read this Court's decisions to require only that the challenged law will be "applied in future elections." *Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 165 (5th Cir. 2009) (quoting *Storer*, 415 U.S. at 737 n.8). By contrast, others demand proof that the challenged practice will again be imposed on the "same complaining party." *Van Wie v. Pataki*, 267 F.3d 109, 114 (2d Cir. 2001) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). And courts in this latter camp are further split over how a plaintiff can satisfy that requirement.

In this case, the Eleventh Circuit deepened the split by holding that, to avoid mootness, a candidate-plaintiff must not only allege he will run again but

must also show that his future candidacy would have a substantial chance of success. Absent such a showing, courts within that circuit can disregard even a candidate-plaintiff's sworn statement that he intends to run again (and will again confront the challenged practice).

Only review by this Court can resolve the recurring conflict over how to interpret the "capable of repetition" requirement in election controversies. Given the importance of access to the political process, it is vital that this Court provide guidance—to lower courts, election authorities, and plaintiffs—on when and how election-law challenges can be adjudicated. Until this Court provides such guidance, unconstitutional ballot-access restrictions will be insulated in the Eleventh Circuit and other jurisdictions from effective judicial review, thereby denying both candidates and voters some of their most important constitutional rights.

STATEMENT OF THE CASE

1. On May 23, 2013, Jo Bonner announced his retirement from the U.S. House of Representatives effective three months later. Pet. App. 48a. Bonner's retirement necessitated a special election to fill the vacancy from Alabama's First Congressional District. *Id.* 48a-49a.

Alabama law provides two different mechanisms for appearing on the ballot. Pet. App. 47a. Candidates representing major political parties are automatically placed on the ballot after prevailing in their parties' nomination processes. *Id.* By contrast, all other candidates gain access to the ballot by presenting petitions signed by a specified number of registered

voters within the relevant political subdivision. *Id.* That number is equal to three percent of the ballots most recently cast for governor in that subdivision. Ala. Code § 17-9-3(a)(3). This requirement applies to both regularly-scheduled and special elections. Pet. App. 47a-48a. For the special election to fill Representative Bonner's seat, this number was 5,938. *Id.* 50a. And under Alabama law these signatures all had to be collected and submitted by September 24, just 56 days after the date for the special election had been set. *Id.*

2. Petitioner James Hall, a 39-year-old Marine Corps veteran and longtime Alabamian, has been active in politics for many years. Believing that his election to Congress would serve interests "excluded and ignored by the major political parties," he decided to run as an independent in the special election for Representative Bonner's seat. First Am. Compl. ¶ 3, ECF No. 12.

Petitioner worked "tirelessly" to gather the 5,938 required signatures, despite his full-time job and the short timeframe. Pet. App. 51a. He solicited signatures from voters at "approximately 5,000 homes," various businesses, and public events such as "charity runs, festivals, yard sales, concerts, sporting events, [and] a gun show." *Id.* (quoting Hall Decl. 2, Oct. 31, 2017, ECF No. 25-1). He managed to obtain close to 3,000 signatures. *Id.* 52a. But even though canvassing homes produced "roughly one signature for every 12 houses visited"—meaning that a significant number of voters were prepared to support placing petitioner on the ballot—petitioner would have had to "knock on over 71,000 doors" to obtain the required number. *Id.* 51a, 76a. And paid signature-gatherers

"would have cost him a prohibitive sum—over $23,000—to get the bare minimum number of signatures." *Id.* 76a-77a.

3. A week before the petition deadline, recognizing that he was bound to fall short of the statutory signature requirement, petitioner filed suit in the U.S. District Court for the Middle District of Alabama. Pet. App. 54a. He brought constitutional challenges, as both a candidate and a voter, to Alabama's signature requirement as applied to special elections. *Id.* He sought a declaratory judgment and both preliminary and permanent injunctive relief. *Id.*

Although the district court agreed, in light of the impending election, to expedite the proceedings, *see* Order, Oct. 25, 2013, ECF No. 20, it denied petitioner's motion for a preliminary injunction placing his name on the ballot, Pet. App. 55a-56a. The court expressed concern that granting that form of relief after overseas ballots had already been mailed would incur "great expense to the State" and "risk voter confusion." *Id.* 56a (discussing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). The Eleventh Circuit affirmed. *Id.*

In December 2013, Alabama conducted the special election in the First Congressional District. Pet. App. 57a. Only the Democratic and Republican candidates appeared on the ballot. *Id.* 54a.[2]

4. After the election, the State moved to dismiss petitioner's complaint as moot. Pet. App. 89a. The district court agreed that the case was moot as to

---

[2] Alabama's Secretary of State refused to put petitioner on the ballot because his timely-filed signature petition did not contain the required number of signatures. Pet. App. 52a.

petitioner's claim for a preliminary injunction. *Id.* 90a. But the court held that petitioner's claim for a permanent injunction and a declaratory judgment remained justiciable because it was "capable of repetition, yet evading review." *Id.* 101a.

The district court explained that the parties did not dispute that the "challenged action"—here, enforcement of the signature requirement—was "in its duration too short to be fully litigated prior" to the election. Pet. App. 92a (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)).

The sole dispute was whether petitioner's claim was capable of repetition. Pet. App. 92a. The State had argued that it was not, because there was no "reasonable expectation" of "future special elections" with "equally severe burdens on [petitioner]'s First Amendment rights." *Id.* 94a. The district court rejected this argument because Alabama has a "long history of holding special elections." *Id.* 96a.

The State had also argued that the case could proceed only if "the same . . . independent candidate plaintiff[]" would likely "be subject to the same constitutional burden in a future special election." Pet. App. 100a. The district court "acknowledge[d]" the "conflicting law in the circuits on this issue." *Id.* It then held that petitioner's declaration stating that he intended to continue to seek public office in Alabama as an independent candidate and intended to vote for future independent candidates sufficed to avoid mootness. *Id.* 101a. The court therefore denied the motion to dismiss. *Id.* 103a.

The parties subsequently filed cross-motions for summary judgment. The State again argued that

petitioner's case was moot—this time on the ground that because petitioner had since run as a Republican in a local election, "Alabama's ballot-access laws for independent candidates no longer appl[ied] to Hall." Pet. App. 62a. The district court rejected this variant of the State's mootness argument as well. *Id.* The court found it "still reasonably likely that the controversy will recur as to Hall" because he was "free to affiliate with the Republican Party for now while retaining his right and persisting in his desire to run as an independent in the future." *Id.* 62a, 65a. The district court further explained that courts of appeals outside the Eleventh Circuit had allowed cases to proceed even absent "any explicit statement" that the plaintiff "intended to run or vote again." *Id.* 66a.

The district court then addressed the merits of petitioner's claims. It held that, as applied to special elections, Alabama's three-percent signature requirement violated the First and Fourteenth Amendments. Pet. App. 46a.

First, the magnitude of the signature requirement "imposes a severe burden in the context of special elections." Pet. App. 81a. Specifically, the "truncated petitioning window, lack of preparation time, and low voter interest" in these elections "offer[] reasonably diligent independent candidates no realistic means of ballot access." *Id.* 82a.

Second, the state had failed to show "that the 3% signature requirement is narrowly tailored to advance" any compelling state interest. Pet. App. 83a.

The district court therefore granted petitioner's motion for summary judgment. The court viewed declaratory relief as "sufficient, in light of the court's

confidence" that the Secretary of State would "act accordingly." Pet. App. 88a.

5. A divided Eleventh Circuit panel vacated the judgment of the district court and remanded the case with instructions to dismiss the complaint. Pet. App. 24a. The court did not reach the constitutionality of Alabama's ballot-access regime as applied to special elections because it concluded that petitioner's claims, both as a candidate and as a voter, were moot. *Id.* 3a. It based its holding on its view that there was "no reasonable expectation that Hall, the same complaining party, will again be subject to the Alabama 3% requirement as an independent candidate or voter in a special election for a U.S. House seat." *Id.* 7a.

The Eleventh Circuit acknowledged, as petitioner had argued, that this Court's decision in *Storer v. Brown*, 415 U.S. 724 (1974), "could be construed" to "dispens[e] with" the same-plaintiff requirement in ballot-access cases. Pet. App. 9a. In that decision, this Court had explained that although the original election was "long over," the plaintiffs' challenge was not moot because the issue presented, and its "effects on independent *candidacies*," would "persist" when the statutes were "applied in future elections." *Id.* (quoting *Storer*, 415 U.S. at 737 n.8) (emphasis added).

But "[t]o the extent" that the Fifth, Sixth, and Ninth Circuits have followed that construction of *Storer*, the panel majority "respectfully disagree[d]" with how those circuits apply mootness doctrine in election-law cases. Pet. App. 18a n.5 (citing *Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005)); *see also id.* 19a n.6 (citing *Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 164-65 (5th Cir.

2009)); *Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000)). In the majority's view, courts may not "dispense with" the same-plaintiff rule altogether. *Id.* 18a n.5.

The Eleventh Circuit also recognized that "several cases, multiple treatises, and several scholars" have embraced a "rather relaxed" mootness standard in election cases. Pet. App. 15a; *see also id.* 16a-19a (citing 13C Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3533.9 (3d ed. 2008); and 15 *Moore's Federal Practice* § 101.99 (2018)). In particular, it recognized that other circuits allow candidates to continue their challenges post-election based on a simple statement that they intend to run in a future election. *Id.* 17a-19a.

But the panel majority rejected that rule too. In the majority's view, it is not enough for the candidate-plaintiff to assert—as petitioner did in a sworn declaration—an "intent to run in future special elections." Pet. App. 20a n.7.

The panel majority fastened on the fact that petitioner had challenged practices as applied to special elections. The court thought this entitled it to disregard petitioner's sworn declaration: Because special elections had been "infrequent" historically, there was little likelihood of another special election in the First Congressional District in petitioner's lifetime. Pet. App. 20a.

And although the court recognized "a greater likelihood of a future special election when all U.S. House seats" in Alabama "are in play," Pet. App. 24a n.11, it discredited petitioner's stated intent to run for any of those seats. In the majority's view, petitioner

would "be considered a carpetbagger" if he attempted to run in another district without first moving there. *Id.* 21a. It saw "no reasonable likelihood of such a race" because it thought that "Hall would be unlikely to prevail if running in a foreign House district." *Id.* 21a n.8.

The panel majority acknowledged that any individual plaintiff's challenge to the statute at issue here would be "effectively immune from judicial review and correction." Pet. App. 23a. But it thought that mootness could be avoided by having an aspiring candidate or voter "file a class action suit that comports with the strictures of Federal Rule of Civil Procedure 23." *Id.*

6. Judge Jill Pryor dissented. She agreed with the district court both that the case was not moot and that "Alabama's ballot access requirement is unconstitutional" under the circumstances presented here. Pet. App. 43a.

She criticized the majority for contributing to a "circuit split" over whether and how the same-plaintiff rule applies in election cases. Pet. App. 33a. She also stressed that the majority "add[ed] an element to the same complaining party inquiry that no other court has adopted"—namely, a requirement for petitioner to "show that he has a chance not only to run in a future election, but also to win it." *Id.* 39a. What is more, the majority's application of the same-plaintiff test improperly "create[d] a different standard for special elections" in the "absence of any indication from the Supreme Court or even persuasive authority from another circuit to support it." *Id.* 35a.

As for the majority's class action proposal, the dissent expressed doubt that it "would provide a viable option" for avoiding mootness "[u]nder the majority's logic." Pet. App. 41a. The claims of class members in other districts would face the same problems the majority's test had created for petitioner's claim. *Id.* 41a-42a.

REASONS FOR GRANTING THE WRIT

I. There is a three-way split among the courts of appeals over the question presented.

The courts of appeals are intractably divided over whether plaintiffs challenging ballot-access restrictions must satisfy a same-plaintiff requirement to avoid mootness—that is, whether the plaintiffs must show "a reasonable expectation" that they personally will "be subjected to the same action again," *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam). As the Fourth Circuit recently explained, the courts of appeals have taken "different views" of this Court's caselaw and have thus "reached different results." *Stop Reckless Econ. Instability Caused by Democrats v. FEC*, 814 F.3d 221, 230 (4th Cir. 2016); *see also* Pet. App. 18a-19a, 100a (pointing to the disagreement).

Three circuits do not apply a same-plaintiff requirement in ballot-access cases. Nine circuits do, but they are further split over what such a requirement entails. Most apply the requirement in a relaxed manner, which petitioner's declaration would undeniably satisfy. But others, including the Eleventh Circuit here, demand significant evidence to satisfy this requirement above and beyond an assertion that

the plaintiff-challenger will run again in future elections.

This split will not go away without this Court's intervention. The courts of appeals acknowledge as much, recognizing that the "tension" among them arises from disagreement over how to read this Court's opinions. *Van Wie v. Pataki*, 267 F.3d 109, 114 (2d Cir. 2001). Only this Court can resolve competing rules within its own caselaw.

1. The Fifth, Sixth, and Ninth Circuits do not apply a same-plaintiff requirement in election-law cases.

In *Kucinich v. Texas Democratic Party*, 563 F.3d 161 (5th Cir. 2009), a candidate challenged a party loyalty oath that served as a prerequisite to placement on the party primary ballot. *Id.* at 163. While the appeal from denial of a preliminary injunction was pending, the primary election occurred. *Id.* At oral argument, the candidate's counsel "declined to express a belief that [his client would] again be subject to the party's oath requirement." *Id.* at 165. Nonetheless, the Fifth Circuit held that the case was not moot because, as in *Storer v. Brown*, 415 U.S. 724 (1974), the contested law's effects would "persist . . . in future elections." *Kucinich*, 563 F.3d at 165 (quoting *Storer*, 415 U.S. at 737 n.8). Having reviewed a "consistent line of rulings" from this Court, the Fifth Circuit aligned itself with Justice Scalia's understanding of this "Court's treatment of election law cases," which "differs from its traditional mootness jurisprudence by dispensing with the same-party requirement." *Id.* at 164-65 (citing *Honig v. Doe*, 484 U.S. 305, 335-36 (1988) (Scalia, J., dissenting)).

The Fifth Circuit took the same approach in *Moore v. Hosemann*, 591 F.3d 741 (5th Cir. 2009). In that case, it permitted a ballot-access challenge to proceed despite the fact that the candidate did not aver "that he [was] likely to run" again. *Id.* at 744. It was enough that the challenged practice remained in force and future candidates would "need to conform to its demands." *Id.* at 744-45. Indeed, even when it is "doubtful" that the current plaintiff will again be subjected to an election regulation, challenges to such regulations in the Fifth Circuit are not moot. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006). The fact that "other individuals certainly will be affected by the continuing existence" of the challenged practice is sufficient to satisfy Article III. *Id.*

The Sixth Circuit likewise does not require plaintiffs with initial standing to challenge an election practice to demonstrate that they themselves will be subjected in future elections to the challenged practice. In *Lawrence v. Blackwell*, 430 F.3d 368 (6th Cir. 2005), the plaintiffs (a candidate and a voter) challenged Ohio's filing deadline for independent congressional candidates. *Id.* at 369-70. The court of appeals explained that even if a court "could not reasonably expect that the controversy would recur with respect to" the named plaintiffs, "the fact that the controversy almost invariably will recur with respect to some future candidate or voter" would be "sufficient" to avoid mootness. *Id.* at 372.

Finally, the Ninth Circuit has rejected a same-plaintiff requirement in ballot-access cases. In *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000), the plaintiff sought to file as a candidate for a special

congressional election in California without first establishing residency in the state. *Id.* at 1032. Although the election had passed, the Ninth Circuit held that the plaintiff's challenge was not moot. *Id.* at 1033. Judge O'Scannlain's opinion for the court explained that the "capable-of-repetition prong should not be construed [so] narrowly" that a future intention to seek election is the "*only*" way to satisfy it. *Id.* In reaching this conclusion, he relied on *Dunn v. Blumstein*, 405 U.S. 330 (1972), where this Court "proceeded to the merits without examining the future political intentions of the challenger[]." *Schaefer*, 215 F.3d at 1033. Thus, even though Schaefer had "demonstrated no likelihood of running for office" again in California, and appeared now to be a state resident, the case was not moot because the state could continue to deny "any other nonresident the right" to run in its congressional elections. *Id.*; *see also, e.g.*, *Caruso v. Yamhill Cty.*, 422 F.3d 848, 853-54 (9th Cir. 2005).

Under the rule applied in the Fifth, Sixth, and Ninth Circuits, petitioner's case would not be moot because Alabama's law remains in effect and will govern future candidacies in special elections. *See* Ala. Code § 17-9-3.

2. The Second and Eleventh Circuits take a diametrically opposed position to the Fifth, Sixth, and Ninth Circuits. They demand significant evidence that a candidate-plaintiff will again suffer the complained-of injury.

The Second Circuit first announced its rule in *Van Wie*, a case involving party affiliation requirements for voters. 267 F.3d at 111. After reviewing five opinions by this Court that appeared to cut in conflicting

directions, the court of appeals adopted a same-plaintiff requirement for all election cases. *Id.* at 114. And it applied that requirement with evidentiary rigor. It treated the plaintiffs' assertion that they would face the same dilemma again as a "speculation" that did "not establish 'a reasonable expectation'" that they would "again be subjected to the same dispute." *Id.* at 115 (quoting *Dennin v. Conn. Interscholastic Athletic Conference, Inc.*, 94 F.3d 96, 101 (2d Cir. 1996)).

In *Sloan v. Caruso*, 566 Fed. Appx. 98 (2d Cir. 2014), the Second Circuit confirmed that the same-plaintiff requirement applies to ballot-access challenges. It treated a candidate's statement that he intended to run for office the next year as nothing more than "a mere theoretical possibility that the controversy [was] capable of repetition." *Id.* at 99 (quoting *Van Wie*, 267 F.3d at 115); *see also Dekom v. New York*, No. 12-CV-1318 (JS)(ARL), 2013 WL 3095010, at *10 n.14 (E.D.N.Y. June 18, 2013), *aff'd*, 583 Fed. Appx. 15 (2d Cir. 2014).

In this case, the Eleventh Circuit announced that it would apply a same-plaintiff requirement in ballot-access cases. *See* Pet. App. 20a-21a. And, like the Second Circuit, it held that an express declaration of an intent to run is not necessarily enough to avoid mootness. In the Eleventh Circuit's view, candidates can show a "reasonable expectation" that they will run again (and thereby be subjected to the challenged practice again) only if they have a "reasonable" shot at victory. *See id.* 21a & nn.8-9.

3. The remaining seven circuits have adopted an intermediate position. In contrast to the Fifth, Sixth, and Ninth Circuits, they require that candidate-

plaintiffs satisfy some version of the same-plaintiff requirement to avoid mootness. But, in contrast to the Second and Eleventh Circuits, all of these circuits either presume that past candidates will continue to aspire to elected office or fully credit statements of intent to run again as satisfying the test.

Consider the First Circuit. That court held that a candidate's lawsuit does not become moot post-election so long as a candidate "has not renounced possible future candidacies." *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 37 n.12 (1st Cir. 1993). The court reasoned that "politicians, as a rule, are not easily discouraged in the pursuit of high elective office." *Id.* In short, the First Circuit gives plaintiffs in ballot-access cases the "benefit of the doubt" when analyzing the same-plaintiff criterion. *Libertarian Party of N.H. v. Gardner*, 843 F.3d 20, 24 (1st Cir. 2016) (quoting *Barr v. Galvin*, 626 F.3d 99, 106 (1st Cir. 2010)).

The Third Circuit has similarly held the same-plaintiff requirement satisfied unless there is "evidence to the contrary" to rebut the premise "that it is reasonable to expect political candidates to seek office again in the future." *Belitskus v. Pizzingrilli*, 343 F.3d 632, 648-49 & n.11 (3d Cir. 2003). In *Merle v. United States*, 351 F.3d 92 (3d Cir. 2003), that court therefore held that alleging an intent to run in subsequent elections would be sufficient, though not necessary, to spare a case from mootness. *Id.* at 95.

In the Fourth Circuit, plaintiffs can satisfy the "capable of repetition" requirement so long as they are merely "considering running in a future election." *Lux v. Judd*, 651 F.3d 396, 401 (4th Cir. 2011). Rejecting the notion that the mootness exception can

be satisfied "only if the ex-candidate specifically alleges an intent to run again," the Fourth Circuit reasons that the fact that political candidates have "run for office before" is enough to indicate they "may well do so again." *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 435-36 (4th Cir. 2008) (quoting *Int'l Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 473 (1991)).

So too in the Seventh Circuit. That court does not interpret the same-plaintiff requirement "literally." *Majors v. Abell*, 317 F.3d 719, 723 (7th Cir. 2003). Instead, a mere statement of interest in running for office again will suffice, *Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000), as "the court will not keep interrogating the plaintiff to assess the likely trajectory of his political career," *Majors*, 317 F.3d at 723.

The Eighth Circuit has likewise held that the "capable of repetition" requirement is satisfied where the plaintiff, "[a]s an active politician," would likely be "in a position to wish to run for office" again. *Van Bergen v. Minnesota*, 59 F.3d 1541, 1547 (8th Cir. 1995); *see also McLain v. Meier*, 637 F.2d 1159, 1162 n.5 (8th Cir. 1980).

The Tenth Circuit demands no more. In *Parker v. Winter*, 645 Fed. Appx. 632 (10th Cir. 2016), that court asked whether the plaintiff "would be subjected to the same action again," and held that he likely would, even though the complaint did not "discuss his intention to run for office at any point in the future." *Id.* at 634-35. It was enough that the plaintiff was "capable of doing so." *Id.* at 635 (quoting *Lawrence*, 430 F.3d at 371); *see also Pearlman v. Vigil-Giron*, 71 Fed. Appx. 11, 13-14 (10th Cir. 2003).

Finally, the D.C. Circuit deems the same-plaintiff requirement satisfied so long as the plaintiff has run before and expresses an intent to run again. *See LaRouche v. Fowler*, 152 F.3d 974, 978-79 (D.C. Cir. 1998).

Petitioner's case would not be moot in this septet of circuits. Petitioner has run for office more than once already and has sworn under oath that he plans to run in any future special election for the House of Representatives in Alabama regardless of the district. Pet. App. 62a, 101a. He has also sworn that he intends to vote for independent candidates in any election where he is able to do so. *Id.* 101a. And the State has never denied that the Alabama statute at issue here will govern all such elections.

4. There is no reason to await further percolation. Every circuit that oversees elections has now weighed in on how to assess mootness where candidates or voters challenge ballot-access restrictions. The courts of appeals recognize the existence of a conflict.

Certiorari is especially appropriate when this Court has "two lines of precedent" that potentially cut in opposite directions, because the Court is the only actor that can "clarify the proper scope of the doctrine." *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 29, 21 (1997). Such is the case here. The disarray among the circuits stems from their contradictory readings of this Court's caselaw.

Courts of appeals believe there is "imprecision" as to whether this Court's election-law decisions "demand[] that it be the same party who is likely to face a similar [restriction] in the future." *Barr*, 626 F.3d at 105. Some courts focus on the language in

Storer about the relevant repetition involving "candidacies," rather than candidates. 415 U.S. at 737 n.8. They conclude that this Court has "dispens[ed] with the same-party requirement" in ballot-access cases "and 'focus[ed] instead upon the great likelihood that the issue will recur between the defendant and the other members of the public at large.'" *Kucinich*, 563 F.3d at 165 (quoting *Honig*, 484 U.S. at 335-36 (Scalia, J., dissenting)).

By contrast, other courts read decisions such as *Davis v. FEC*, 554 U.S. 724 (2008), and *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), as requiring that the *same complaining party* have a reasonable expectation that it will face the same action again. *See* Pet. App. 11a-13a. These courts believe that they must apply a same-plaintiff rule in all election cases, because *Davis* and *Wisconsin Right to Life* used *Weinstein*'s "same complaining party" formulation to analyze whether campaign finance controversies were capable of repetition. *See id.* 13a.

The question whether, and under what circumstances, the same-plaintiff requirement applies in election cases has therefore been "le[ft] to the Supreme Court." *Stop Reckless Econ. Instability*, 814 F.3d at 231. If this Court does not answer the question presented, courts will continue to apply different versions of mootness doctrine, with some reaching the merits and others insulating constitutional claims from judicial review.

II. It is important that this Court resolve the question presented.

Resolving the question presented is critical to orderly and consistent adjudication of claims involving

rights that "rank among our most precious freedoms," *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

Every state imposes a variety of restrictions on access to the electoral process. *See Ballot Access for Major and Minor Party Candidates*, Ballotpedia, https://bit.ly/2ryJ8op (last visited Feb. 27, 2019). These include signature-gathering requirements and restrictions, filing fees, time limitations, affiliation provisions, and the like. *See* Jay M. Zitter, Annotation, *Validity, Construction, and Application of State Statutes Governing "Minor Political Parties,"* 120 A.L.R.5th 1 (2004).

These restrictions can impair the ability of citizens to vote for the candidates of their choice and to associate for the advancement of political beliefs—rights that "mean[] little if a party [or candidate] can be kept off the election ballot and thus denied an equal opportunity to win votes," *Williams*, 393 U.S. at 31. And unconstitutionally severe ballot-access restrictions do not just harm candidates and voters; they can threaten democracy more broadly by "reduc[ing] diversity and competition in the marketplace of ideas," *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983).

Independent and third-party candidates serve at least two critical functions. First, they often reflect the will of the voters. There have been 77 Senators elected as independent or third-party candidates. And an independent or third-party candidate has won election

to the U.S. House of Representatives nearly 700 times.[3]

Second, even when these candidates have not prevailed, they have been "fertile sources of new ideas and new programs," *Anderson*, 460 U.S. at 794—from abolition to women's suffrage—that later have "made their way into the political mainstream," *id.*

Whether the judicial system can adjudicate challenges to restrictions on these candidacies, though, depends on whether courts retain jurisdiction over properly filed lawsuits even after the elections that initially prompted the lawsuits have taken place. After all, it is nearly impossible to reach final resolution of the merits of a ballot-access dispute prior to an election. As in this case, where Election Day was just a few months after the vacancy's announcement, there is seldom enough time to fully adjudicate such cases before the election passes. And obtaining preliminary relief close to an election is not a realistic possibility, given that *Purcell v. Gonzalez*, 549 U.S. 1

---

[3] *See Senators Representing Third or Minor Parties*, U.S. Senate, https://bit.ly/2PcceTT (last visited Feb. 27, 2019); *Party Divisions of the House of Representatives*, History, Art & Archives, U.S. House of Representatives, https://bit.ly/2GrTNeX (last visited Feb. 27, 2019).

Moreover, hundreds of third-party and independent office-holders serve at the state and local level. *See Current Third-Party and Independent State Officeholders*, Ballotpedia, https://bit.ly/2qNkJuB (last visited Feb. 27, 2019); *see also Elected Officials*, Libertarian Party, https://bit.ly/2AJVIVK (last visited Feb. 27, 2019) (177 officeholders); *Officeholders*, Green Party, https://bit.ly/2amhdjn (last visited Feb. 27, 2019) (161 officeholders); *Current Officeholders*, Constitution Party, https://bit.ly/2BNM4TN (last visited Feb. 27, 2019) (25 officeholders).

(2006) (per curiam), puts a strong thumb on the scale against enjoining election rules—even likely unconstitutional ones—close to Election Day. *See id.* at 4-5.

District courts in jurisdictions like the Eleventh Circuit thus find themselves in a quandary. They are unable to give plaintiffs relief before an election because of compressed timeframes and *Purcell*. So the question of whether they can give relief after an election takes on added importance. The question presented here cuts to the very heart of that issue.

If a stringent same-plaintiff rule applies, there will be neither binding resolution of the particular controversy nor any articulation of broader election-law principles to guide other jurisdictions. Such a system would "prove more wasteful than frugal," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 192 (2000). Courts will be forced to adjudicate the same challenges to the same laws in each election cycle without producing binding precedent as to the laws' legality. As a result, unconstitutional election laws can remain perpetually on the books and be insulated from judicial review.[4]

---

[4] Indeed, had they applied a strict same-plaintiff rule, courts might never have struck down such unconstitutional practices as "full slate" requirements mandating parties run candidates for every office on a ballot; filing fees with no indigence exception; and state residency requirements for U.S. Representatives at time of filing instead of election. *See, e.g.*, *Libertarian Party of Ill. v. Ill. State Bd. of Elections*, 164 F. Supp. 3d 1023, 1028-29 n.2, 1032 (N.D. Ill. 2016) ("full slate"), *aff'd sub nom. Libertarian Party of Ill. v. Scholz*, 872 F.3d 518 (7th Cir. 2017); *Belitskus v. Pizzingrilli*, 343 F.3d 632, 647-49 & n.11 (3d Cir. 2003) (filing

No one is served by such a system—not prospective candidates, not voters, not jurisdictions seeking to promulgate fair election laws, and certainly not courts. At the very least, such an odd system should not be allowed to persist without this Court's review.

III. This case is the right vehicle for resolving the question presented.

This case is an ideal vehicle for resolving the question of how to determine whether a ballot-access challenge is sufficiently capable of repetition to avoid mootness.

1. The parties have "never disputed" that petitioner's lawsuit could not "be fully litigated prior to" the election and would therefore evade review absent the mootness exception. Pet. App. 63a, 92a (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). The decision below thus explicitly "confine[d] [its] inquiry" to the question presented by this petition: "whether this case is capable of repetition." *Id.* 5a. It squarely held that petitioner had failed to satisfy this requirement only because he had not shown a "reasonable expectation" that he personally would be subjected to the Alabama three-percent signature requirement in a future congressional special election. *Id.* A well-reasoned dissent also analyzed the "capable of repetition" prong at length, further sharpening the issue for review. *See id.* 25a-44a.

---

fees); *Schaefer v. Townsend*, 215 F.3d 1031, 1033, 1039 (9th Cir. 2000) (state residency requirement).

2. The question presented is outcome-determinative. In the Fifth, Sixth, and Ninth Circuits, petitioner's case would have continued because those circuits have dispensed with the same-plaintiff requirement altogether. In the First, Third, Fourth, Seventh, Eighth, Tenth, and D.C. Circuits, petitioner's case would have also avoided mootness because those circuits would have given dispositive weight to his sworn declaration of intent to run in future elections.

3. This case also highlights the stakes of the Article III question presented. The district court issued a lengthy and well-reasoned ruling that application of the three-percent signature requirement in special elections violates the First and Fourteenth Amendments. Reversing the judgment of the Eleventh Circuit would allow that court to address the merits of petitioner's challenge. The court of appeals could then bring needed clarity to the constitutional restraints on this and other ballot-access requirements.

IV. The Eleventh Circuit's decision is wrong.

The Eleventh Circuit's approach contravenes decades of precedent and effectively immunizes ballot-access restrictions from judicial review. Its stringent same-plaintiff rule will simultaneously force courts to handle a barrage of emergency motions during every election cycle but prevent final resolution of the legal issues involved. And its application of the rule to special elections is even less justifiable. Finally, its hope that class actions can provide an alternative route to full adjudication of these cases is ill-founded.

A. The Eleventh Circuit misconstrues this Court's precedent governing the "capable of repetition" requirement.

1. The best reading of this Court's caselaw is that there is no same-plaintiff requirement in ballot-access cases. This Court has repeatedly allowed ballot-access challenges to proceed even after an election has occurred, so long as the challenged law will govern future elections. And not by mere oversight: What matters is whether similar *candidacies* will recur, not whether the same *candidates* will run again. So long as the burden placed on other prospective candidates "remains and controls future elections," an action is capable of repetition and thus not moot. *See Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

Thus, in *Storer v. Brown*, 415 U.S. 724 (1974), independent candidates' constitutional challenges to a party disaffiliation requirement were not mooted by the election's completion. *Id.* at 737 n.8. The case remained justiciable despite the fact that "no effective relief" could be provided to the original parties themselves, because the "issues properly presented, and their effects on independent candidacies" would "persist as the [state's] statutes [we]re applied in future elections." *Id.* In *Moore*, this held true even though "the particular candidacy was not apt to be revived in a future election." *Richardson v. Ramirez*, 418 U.S. 24, 35 (1974) (citing *Moore*, 394 U.S. 814); *see also Rosario v. Rockefeller*, 410 U.S. 752, 756 & n.5 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972). In short, where this Court has been satisfied that the challenged practice itself is capable of repetition, it has never held that an election challenge

was moot because the practice would not be challenged by the same plaintiff.

The Eleventh Circuit therefore erred in ordering that petitioner's victory on the merits be vacated as moot. The ballot-access restrictions at issue are still on the books in Alabama. *See* Ala. Code § 17-9-3. So all prospective independent candidates will face the severely burdensome three-percent signature requirement in future special elections. And the issue will recur: In Alabama, special elections for U.S. House seats "historically have occurred on average once every 12 years" since 1941. Pet. App. 37a (Jill Pryor, J., dissenting).[5]

2. Even assuming *arguendo* that some version of the same-plaintiff requirement should apply to ballot-access cases, the Eleventh Circuit's version of this test finds no real support in this Court's decisions.

To the extent this Court's election law cases have considered whether the individual plaintiffs had a "reasonable expectation" of being "subjected to the same action again," this Court has never required more than a simple statement that the plaintiff anticipates being subjected again to the challenged practice in the future. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam) (first articulating the same-plaintiff criterion). For example, in *Meyer v. Grant*, 486 U.S. 414 (1988), it was enough that

---

[5] The majority inexplicably excluded special elections in 1941 and 1944 to conclude that special elections have "occurred with intervals over twenty years" since 1947. Pet. App. 6a n.3. But whether the interval is twelve years or twenty, there is still a demonstrated probability of other special elections in petitioner's lifetime.

plaintiffs' counsel at oral argument "represent[ed]" that one of the plaintiffs, "as a probability[,] would be interested in going forward with the [ballot] initiative" that had prompted the initial lawsuit. Transcript of Oral Argument at 37, *Meyer*, 486 U.S. 414 (1988) (No. 87-920); *see Meyer,* 486 U.S. at 417 n.2 (pointing to this exchange). And in *Davis v. FEC*, 554 U.S. 724 (2008), an unsworn "public statement" of future intent to run—made in a newspaper only after the issue of mootness was raised in this Court—sufficed to establish the dispute was capable of repetition and therefore not moot. *Id.* at 736; *see also FEC v. Wisc. Right to Life*, 551 U.S. 449, 463-64 (2007).[6]

Under those precedents, petitioner's case is not moot. Petitioner submitted a sworn declaration that he "intend[ed] to continue to seek elective office in Alabama in the future, including, but not limited to, the office of U.S. Representative and [he] intend[ed] to seek such elective office as an independent candidate" in any "Special Election." Pet. App. 64a (quoting Hall Decl. 1, Jan 27, 2014, ECF No. 48-1). If a statement reported in a newspaper was enough in *Davis*, or cautious speculation by counsel was enough in *Meyer*,

---

[6] And even these statements may not be necessary to find the same-plaintiff requirement satisfied. *See Norman v. Reed*, 502 U.S. 279, 287-88 (1992) (seeing "every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if we should fail to resolve the constitutional issues").

then *a fortiori* petitioner's statement suffices to avoid mootness.[7]

3. The Eleventh Circuit's decision to disregard petitioner's statement of intent on the ground that he would not stand a realistic chance of winning a future election, *see* Pet. App. 21a n.8, only compounds its error. This Court has never insisted that a plaintiff prove a likelihood of electoral success to overcome mootness. For example, in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the case was not moot even though the candidate there only received approximately six percent of the vote. *Id.* at 784 & n.3. And American history is marbled with independent candidates—from Eugene Debs to Ross Perot to petitioner here—who have run for office, undaunted by long odds of electoral success, because they had a message to convey.

Nor can the Eleventh Circuit's assumption that it would be "farfetched" for petitioner to run in *any*

---

[7] Moreover, the Eleventh Circuit "overstates the stringency" of what constitutes a reasonable expectation of recurrence, *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988). This error stems from its confusion of *frequency* with *likelihood*. Just because special elections occur infrequently does not make it "highly unlikely" that one will occur in petitioner's lifetime, Pet. App. 20a. To the contrary, there is a near certainty that petitioner will have the opportunity to run again in a special election.

From 2004-2013, there were thirty-one special elections held in Alabama. Pet. Reh'g & Reh'g En Banc 12 n.5. Special elections are also commonplace for filling vacancies in Congress: In the 115th Congress alone, there were ten off-season special elections for seats in the House of Representatives and one for a Senate seat. *Special Elections to the 115th United States Congress (2017-2018)*, Ballotpedia, https://bit.ly/2oxVeP2 (last visited Feb. 27, 2019).

Alabama congressional district be squared with either the Constitution or political reality. Leaving aside the panel majority's "carpetbagger" rhetoric, Pet. App. 21a & n.8, the Constitution permits any citizen to represent any congressional district in his state. U.S. Const. art. I, § 2, cl. 2; *see also* Pet. App. 37a. And this constitutional entitlement is not merely academic: In 2017, at least twenty members of Congress lived somewhere "outside the districts they were elected to represent." Pet. App. 38 n.2.

4. Finally, the Eleventh Circuit's mootness test cannot be justified on the grounds that this case involves a special election. *See* Pet. App. 8a. If anything, that fact makes the Eleventh Circuit's rule less defensible. As Judge Friendly explained in a case involving a special election for a New York congressional district, special elections are a recurring phenomenon and cases involving them are especially capable of repetition, yet evading review given "the very speed with which such elections must be conducted." *Montano v. Lefkowitz*, 575 F.2d 378, 382 (2d Cir. 1978).

Disputes involving special elections are especially likely to evade binding resolution under a rule like the Eleventh Circuit's. Special elections necessarily occur on short timeframes.[8] This leaves courts with little

---

[8] Here, the special election occurred fewer than seven months after Representative Bonner announced his retirement. And in the sixteen off-season special elections for U.S. House seats that have occurred since, the median time between the vacancy's announcement and Election Day was fewer than five months. *See Special Elections to the 115th United States Congress (2017-2018),* Ballotpedia, https://bit.ly/2oxVeP2 (last

time to adjudicate special-election challenges before the elections pass.[9] Thus, no matter how diligent plaintiffs are, or how much courts accelerate adjudication, there is no chance of reaching binding resolution before elections pass and cases become moot.

Moreover, many questions regarding special elections cannot be resolved by leaving such issues to litigation involving regularly-scheduled elections, which can perhaps take a more leisurely journey through the courts. As this case shows, special-election cases frequently involve as-applied challenges to statutes that may well be constitutional when it comes to regularly-scheduled elections. Because special elections occur quickly and without the usual buildup that generates voter interest, otherwise-constitutional ballot-access restrictions can be overly burdensome in the special-election context. *See* Pet. App. 82a.[10]

---

visited Feb. 27, 2019); *Special Elections to the 114th United States Congress (2015-2016)*, Ballotpedia, https://bit.ly/2RSsJXn (last visited Feb. 27, 2019); *Special Elections to the 113th United States Congress (2013-2014)*, Ballotpedia, https://bit.ly/2EveQv5 (last visited Feb. 27, 2019).

[9] For example, the median civil case in the Middle District of Alabama takes nearly ten months to wind its way through the district court, not to mention time spent to reach a precedential appellate decision. U.S. Courts, Statistics and Reports, *U.S. District Courts—Civil Federal Judicial Caseload Statistics* tbl.C-5 (Mar. 31, 2018), https://bit.ly/2Cbfonv.

[10] Consider, for instance, how the Alabama signature requirement at issue in this case applies to special elections. Here, petitioner had at most 106 days—as compared to the unlimited timeframe for regular elections. Pet. App. 25a, 78a. Meeting such a deadline "requires considerable organization at

Thus, no other court has singled out special election cases for distinctively severe treatment with respect to the question of mootness. To the contrary: Other courts consistently treat special and regularly-scheduled elections interchangeably with respect to analysis of mootness. *See ACLU of Ohio, Inc. v. Taft*, 385 F.3d 641, 646-47 (6th Cir. 2004); *Schaefer v. Townsend*, 215 F.3d 1031, 1032-33 (9th Cir. 2000); *see also Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 608-09, 623-24 (E.D. Pa. 2018); *Gill v. Galvin*, No. 16-11720-DJC, 2017 WL 2221185, at *3-4 (D. Mass. May 19, 2017); *Constitution Party of Mo. v. St. Louis Cty.*, No. 4:15-CV-207 RLW, 2015 WL 3908377, at *3 (E.D. Mo. June 25, 2015). And they have allowed such challenges to proceed.

B. The class action device cannot solve the mootness problem the Eleventh Circuit's decision creates.

The Eleventh Circuit all but concedes that its rule would leave ballot-access restrictions "effectively immune from judicial review and correction" in any case involving an individual plaintiff. *See* Pet. App. 23a. But the panel majority floats the possibility that review can be obtained in these sorts of cases through a class action lawsuit. *Id.* That suggestion is entirely misplaced because there is simply no way to get a class certified in a case like this.

First, the time it takes to certify a class would further exacerbate the risk of mootness. An empirical

---

an early stage in the election, a condition difficult for many small parties to meet." *Burdick v. Takushi*, 504 U.S. 428, 443 (1992) (Kennedy, J., dissenting) (discussing a 150-day signature deadline).

study found that it takes on average 3.9 months to certify a class for cases initially filed in federal court. *See* Thomas E. Willging & Emery G. Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003–2007*, 80 U. Cin. L. Rev. 315, 321-22 (2011). Thus, it is unrealistic to expect that a class could be certified before the election occurred.

Moreover, once the election occurs, the named plaintiff's claims would be moot, at least where the Eleventh Circuit's same-plaintiff requirement applies, thereby ending any possibility of certifying a class. *See Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991). Rather than solve the mootness issue, the majority's suggestion will only cause plaintiffs to lose precious months in a quixotic attempt to certify a class.

Indeed, adopting the Eleventh Circuit's suggestion would require a significant expansion of this Court's existing caselaw regarding the certification of class actions. This Court recognized an exception to mootness for claims that "are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's initial interest expires." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980). But a putative class can avail itself of this exception only where there is a "constant existence of a class of persons suffering" an inherently transitory deprivation. *Id.* (quoting *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)); *see also Sosna v. Iowa*, 419 U.S. 393, 399-400 (1975).

In cases like petitioner's, however, the injury is not *constantly* being inflicted on a revolving

population. The injury occurred in the past to one set of voters and candidates and, if the challenged law remains on the books, will injure an additional set of voters and candidates when the next special election is announced. But in between those two elections, there is no group of people suffering a current injury who can compose a class to be certified. Thus, not only would this Court have to dramatically expand the workaround it developed in *Gerstein* and *Geraghty*, but it would have to substantially rethink standing doctrine as well: The Eleventh Circuit nowhere explains how any potential class representative could have an "interest [that] extends beyond his or her own concern about access to the ballot for a particular special election," Pet. App. 23a. Far better to simply hold, as the Fifth, Sixth, and Ninth Circuits already have, and as this Court's decision in *Storer* supports, that plaintiffs like petitioner can continue to challenge ballot-access restrictions even after the election has happened.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffrey L. Fisher
Brian H. Fletcher
Pamela S. Karlan
Leah M. Litman
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

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

April 29, 2019

APPENDIX

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-16766

D.C. Docket No. 2:13-cv-00663-MHT-TFM

JAMES HALL,

Plaintiff – Appellee,

versus

SECRETARY, STATE OF ALABAMA,

Defendant – Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

(August 29, 2018)

Before WILLIAM PRYOR, JILL PRYOR, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge:

Under Alabama law, independent candidates for political office may obtain ballot access, meaning the right to have their name listed on the election ballot, by filing a petition signed by 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, district, or other political subdivision in which the candidate seeks to qualify." Ala. Code. § 17-9-

3(a)(3). In *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007), this Court held that Alabama's 3% signature requirement for ballot access is constitutional as applied during a regular election cycle. *Id.* at 912.

On December 17, 2013, Alabama held a special election to fill a vacancy in its First United States House of Representatives District. Appellee James Hall ran as an independent candidate in that election. Due to Hall's failure to meet the 3% signature requirement, Hall's name did not appear on the special election ballot. Hall sued Appellant, the Alabama Secretary of State, pursuant to 42 U.S.C. § 1983, claiming that the 3% requirement as applied during the special election violated his First and Fourteenth Amendment rights.[1]

After denying Hall's motion for a preliminary injunction (in large part because Hall had not shown a substantial likelihood of success on the merits and because ballots had already been mailed in accordance with the Uniformed and Overseas Citizens Absentee Voting Act), the district court granted summary judgment in favor of Hall, issuing a declaratory judgment that Alabama's 3% signature requirement for ballot access violates the First and Fourteenth

---

[1] Plaintiff-below N.C. "Clint" Moser, Jr. also brought First and Fourteenth Amendment claims in the district court. The district court dismissed Moser's claims as moot, and Moser did not appeal. Plaintiffs also initially brought Equal Protection Clause and Fifteenth Amendment claims. The district court granted summary judgment in favor of the Secretary on Plaintiffs' Equal Protection Clause claims and found that Plaintiffs waived their Fifteenth Amendment claims. Neither Hall nor Moser appealed those decisions.

Amendments when enforced during any off-season special election for a U.S. House of Representatives seat in Alabama, for which: "(a) the vacancy is announced less than 124 days prior to the petition deadline and (b) the date of the special election is announced less than 57 days prior to the petition deadline." Appellant, the Secretary, brings this appeal. Appellant argues that: (1) the case is moot; and, alternatively, (2) Alabama's 3% signature requirement is constitutional in the specific circumstances challenged by Hall. As discussed below, we conclude that this case is moot. Thus, we do not address the constitutionality of Alabama's 3% signature requirement as applied during the special election circumstances presented here.

I.

"Mootness is a question of law, which this court reviews *de novo*." *Via Mat Int'l S. Am. Ltd. v. United States*, 446 F.3d 1258, 1262 (11th Cir. 2006). "The doctrine of mootness derives directly from the [Article III] case-or-controversy limitation because 'an action that is moot cannot be characterized as an active case or controversy.'" *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1335 (11th Cir. 2001) (per curiam) (quoting *Adler v. Duval Cty. Sch. Bd.*, 112 F.3d 1475, 1477 (11th Cir. 1997)). "[A] case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Id.* at 1336 (quoting *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health and Rehab. Servs.*, 225 F.3d 1208, 1216–17 (11th Cir. 2000)). "If events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability

to give the plaintiff or appellant meaningful relief, then the case is moot and must be dismissed." *Id.*

There is an exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911) "[I]n the absence of a class action, the 'capable of repetition, yet evading review' doctrine [i]s limited to the situation where two elements combine[]: (1) the challenged action [i]s in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [i]s a reasonable expectation that the same complaining party w[ill] be subjected to the same action again."[2] *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1343 (11th Cir. 2014) (adopting the same two-prong test). "The remote possibility that an event might recur is not enough to overcome mootness, and even a likely recurrence is insufficient if there would be ample opportunity for review at that time." *Al Najjar*, 273 F.3d at 1336.

"The 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks." *Storer v. Brown,* 415 U.S. 724, 737 n.8 (1974). Regarding the application of the exception to as-applied challenges, the plaintiff need not show that every "legally relevant" characteristic in the case will recur. *See Fed.*

---

[2] For the reasons discussed below, we reject Hall's argument that the Supreme Court has dispensed with the requirement that the same complaining party will be subject to the same action again.

Election Comm'n v. Wis. Right To Life, Inc., 551 U.S. 449, 463 (2007). Rather, it is sufficient that there is a reasonable expectation that "materially similar" circumstances will recur. *See id.* at 463–64 (holding that the plaintiff's challenge to a law making it a crime to run ads mentioning political candidates within a certain number of days before an election was not moot based on the plaintiff's assertion that it intended to run "'materially similar' future targeted broadcast ads mentioning a candidate" before future elections (citation omitted)).

II.

To determine whether this case is capable of repetition, we confine our inquiry to whether there is a reasonable expectation that Hall will be faced with meeting the 3% ballot-access requirement during an Alabama special election for a U.S. House seat. The scope of the relief sought by Hall, and the relief granted by the district court, was thus limited. Moreover, meeting the 3% requirement for an office other than a U.S. House seat could require Hall to collect a materially different number of signatures than the number that he was required to collect in 2013. Thus, a special election for an office other than a U.S. House seat would not subject Hall to the same or a materially similar action to the action that he faced in 2013. We must therefore determine whether there is a reasonable expectation that Hall will have an opportunity during his life to run or vote in a special election for a U.S. House seat in Alabama. We conclude that there is not.

Hall resides in Alabama's First House District and there is no indication that he intends to move. Before

2013, the last special election in Alabama's First House District was in 1935. Although it is possible that there will be an unexpected vacancy in Alabama's First House District during Hall's life, reasonable expectation requires more than a theoretical possibility. Similarly remote is the possibility that Hall will run or vote in a special election for another Alabama House seat. The record indicates that, recently, special elections for any U.S. House seat in Alabama have occurred only about every twenty years.[3] Hall contends that he wants to run in any special election for a U.S. House seat in Alabama regardless of his residence. But, as more fully discussed below, the prospect of Hall running to represent a district in which he does not live is far-fetched. And Hall can only vote in the district in which he resides. Given the infrequency and unpredictable nature of special elections for U.S. House seats, it is unreasonable to expect Hall to move to another Alabama district at a time that allows him to run or vote in such an election in that district. *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam) ("The Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the

[3] Alabama has held special elections for U.S. House seats in 1941, 1944, 1947, 1972, 1989, and 2013. Based on the fact that Alabama has held six special elections for U.S. House seats since 1941, the dissent suggests that special elections for U.S. House seats in Alabama have historically occurred approximately every twelve years. Since 1947, however, special elections for U.S. House seats in Alabama have occurred with intervals over twenty years. In any event, the frequency of special elections in Alabama House seats is such that it will likely be a long time before the next one.

[capable-of-repetition] test . . . ."); *Al Najjar*, 273 F.3d at 1336. Thus, this case does not satisfy the second prong of the capable-of-repetition-yet-evading-review exception to mootness. There is no reasonable expectation that Hall, the same complaining party, will again be subject to the Alabama 3% requirement as an independent candidate or voter in a special election for a U.S. House seat.

III.

We recognize that some of the Supreme Court's early election law cases suggest that the same complaining party rule may apply in a rather relaxed manner in the context of election cases. *See Storer*, 415 U.S. at 737 n.8. In *Storer*, the Supreme Court addressed several challenges to California's election laws as applied during a regular election cycle. *Id.* at 727. For example, California law barred independent candidates from gaining ballot access if the candidate had been affiliated with a political party within the previous twelve months. *Id.* at 726. Two of the challengers, Storer and Frommhagen, sought to run as independent candidates for California's Sixth and Twelfth Congressional Districts in the 1972 election. *Id.* at 727 n.3. They were barred from obtaining ballot access because both had been registered Democrats until early 1972. *Id.* at 728.

Before reaching the merits of their challenge, the Court found that the case was not moot because "the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections." *Id.* at 737 n.8. The Court did not explicitly address whether there was a reasonable expectation that Storer, Frommhagen, or

any of their supporters would be subjected to the same action again. The *Storer* opinion did not address whether these candidates expressed their intent to change their affiliation again in the future or their intention to run again as independent candidates and seek ballot access. Nevertheless, the Supreme Court addressed the merits of the case, recognizing that "[t]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges" to California's election laws. *Id.* The *Storer* opinion also involved two other challengers, Hall and Tyner, members of the Communist Party, who sought ballot access to run as independent candidates for President and Vice President of the United States. *Id.* at 727–28. The Supreme Court addressed the merits of their challenge also. *Id.* at 738.

The instant case, however, is materially different than *Storer*. *Storer* addressed ballot access restrictions during a regular election cycle. Thus, the issue presented in that case would almost certainly repeat every few years, presenting the *Storer* politicians with repeated opportunities to run. In stark contrast, the issue presented by Hall will not repeat during every election cycle in Alabama. Rather, the record indicates that, with this particular U.S. House seat, the last special election was in 1935, and the record indicates that, recently, a special election for any U.S. House seat in Alabama has occurred only about every twenty years. The issue presented in this case will therefore recur, if at all, with far less frequency than the issue presented in *Storer* and other cases that involve challenges to election laws as applied during regular

election cycles. Given this distinction, the application of the same complaining party rule in ordinary election law cases has limited import here.

IV.

It is true that the language used by *Storer*—i.e., that the case was not moot because the "effects [of the challenged burdens] on independent candidacies . . . will persist as the California statutes are applied in future elections," *id.* at 737 n.8—could be construed to suggest that the Court was dispensing with any requirement that the same complaining party will be subject to the same action again. Relying on *Storer*, Hall argues that the same complaining party rule does not apply in the context of election cases. For several reasons, we reject Hall's argument; we do not believe *Storer* should be construed as dispensing with the same complaining party rule.

First, *Storer* is consistent with a relaxed application of the same complaining party rule. The Court did not explicitly address whether the four challengers would again seek to run as independent candidates and run afoul of the restriction that kept them off of the ballot, but it is not unreasonable to expect that politically active persons, like the challengers, would do so in another general election. As indicated below, cases construing the boundaries of the relaxation of the same complaining party rule in election cases do not always require affirmative proof that the same complaining party intends to continue similar participation in political activities and challenge again the restriction at issue; rather, the cases require only that there be a reasonable expectation under all the circumstances that the same

complaining party will continue such activities and again be subject to the challenged restriction.

A second reason that we do not believe that *Storer* dispensed with the same complaining party rule is as follows. Supreme Court cases after *Storer* have consistently applied the same complaining party rule in evaluating whether a case falls within the capable-of-repetition-yet-evading-review exception to mootness. *DeFunis v. Odegaard*, 416 U.S. 312, 314, 319–20 (1974) (per curiam) (holding that the plaintiff's challenge to the law school's admission procedure was moot because the plaintiff, who "brought the suit on behalf of himself alone, and not as the representative of any class," was enrolled at the law school and would "complete his law school studies at the end of the term for which he [was] registered regardless of any decision th[e] Court might reach on the merits of th[e] litigation"); *Richardson v. Ramirez*, 418 U.S. 24, 36 (1974) (recognizing in the election law context that "if the case were limited to the named parties alone, it could be persuasively argued that there was no present dispute on the issue of the right to register [to vote] between the three named individual respondents in this Court and the one named petitioner here" but holding that the case was not moot because the "individual named plaintiffs brought their action in the Supreme Court of California on behalf of themselves and all other ex-felons similarly situated"); *Sosna v. Iowa*, 419 U.S. 393, 399 (1975) (holding that the case was not moot because the plaintiff represented a certified class but opining, "If appellant had sued only on her own behalf, both the fact that she now satisfies the one-year residency requirement and the fact that she has obtained a

divorce elsewhere would make this case moot and require dismissal."); *Weinstein*, 423 U.S. at 149 (holding that the plaintiff's challenge to North Carolina's parole procedures was moot because the plaintiff had been paroled and stating, "*Sosna* decided that in the absence of a class action, the 'capable of repetition, yet evading review' doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976) (holding that the case was not moot because the dispute between the state and the Nebraska Press Association, among others, regarding a restraining order on the press during a criminal trial was capable of repetition); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 187–88 (1979) (applying the *Weinstein* two-prong test and determining that the State Board's challenge to the Chicago Board's unilateral settlement regarding a 1977 special mayoral election in Chicago was moot because the Chicago Board's entry into the settlement was not "a policy it had determined to continue," "a consistent pattern of behavior," or "a matter of statutory prescription"); *Murphy*, 455 U.S. at 482–84 (quoting the *Weinstein* two-prong test and holding that the case was moot because there was "no reason to believe that [the plaintiff] Hunt w[ould] once again be in a position to demand bail before trial"); *Honig v. Doe,* 484 U.S. 305, 319–20 (1988) (holding that the challenge to the school district's rule allowing the unilateral exclusion of disabled children for dangerous

or disruptive conduct was not moot as to one of the plaintiffs because there was a reasonable expectation that that plaintiff "would once again be subjected to a unilateral 'change in placement' for conduct growing out of his disabilities"); *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988) (applying the *Weinstein* two-prong test in the election law context and holding that the case was not moot where the proponents of a ballot initiative continued to advocate for its adoption); *Int'l Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 473 (1991) (holding in the context of union elections that the individual plaintiff's challenge to a union election rule was not moot "even though respondent's campaign literature has been distributed and even though he lost the election by a small margin," and noting that "[r]espondent has run for office before and may well do so again"); *Norman v. Reed*, 502 U.S. 279, 288 (1992) (holding in the election law context that a challenge to the petitioners' ability to appear on the 1990 ballot under the Harold Washington Party name was not moot even though the 1990 election had passed because "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints"); *Wis. Right To Life, Inc.*, 551 U.S. at 462–64 (quoting the *Weinstein* two-prong test in the campaign ad election context and holding that the plaintiff's challenge to a law prohibiting targeted broadcasts within a certain number of days before an election was not moot because the plaintiff intended to run materially similar targeted broadcast ads before future elections); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735–36 (2008) (quoting the *Weinstein* two-prong test in the campaign finance election law context

and holding that the plaintiff's challenge to certain campaign contribution limits was not moot where the plaintiff made a public statement expressing his intent to self-finance another bid for a House seat).

As the foregoing cases demonstrate, the Supreme Court has indicated repeatedly that the capable-of-repetition-yet-evading-review exception to mootness should be tested by the *Weinstein* two-pronged test (including the same complaining party rule) in cases generally. And, particularly relevant for the instant case, several Supreme Court cases have applied the same complaining party rule in the election law context, as indicated in the parenthetical notations above. For example, the Court in *Meyer v. Grant* sets out the two-pronged *Weinstein* test, holds that both prongs are satisfied, and explains that the plaintiffs (who challenged state law restrictions to ballot access) continued to advocate for the adoption of the state constitutional amendment at issue and thus it was "reasonable to expect that the same controversy will recur between these two parties, yet evade meaningful judicial review." 486 U.S. at 417 n.2. The fact that the Supreme Court has expressly found that the same complaining party rule is satisfied in election law cases counsels against interpreting *Storer* as dispensing with the rule. *See also Arcia*, 772 F.3d at 1343 (in the election context, this Court applied the two-pronged *Weinstein* test, including the same complaining party rule).

Finally, the Supreme Court's other early election cases are consistent with our interpretation of *Storer*. For example, in *Moore v. Ogilvie*, 394 U.S. 814 (1969), independent candidates for the offices of electors of the

President and Vice President of the United States challenged an Illinois ballot access signature requirement. *Id.* at 815. The Court held that the case was not moot because the law would continue to control future elections, "as long as Illinois maintains her present system as she has done since 1935." *Id.* at 816. Although the Court did not explicitly address the likelihood that the same independent candidates would seek to run again, there was a reasonable expectation that they would do so, given that they were politically active individuals who would have the opportunity to do so every four years. Also, in *Brockington v. Rhodes*, 396 U.S. 41 (1969) (per curiam), the Court held that the plaintiff's ballot access challenge was moot because the election was over and the plaintiff sought only a limited, extraordinary remedy—"a writ of mandamus to compel the appellees to place his name on the ballot as a candidate for a particular office in a particular election." *Id.* at 43. The Court noted that the plaintiff did not allege that he intended to run for office in future elections, attempt to maintain a class action, sue on behalf of himself and independent voters, or seek a declaratory judgment. *Id.* at 43. The Court's recognition of the first three factors suggests that the Court considered whether the same plaintiff would be subjected to the same action again in this pre-*Storer* election law case.[4]

---

[4] The final two pre-*Storer* election law cases on which Hall relies also fail to support his argument that the Supreme Court has dispensed with the same complaining party rule in the election context. These cases, *Dunn v. Blumstein*, 405 U.S. 330 (1972) and *Rosario v. Rockefeller*, 410 U.S. 752 (1973), were class actions. *Dunn*, 405 U.S. at 331 ("The issue arises in a class action

V.

Although it is clear that the Supreme Court has not dispensed with the same complaining party rule, several cases, multiple treatises, and several scholars have suggested that the rule is applied in a rather relaxed manner. *See* 13C Charles A. Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice & Procedure § 3533.9 (3d ed. 2008) ("Wright & Miller") ("Although it has not been abandoned, the requirement that the individual plaintiff is likely to be affected by a future recurrence of a mooted dispute has been diluted in some cases."); 15 Moore's Federal Practice § 101.99 (2018) ("[T]he [capable-of-repetition] exception generally applies only if the claim of *the very same*

---

for declaratory and injunctive relief brought by appellee James Blumstein."); *Rosario*, 410 U.S. at 755 n.4 ("The present consolidated case originated in two complaints, one by the petitioner Rosario and other named plaintiffs, on behalf of a class, and one by the petitioner Eisner."). As noted above, in *Sosna*, the Supreme Court made clear that the class action context is different than the situation in which an individual plaintiff's claim is moot and not capable of repetition with regards to the individual plaintiff. Relying on *Dunn* and *Rosario*, the *Sosna* Court held that the plaintiff's class action challenge to Iowa's durational residency requirement to obtain a divorce was not moot even though the named plaintiff had satisfied the requirement, obtained a divorce, and was therefore unlikely to be subjected to the same action again. 419 U.S. at 401–02. The Court observed that the class action issue "was present in *Dunn v. Blumstein*, 405 U.S. 330 (1972), and was there implicitly resolved in favor of the representative of the class." *Id.* at 400; *see also United States v. Sanchez-Gomez*, No. 17-312, 2018 WL 2186177, at *5 (U.S. May 14, 2018) ("The 'fact that a putative class acquires an independent legal status once it is certified' was . . . 'essential to [the] decision[ ] in *Sosna*.'" (alteration adopted) (quoting *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013))).

litigant will evade review. . . . However, this standard has been relaxed in some cases . . . ."); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv. L. Rev. 603, 623 (1992) (arguing that mootness should be considered a prudential doctrine); Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Thirdparty Standing and Mootness in the Federal Courts*, 35 U. Miami L. Rev. 393, 444 (1981) (recognizing that the Supreme Court has applied the same complaining party rule with "leniency" in election cases).

One treatise states, "The requirement that the plaintiff show a prospect of personal future involvement with challenged practices may be relaxed substantially with respect to matters of apparent public interest." Wright & Miller, *supra* at § 3533.8.3. Another opines that the rule is relaxed in cases "involving elections or ongoing government policies." Moore's Federal Practice, *supra* at § 101.99. Particularly regarding election cases, "[c]andidates have often been allowed to challenge restrictions on candidacy after completion of the election immediately involved and without any showing of plans to become involved in any future election." Wright & Miller, *supra* at § 3533.9. Our discussion above of *Storer* seems to confirm some relaxation. *See also Moore*, 394 U.S. at 815–16 (holding that the independent candidates' challenge to Illinois's ballot access signature requirement was not moot without explicitly addressing the likelihood that the same independent candidates would seek to run again); *Brown*, 498 U.S. at 473 & n.8 (stating that "[r]espondent has run for office before and may well do so again" but also noting

that the respondent was in fact running in another union election).

The Sixth Circuit case *Lawrence v. Blackwell*, 430 F.3d 368 (6th Cir. 2005), illustrates this relaxed application of the same complaining party rule. *Lawrence* involved an independent candidate's challenge to Ohio's restrictions on ballot access in the context of a regular general election cycle. *Id.* at 370. The court held that the case was not moot notwithstanding that the 2004 election at issue had passed. *Id.* at 371. Applying the same complaining party rule, the court held that the controversy was capable of repetition:

> Although Lawrence has not specifically stated that he plans to run in a future election, he is certainly capable of doing so, and under the circumstances it is reasonable to expect that he will do so. Neither is an explicit statement from Shilo necessary in order to reasonably expect that in a future election she will wish to vote for an independent candidate who did not decide to run until after the early filing deadline passed. The law at issue is still valid and applicable to both Lawrence and any independent candidate Shilo might wish to vote for in future election years. Therefore, the controversy is capable of repetition.

Id. Thus, the Sixth Circuit has held that there is no requirement for affirmative proof that the same complaining party intends to continue similar participation in politics and again challenge the restriction at issue; it is sufficient that there be a reasonable expectation under the circumstances that

he will again be subjected to the challenged restriction.[5]

Other courts have interpreted the same complaining party rule in a similarly relaxed manner. *See Merle v. United States*, 351 F.3d 92, 95 (3d Cir. 2003) (holding that a postal worker's challenge to a provision of the Hatch Act that barred him from running for Congress was not moot even though the election had passed because it was reasonable to expect the plaintiff to wish to run for office again regardless of whether he explicitly stated his intent to do so but also interpreting the plaintiff's statement that he would be subject to the Hatch Act in future elections as an indication that the plaintiff intended to run for office again); *Majors v. Abell*, 317 F.3d 719, 723 (7th Cir. 2003) (holding that the plaintiff's challenge to a state law regarding political advertising was capable of repetition even though the named plaintiff had not sought to run as a candidate in the next election, stating, "[I]n an election case the court will not keep interrogating the plaintiff to assess the likely trajectory of his political career."); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 37 n.12 (1st Cir. 1993) (finding a reasonable expectation that the plaintiff "w[ould] encounter the same barrier again" where "she ha[d]

---

[5] The Sixth Circuit in *Lawrence*, either in dicta or an alternative holding, also seemed to dispense with the requirement of a reasonable expectation that the same complaining party be subjected to the same restriction again. *Id.* at 372. To the extent that the Sixth Circuit so held, we respectfully disagree for the reasons set forth in this opinion. In any event, the Sixth Circuit case is distinguishable from the instant case because it involved a regular election cycle, which would recur frequently.

not renounced possible future candidacies," and noting that "politicians, as a rule, are not easily discouraged in the pursuit of high elective office"); *see also Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 165 (5th Cir. 2009) (holding that a challenge to a Texas Democratic Party oath requirement was not moot even though the plaintiff's counsel "could not state whether his client ha[d] an intention to run for President in the future and declined to express a belief that [the plaintiff] w[ould] again be subject to the party's oath requirement"); *Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000) (relying on *Dunn* and holding that the plaintiff's challenge to a residency requirement was not moot even though the candidate refused to disclose whether he intended to run in future elections); *McLain v. Meier*, 637 F.2d 1159, 1162 n.5 (8th Cir. 1980) (holding that the plaintiff's challenge to state ballot access and formatting statutes was not moot without requiring proof that the plaintiff intended to seek ballot access in future elections).[6]

---

[6] To the extent that the Fifth Circuit in *Kucinich*, the Ninth Circuit in *Schaefer*, or the Eighth Circuit in *McLain* suggests that the same complaining party rule does not apply at all, we respectfully disagree, as discussed above. *Cf. Kucinich*, 563 F.3d at 164–65 (observing Justice Scalia's argument "that the Court's treatment of election law cases differs from its traditional mootness jurisprudence by dispensing with the same-party requirement" (citing *Honig*, 484 U.S. at 335–36 (Scalia, J., dissenting)); *Schaefer*, 215 F.3d at 1033 & n.1 (finding that the plaintiff's challenge to the residency requirement was not moot even though the plaintiff had satisfied the requirement and the election had already been held); *McLain*, 637 F.2d at 1162 n.5 ("Regardless of [the plaintiff]'s candidacy in any future election, election law controversies tend not to become moot."). Moreover, like the Sixth Circuit *Lawrence* case, *Kucinich* and *McLain*

We need not definitively decide in this case the outer boundaries of the relaxation with respect to the application of the same complaining party rule. We are confident that the instant case does not satisfy the same complaining party rule, however relaxed the rule may be. In light of the history of the infrequent occurrences of special elections in Alabama for U.S. House seats, we conclude that it is highly unlikely that Hall will have an opportunity during his life to seek to run or vote in a special election for a U.S. House seat in Alabama.[7] As noted above, it is highly unlikely that there will be another special election in Hall's own First U.S. House District during his life. And we

---

involved challenges to election laws as applied during regular election cycles. And although *Schaefer* involved a special election, the opinion suggests that the challenged residency requirement would apply with equal or greater force during regular election cycles. 215 F.3d at 1034 n.2. Thus, the issues presented in those cases would likely recur frequently, making those cases materially different than the instant case.

[7] By focusing so intensely on Hall's asserted intent to run in future special elections for U.S. House seats in Alabama, the dissent ignores a critical issue in this case—i.e., whether Hall will have an opportunity to run in such an election. Regardless of Hall's intent, if Hall is not likely to have the opportunity to run in a future special election for a U.S. House seat in Alabama, there can be no reasonable expectation that he will do so.

We recognize that courts "do not always require affirmative proof that the same complaining party intends to continue similar participation in political activities" in order to find that the same complaining party rule is satisfied. *See supra* Part IV. However, the law is well established that courts do require that there be "a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein*, 423 U.S. at 149. For all of the reasons discussed in this opinion, we cannot conclude that there is such a reasonable expectation in this case.

consider the prospect of Hall's running to represent a district in which he does not reside a mere theoretical possibility. Even if Hall were willing to move to another district upon the announcement of a mid-term U.S. House vacancy—and there is no suggestion that he is—the unpredictable nature of a mid-term U.S. House vacancy would mean that Hall's move to the new district would be shortly before the election. Thus, Hall would probably be considered a carpetbagger if he attempted to run in the special election, further reducing the likelihood of his doing so.[8] Similarly unlikely is the prospect of Hall uprooting his life and quickly moving to a new U.S. House district in order to register and vote in a special election in that district. We therefore conclude that this case is not capable of repetition with regards to Hall under any reasonable application of the same complaining party rule.[9]

---

[8] The dissent's focus on our carpetbagger comment is misplaced. The fact that Hall would be unlikely to prevail if running in a foreign House district is just one more factor indicating that there is no reasonable likelihood of such a race.

[9] The dissent mistakenly suggests that we make a factual finding that Hall does not really intend to run in future special elections for U.S. House seats in Alabama. To the contrary, we hold only, as established law provides, that there must be a "reasonable expectation" that he will run again and be subjected to the same or similar restrictions. Under the circumstances presented here, we cannot conclude that Hall's intent is reasonable. Running in a special election for a U.S. House seat outside of Hall's district would require Hall to either abruptly move or regularly travel to another part of Alabama to campaign. Such practical difficulties along with the fact that such an election may not occur for twenty years make the prospect of Hall running in such an election remote regardless of Hall's present intent.

We recognize that this case presents a conflict between strong and legitimate concerns. On the one hand, the district court's opinion seems to us to be a resolution of only the rights of future independent candidates seeking ballot access in future special elections. We can perceive of no real interest on the part of Hall because there is no remedy available to him other than the satisfaction of having this Court tell him that he should have been allowed access to the ballot. *See Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1268 (11th Cir. 2017) (en banc) (recognizing that "absent an accompanying practical effect on the legal rights or responsibilities of the parties before us, we are without jurisdiction to give" litigants "purely psychic satisfaction" through "judicial validation"), *cert. denied sub nom.*, No. 17-869, 2018 WL 1460786 (U.S. Mar. 26, 2018). Any opinion by us on the merits of this case would be nothing more than an advisory opinion. Wholly aside from our constitutional constraint to entertain only real cases or controversies, advisory opinions are always unwise. It is hard for a party to devote the appropriate effort to prosecute a case that can make no real difference to the party; the parties' advocacy

---

In the dissent's view, the constitutional issue of mootness depends entirely on a plaintiff's mere assertion of intent to run regardless of how unreasonable that may be. In our judgment, the constitutional authority of a court to decide a case could not depend on so slender a read, one so readily subject to manipulation.

necessarily suffers, and the Court is left without necessary guidance.[10]

On the other hand, courts are understandably loathe to permit a situation in which a governmental restriction is effectively immune from judicial review and correction, because the duration of the restriction is too short to be fully litigated before it expires. Fortunately, the instant case does not present a situation in which a challenge to the Alabama restriction will always evade review. Although "the 'mere presence of . . . allegations' that might . . . benefit other similarly situated individuals cannot 'save [a litigant's] suit from mootness once [his] individual claims' have dissipated," *Sanchez-Gomez*, 2018 WL 2186177, at *6 (quoting *Genesis Healthcare Corp.*, 569 U.S. at 73), a litigant whose interest extends beyond his or her own concern about access to the ballot for a particular special election can file a class action suit that comports with the strictures of Federal Rule of Civil Procedure 23, and thus avoid mootness. *Id.* at *5–6. The Supreme Court in *Sosna* has held that, when a suit is brought as a class action and the district court

[10] To the extent that the dissent suggests that a plaintiff's past candidacy alone is sufficient – i.e., sufficient to satisfy the requirement that there be a reasonable expectation that the plaintiff will run again and be subjected to the same or similar restrictions – even if it is extremely unlikely that the plaintiff will have the opportunity to run and be subjected to the same or similar restrictions, the dissent is in effect dispensing with any requirement that the same complaining party will be subject to the same action again. In Part IV of our opinion, we consider and reject this proposition. We believe that our position—rather than the dissent's position—is more in harmony with the cases in the Supreme Court and the other circuits.

has certified the class and found that the named plaintiff would fairly and adequately protect the interests of the class, "[t]he controversy may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot" and is not capable of repetition with regards to the named plaintiff. 419 U.S. at 402. We believe that such a posture is much preferable, as compared to the advisory opinion that Hall seeks, because the class certification findings provide assurance that the class of future candidates and/or future voters would be adequately represented by vigorous advocacy.[11] *See also Sanchez-Gomez*, 2018 WL 2186177, at *6 ("[C]ourts may not 'recognize . . . a common-law kind of class action' or 'create *de facto* class actions at will.'" (quoting *Taylor v. Sturgell*, 553 U.S. 880, 901 (2013))).

For the foregoing reasons, we conclude that this case is MOOT. Accordingly, we vacate the judgment of the district court and remand with instructions to dismiss the case as MOOT.

VACATED and REMANDED with instructions.

---

[11] The dissent expresses concern that a class action challenging Alabama's ballot access restrictions during a special election would also be moot and not capable of repetition with regards to any member of the class once the election at issue had passed. We disagree. Such a class action could likely include independent candidates and voters in all U.S. House districts in Alabama. There is a greater likelihood of a future special election when all U.S. House seats are in play; thus, the class would have a much stronger argument than Hall that the issue was capable of repetition with regards to at least some members of the class.

JILL PRYOR, Circuit Judge, dissenting:

In 2013, Congressman Jo Bonner, who represented Alabama's First Congressional District, announced that he would be retiring, and a special election was called to elect the district's next representative. James Hall, a 39-year-old United States Marine Corps veteran, sought to run as an independent candidate in the special election.

To be listed on the ballot, candidates had to obtain signatures from 5,938 registered voters in the district—a number equivalent to 3% of the votes cast in the district in the last gubernatorial election. *See* Ala. Code § 17-9-3(a)(3). There were only about four months between Congressman Bonner's announcement and the deadline for candidates to submit the required signatures. Within this relatively brief period, Hall decided to run, created a plan for collecting signatures, and began gathering them. Hall's time frame was even more compressed because the Secretary of State had no official form available for candidates to use to collect signatures for the special election, which meant that Hall could not begin gathering signatures until the Secretary of State approved his form. After receiving the Secretary of State's approval, Hall had only 106 days remaining to obtain the signatures. He sought signatures at community events, canvassed his network of friends and colleagues, and visited over 5,000 homes, but he was unable to collect the required number of signatures in time. As a result, Hall's name did not appear on the ballot for the 2013 special election.

In this appeal, Hall challenges the State of Alabama's application of its ballot access requirement

to the 2013 special election. We previously held that Alabama's ballot access requirement was constitutional when applied to a regularly scheduled election, *Swanson v. Worley*, 490 F.3d 894, 896-97, 903 (11th Cir. 2007), but this appeal presents a different question: whether the ballot access requirement is constitutional when applied to a special election for a United States House of Representatives seat, where a candidate faces a considerably more compressed time frame for gathering signatures. Unfortunately, the majority avoids answering this important constitutional question by concluding—incorrectly, in my view—that Hall's claim is moot.

The Constitution limits our jurisdiction to actual cases or controversies. *See* U.S. Const. art. III, § 2, cl. 1. We lack jurisdiction to hear a moot case—one that "no longer presents a live controversy with respect to which the court can give meaningful relief." *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) (internal quotation marks omitted). But even if the controversy at hand is no longer live, we may retain jurisdiction under an exception to the mootness doctrine that addresses circumstances in which the issue is capable of repetition yet tends to evade judicial review. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (internal quotation marks omitted). This exception applies when (1) "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration," and (2) "there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.* (alterations adopted) (internal quotation

marks omitted). No one disagrees that the first prong of this test is satisfied here.

The majority holds that the second prong of the test, the "same complaining party rule," is not satisfied here. Maj. Op. at [20a]. The majority concedes that in the context of election challenges the same complaining party rule applies in a "relaxed" manner. *Id.* Despite failing to identify what kind of proof is required to satisfy the same complaining party rule in this context, the majority holds that Hall's proof was insufficient. *See id.* ("We are confident that the instant case does not satisfy the same complaining party rule, however relaxed the rule may be."). And it reaches this conclusion even though Hall testified that he plans to run as an independent candidate in a future election.

I disagree with the majority's application of the same complaining party rule in this case. Looking to Supreme Court precedent, I would conclude that in the unique context of an election-related challenge, we can infer from Hall's past candidacy alone that there is a reasonable expectation he will run as an independent candidate in a future special election and be subject to the same ballot access requirement. But even assuming that to satisfy the same complaining party rule a candidate is required to submit some additional evidence of his intent to run again, I believe Hall satisfied this burden with his testimony that he intends to run as an independent candidate in future elections, which would include special elections. I would hold that the case is not moot, address the merits, and affirm based on the district court's well-reasoned opinion. I respectfully dissent.

I. In Election Challenges, Courts Can Infer That Candidates Will Run in Future Special Elections from the Fact That They Ran in a Previous Special Election.

To satisfy the same complaining party rule, a plaintiff must show that "there is a reasonable expectation" that she "will be subject to the same action again." *Kingdomware Techs*, 136 S. Ct. at 1976 (alterations adopted) (internal quotation marks omitted). In general, this means that a plaintiff must come forward with evidence of her future plans. But, as the majority concedes, the Supreme Court has applied this rule less strictly in the context of election-related challenges. *See Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974). In this unique context, we can infer a reasonable expectation that a candidate will run in a future election and be subject to the same challenged ballot access restriction from the fact that she previously ran as a candidate.

The Supreme Court implicitly drew such an inference in *Storer*. There, several candidates challenged a California law that barred an individual who had recently been affiliated with a political party from being listed as an independent candidate on an election ballot. *Id.* at 726-27. By the time the case made its way to the Supreme Court, the election for which the candidates sought ballot access had passed. *Id.* at 737 n.8. In addition, for some of the plaintiffs, sufficient time had passed since they disaffiliated from their former political party that they now were exempt from the challenged law. *See id.* at 726-28. The Supreme Court nevertheless held that the case was not moot because "the issues properly presented, and their

effects on independent candidacies, will persist as the California statutes are applied in future elections." *Id.* at 737 n.8.

The Court held that the case was not moot without conducting any inquiry into any candidate's intent to run in a future election or the likelihood that the candidate would be subject to the disaffiliation requirement in a future election. *See id.* This was so even though at least some of the candidates would be subject to the disaffiliation restriction in the future only if they chose to rejoin a political party and then decided to run as an independent candidate before sufficient time had passed since their disaffiliation from the political party. *See id.* The absence of any discussion about the actual likelihood of the candidates being subject to the disaffiliation requirement in the future means the Court must have treated the fact that the candidates had run in a past election as sufficient to establish a reasonable likelihood that they would be subject to the challenged restriction again in the future. *See id.*; *see also Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) (concluding—without requiring evidence that any plaintiff would run in a future election and despite a dissent arguing that the case was moot without such evidence—that a challenge to a ballot access requirement for independent candidates was not moot because even though the relevant "election is over, the burden . . . remains and controls future elections").

Subsequent Supreme Court cases confirm that in the specific context of a challenge to a ballot access requirement, courts can infer from the fact that a party previously ran as a candidate a reasonable expectation

that he will run in a future election and again be subject to the challenged requirement. In *Norman v. Reed*, a group of voters who were organizing a new political party challenged an Illinois law requiring them to collect a certain number of signatures for the party to be listed on the election ballot. 502 U.S. 279, 283-84 (1992). By the time the case reached the Supreme Court, the election was over. *Id.* at 287. Yet the Supreme Court held that the case was not moot because "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if [the Court] should fail to resolve the constitutional issues" that arose during the first election. *Id.* at 288. Again, the Court reached this conclusion without requiring evidence that the voters would try to get the party on the ballot in future elections. Instead, it appears that the Court inferred from the voters' past attempt to seek ballot access that they would do so in the future. *See id.*; *see also Int'l Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 473 (1991) (holding that union officer candidate's challenge to union's election rule was not moot because the candidate "has run for office before and may well do so again," without addressing whether there was any evidence of the candidate's actual intent to run again).

I acknowledge that in other election-related cases the Supreme Court has held that the same complaining party rule was satisfied where the plaintiffs presented evidence that they would engage in conduct that would make them subject to the challenged restriction in a future election. *See Davis v. FEC*, 554 U.S. 724, 735-36 (2008); *FEC v. Wis. Right to*

Life, Inc., 551 U.S. 449, 463-64 (2007); *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988). The Supreme Court held in these cases that evidence of the candidate's intent was *sufficient* to satisfy the same complaining party rule, but it has never held that such evidence was *necessary* to satisfy the rule. Nor did the Supreme Court cast any doubt in these cases about its decisions in *Storer*, *Reed*, or other cases in which it required no evidence of the plaintiff's intent to run in a future election.

The majority contends that the Supreme Court's decision in *Brockington v. Rhodes*, 396 U.S. 41 (1969) (per curiam), illustrates that a more searching inquiry into a plaintiff's intent to run in a future election is required. But *Brockington* does not control here. In that case, a candidate challenged an Ohio ballot access law requiring independent candidates to gather signatures from 7% of the qualified voters in the district. *Id.* at 41-42. The candidate obtained signatures amounting to a little over 1% and then petitioned in Ohio state court for a writ of mandamus commanding the election board to certify his nominating petition as sufficient and "to do all things necessary to place [his] name upon the ballot." *Id.* at 42. He sought no declaratory relief. *Id.* at 42. By the time the appeal reached the Supreme Court, the election was over. The Court concluded that the case was moot "in view of the limited nature of the relief sought" because with the election over it was "now impossible to grant the [candidate] the limited, extraordinary relief he sought in the Ohio courts." *Id.* at 43-44. Because the Supreme Court's mootness decision in *Brockington* was driven by the candidate's

decision to seek only mandamus relief, the Court had no occasion to address what evidence would be sufficient for candidates to satisfy the same complaining party rule when they seek a declaratory judgment that a ballot access requirement is unconstitutional. *See id.*

The majority also relies on the Supreme Court's decision in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 175-76 (1979), to support its assertion that to satisfy the same complaining party rule candidates must provide direct evidence of their intent regarding future elections. But that case does not advance the majority's position. After Chicago's mayor died in office, several new political parties and an independent candidate sought to be included on the ballot for the special mayoral election. *Id.* at 177-78. Together they brought a lawsuit against the Chicago Board of Elections and the State Board of Elections challenging a state law requiring independent candidates and new political parties to gather more than 35,000 signatures before they could be included on the mayoral ballot. *Id.* Before the election occurred, the district court permanently enjoined enforcement of the state law. The Chicago Board of Elections and the plaintiffs then reached a settlement agreement, which the district court incorporated into an order, that reduced the required number of signatures for new political parties and independent candidates. *Id.* at 180. The State Board of Elections filed a motion to vacate the district court's order, arguing that the Chicago Board lacked the authority to settle the dispute without its permission. *Id.* The district court denied the motion. *Id.* The State Board then appealed

the district court's orders permanently enjoining enforcement of the ballot access requirement and refusing to vacate the order incorporating the settlement agreement. *Id.*

The Supreme Court affirmed the district court's injunction, holding that the ballot access requirement was unconstitutional. *Id.* at 187. Separately, the Court held that the State Board's challenge to the Chicago Board's settlement authority was moot. *Id.* at 187-88. The capable-of-repetition-yet-evading-review exception to the mootness doctrine did not apply, the Court held, because there was no "reasonable expectation" that the Chicago Board would engage in the challenged conduct—settling litigation without the approval of the State Board—in the future. *Id.* The mootness analysis in *Illinois State Board of Elections* addressed only whether the Chicago Board was likely to attempt to resolve future litigation without agreement from the State Board, not whether future candidates would be subject to the ballot access restriction. I fail to see how the case tells us anything about the application of the same complaining party requirement here.

By requiring evidence of intent to run in a future election from a plaintiff in Hall's position, the majority creates a circuit split. Seven other circuits—like the Supreme Court in *Storer*—have found candidate challenges not moot, despite the election at issue having taken place, without requiring any evidence about the candidate's intent to run in future elections. *See Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 165 (5th Cir. 2009) (holding that a candidate's challenge to a political party's oath requirement was not moot even though his counsel "could not state

whether his client ha[d] an intention to run . . . in the future and declined to express a belief that [plaintiff] w[ould] again be subject to the party's oath requirement"); *Lawrence v. Blackwell*, 430 F.3d 368, 371-72 (6th Cir. 2005) (concluding that a challenge to a ballot access requirement was capable of repetition yet evading review even though the plaintiff had "not specifically stated that he plan[ned] to run in a future election"); *Merle v. United States*, 351 F.3d 92, 94-95 (3d Cir. 2003) (concluding that there was a reasonable expectation that a postal worker, who had sought to run for Congress but was barred by federal law from running for partisan political office, would be subject to the challenged law again even though he failed to allege that he intended to run in a future election); *Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000) (concluding that case was not moot "without examining the future political intentions of the challenger[]"); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 37 n.12 (1st Cir. 1993) (holding that controversy was not moot because the candidate had "not renounced possible future candidacies, and politicians, as a rule, are not easily discouraged in the pursuit of high elective office"); *McLain v. Meier*, 637 F.2d 1159, 1162 n.5 (8th Cir. 1980) ("Regardless of McLain's candidacy in any future election, election law controversies tend not to become moot"). The decisions of our sister circuits uniformly reflect that "in an election case the court will not keep interrogating the plaintiff to assess the likely trajectory of his political career." *Majors v. Abell*, 317 F.3d 719, 723 (7th Cir. 2003). No circuit besides ours has taken a contrary position.

The majority tries to distinguish *Storer* and the decisions from every other circuit on the ground that these cases involved challenges to election laws or regulations in the context of regularly scheduled elections, but this case involves a challenge to a special election. The majority argues that because special elections occur less frequently, we cannot look to cases applying the same complaining party rule to regularly scheduled elections, which will reoccur with predictable regularity. But the majority cites no authority to support its position. In the absence of any indication from the Supreme Court or even persuasive authority from another circuit to support it, I would not create a different standard for special elections. I would instead follow the Supreme Court's analysis and the similar path taken by every other circuit. I would conclude that the same complaining party rule is satisfied in this case because there is a reasonable expectation that Hall will be subject to Alabama's ballot access requirement in a future special election based on the fact that he ran as an independent candidate in a previous special election.

II. Even if Candidates Must Prove Their Intent to Run in a Future Election to Satisfy the Same Complaining Party Rule, Hall Has Carried This Burden.

Even assuming the majority is correct—that to satisfy the same complaining party rule in the context of a special election candidates must submit some evidence of their intent to run for office, which will subject them to the challenged requirement in the future—Hall has met this burden. The majority concludes there is only a "theoretical possibility" that

Hall would be subject to the ballot access requirement in a future special election. Maj. Op. at [21a]. I disagree.

The majority so concludes because special elections for U.S. House of Representatives seats historically have occurred too infrequently in Hall's home district to say that there is a reasonable expectation that one will occur again during his lifetime. But even granting the majority that there is no reasonable expectation that a special election will occur in Hall's own district during his lifetime, we must consider whether a reasonable expectation exists that he will run in a future special election for a House seat anywhere in Alabama. As a resident of Alabama, Hall is eligible to represent any district in the State; there is no legal bar to his running for a House seat in a district other than his home district. *See* U.S. Const. art. I, § 2, cl. 2. Hall's evidence is sufficient to establish a reasonable expectation that he will run for a House seat in a future Alabama special election (whether it is held in his home district or another district) and thus be subject to the same ballot access requirement.

There is no dispute that we can reasonably expect Alabama to hold a special election for an open seat in the U.S. House of Representatives in the future. There will be special elections when members of the House resign for various reasons: to accept other appointments or positions (like Alabama Congressman Jo Bonner or Georgia Congressman Tom Price), due to the fallout from public scandal (like Michigan Congressman John Conyers or Texas Congressman Blake Farenthold), or for personal reasons (like Pennsylvania Congressman Charlie Dent). Seats

unfortunately will become vacant when representatives die while in office (like Mississippi Congressman Alan Nunnelee). Although we do not know when the next such special election will occur in Alabama, we know that another vacancy *will* occur and need to be filled through a special election.[1] Since 1941, the State of Alabama has held six special elections for House seats, meaning special elections historically have occurred on average once every 12 years. Given this frequency and the fact that Hall was only 39 years old during the last special election, we can reasonably expect a future special election for an Alabama House seat to occur in Hall's lifetime. The majority accepts the validity of this type of analysis. *See* Maj. Op. at [5-6] (looking to historical evidence about the frequency in Alabama of special elections for the House of Representatives to assess whether there is a reasonable expectation of a future special election occurring in Hall's lifetime).

The next question is whether, for purposes of applying the same complaining party rule, it is reasonably likely that Hall will run as an independent candidate in such an election. Despite the fact that the Constitution permits Hall to represent any House district in Alabama, *see* U.S. Const. art. I, § 2, cl. 2, the majority concludes that Hall would not run for a seat outside his home district because he would be viewed

---

[1] I note that even in cases outside the election context, the Supreme Court has recognized that to satisfy the same complaining party rule a plaintiff is not required to "establish[] with mathematical precision the likelihood" that he will be subject to the same challenged government action. *Honig v. Doe*, 484 U.S. 305, 320 n.6 (1988).

as a "carpetbagger" and thus would be unlikely to win. Maj. Op. at [21a]. But the majority offers no authority supporting its assumption that a candidate who lives outside a district cannot win an election there. I cannot agree with the majority's unsupported speculation.[2]

But the probability of a candidate winning an election for a seat outside her home district is really beside the point. As the majority acknowledges, Hall testified that he "wants to run in any special election for a U.S. House seat in Alabama regardless of his residence" in another district. *Id.* at [6a]. It is not our place to reject this direct evidence, essentially making a finding of fact that he would not do so. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) ("Factfinding is the basic responsibility of district courts, rather than appellate courts. . . ." (alteration adopted) (internal quotation marks omitted)); *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1293 (11th Cir. 2010) ("[A]s everyone knows, appellate courts may not make fact findings.").

---

[2] Indeed, an internet search for members of Congress who live outside the districts they represent calls into question the majority's assumption that candidates for House seats outside the district where they reside cannot win elections. The results of such a search include reports showing that in June 2017 at least 20 members of Congress were registered to vote (meaning their official residences were located) outside the districts they were elected to represent. I acknowledge the possibility that some of these representatives moved outside their districts after being elected. But even accepting this possibility, the fact that representatives are willing to live outside the districts they were elected to represent suggests that there no significant stigma attached to it.

Furthermore, the majority simply assumes that a candidate will run in an election only if she can win. The majority's supposition ignores that independent and third party candidates may choose to run in elections even though they have no realistic chance of winning. As the Supreme Court has explained, these candidates may run not because they believe that they can win the election, but rather to use the "election campaign [as] a means of disseminating ideas" outside those presented by the two dominant political parties. *Ill. State Bd. of Elections*, 440 U.S. at 186. Hall may run as an independent candidate in a future special election to try to introduce new political ideas and help frame the issues; I cannot agree with the majority that Hall is unlikely to run in an election unless he can win.

By requiring Hall to show that he has a chance not only to run in a future election, but also to win it, the majority adds an element to the same complaining party inquiry that no other court has adopted. In every election-related Supreme Court case discussing the evidence that did or did not satisfy the same complaining party rule, the Court has held that the plaintiffs satisfied the rule when they introduced a statement of intent to participate in a future election. *See Davis*, 554 U.S. at 736 (holding that there was a reasonable expectation that a congressional candidate would be subject to a federal campaign finance law in the future when he "made a public statement expressing his intent" to run for the seat in the future); *see also Wis. Right to Life, Inc.*, 551 U.S. at 463 (concluding that there was a reasonable expectation that an ideological organization would again be subject to a federal law that restricted the content of its

political advertisements in the period shortly before primary and general federal elections because the organization "credibly claimed that it planned on running materially similar future targeted broadcast ads . . . within the blackout period"); *Meyer*, 486 U.S. at 417 n.2 (holding, without considering the likelihood that voters would actually approve the initiative, that it was reasonable to expect that proponents of a ballot initiative would be subject to a state law that prohibited paying petition circulators when, despite the initiative's failure, the proponents "continue[d] to advocate its adoption and plan future attempts to obtain the signatures necessary to place the issue on the ballot"). Not one of these cases required—or even hinted—that the plaintiffs had to establish the likelihood that they would win (or the position they supported would prevail) in a future election to satisfy the same complaining party requirement. I cannot agree with the majority's decision, which effectively adds this additional requirement to the same complaining party rule, to go well beyond Supreme Court precedent.

I am concerned that by imposing more stringent requirements on candidates seeking to challenge ballot access laws, the majority's decision will effectively close the courthouse doors to future independent and third party candidates and voters. As an example, when the next special election for a House seat in Alabama is held, to gain access to the ballot independent and third party candidates again will have to satisfy an onerous signature requirement in a significantly compressed time frame. If Hall—or any other candidate or voter in that future special

election—brings a lawsuit raising a constitutional challenge to the signature requirement, due to the nature of such vacancies there will be very little time to litigate the challenge before the election passes and the case becomes moot. The plaintiff will be unable to rely on the capable-of-repetition-yet-evading-review exception because, using the majority's logic, there will never be a reasonable expectation of the candidate running in another special election in his home district (because such an election is unlikely to occur again during the plaintiff's lifetime) or in a special election in another district (because the plaintiff will be unlikely to win).[3]

The majority acknowledges that "courts are understandably loathe to permit a situation in which a governmental restriction is effectively immune from judicial review and correction, because the duration of the restriction is too short to be fully litigated before it expires." Maj. Op. at [23a]. I agree. The majority suggests, in *dicta*, that its reasoning will not create such a situation because in a future special election a candidate or voter may challenge Alabama's ballot access requirements in a class action. *Id.* at 25-26. I am far less comfortable that a class action would provide a viable option. Under the majority's logic, a future class action challenging the ballot access restriction brought during the next special election would, like Hall's action here, become moot after the special election

[3] It seems to me that a candidate who was unable to gather the number of signatures required to appear on the ballot would never be able to show that he was likely to win a future election. The effect of the majority's decision, then, is to insulate ballot access laws from judicial review.

occurs. The majority's reasons for concluding there is no reasonable expectation that a special election would occur again in Hall's district during his lifetime likewise would indicate that there is no reasonable expectation that a special election would occur again in any class member's district during her lifetime. The majority suggests that the class could consist of independent voters and candidates in *all* districts in Alabama, but it fails to explain how the claims of class members in other districts where no special election was pending would be justiciable.[4]

By making Alabama's ballot access requirements, as applied in the context of special elections, effectively immune from judicial review and correction, the majority's decision closes the courthouse doors to independent and third party candidates and voters. These citizens are left with no meaningful recourse in the courts to challenge these restrictions, even when the restrictions impose substantial burdens on First Amendment and Fourteenth Amendment rights to vote and to associate for political purposes. I cannot agree with the majority that we should depart from Supreme Court precedent and the decisions of all the other circuits to address this issue by holding that ballot access restrictions curtailing these rights—which

---

[4] By pointing to a class action as a suitable alternative, the majority implicitly concedes that a special election can reasonably be expected to occur in at least one House district in Alabama during some class member's lifetime. This argument seems to me to be contrary to the majority's contention that it is "extremely unlikely" that Hall would have the opportunity to run in another special election for a House seat in the same district during his lifetime. Maj. Op. at [23a n.10].

"rank among our most precious freedoms"—are effectively unreviewable. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

* * *

I would hold that the case is not moot under the capable–of–repetition–yet - evading-review exception. There is a reasonable expectation that Hall will be subject to Alabama's ballot access signature requirement in a future special election. I would draw this conclusion based solely on the fact that Hall ran as an independent in the special election at issue here. Alternatively, even if I were to accept the majority's position that Hall was required to produce some evidence showing his intention to run in a future election, I would conclude that he met his burden given his testimony that he plans to run in future elections for any open House seat in the State of Alabama.

Because I would hold that the case is not moot, I would address on the merits Hall's claim that Alabama's ballot access requirement is unconstitutional as applied to the special election here. States certainly have "important and compelling interests in regulating the election process and in having ballot access requirements." *Swanson*, 490 F.3d at 902 (internal quotation marks omitted). But Alabama's ballot access restriction "implicate[s] the constitutional rights of voters, especially those with preferences outside the existing parties, to associate and cast their votes effectively." *Id.* Weighing these interests, I agree with the district court that Alabama's ballot access requirement is unconstitutional as applied in the context of a special election for the House of Representatives when there were only about

four months between the announcement of the vacancy and the deadline for an independent or third party candidate to submit signatures to appear on the ballot, and the candidate was further limited to a 106-day period to collect signatures. I would affirm the district court's judgment.

Respectfully, I dissent.

APPENDIX B

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

JAMES HALL and N.C. "CLINT" MOSER, JR., Plaintiffs, v. JOHN MERRILL, Alabama Secretary of State, in his official capacity, Defendant.	CIVIL ACTION NO. 2:13cv663-MHT (WO)

OPINION

Plaintiffs James Hall and N.C. "Clint" Moser, Jr. planned to run in the December 2013 special election to fill the vacant United States House of Representatives seat in Alabama's First Congressional District. However, neither timely submitted a petition with the number of signatures required under state law, and, as a result, neither appeared on the ballot.

Pursuant to 42 U.S.C. § 1983, Hall and Moser filed this case against Alabama's Secretary of State, raising First and Fourteenth Amendment challenges to the constitutionality of Alabama's ballot-access

laws in the context of such a special election.[1] They raise an equal protection claim as well. Jurisdiction is proper under 28 U.S.C. § 1331.

Currently before the court are Hall and Moser's motion for summary judgment and the Secretary's motion for summary judgment. Based on the record, as well as the oral arguments conducted before this court, the court will grant summary judgment in favor of Hall on his First and Fourteenth Amendment claim, and grant summary judgment in favor of the Secretary on Hall's equal-protection claim. Because the relief to be afforded to Hall is identical to the relief sought by Moser, the court need not decide whether it has jurisdiction to hear, or evaluate the merits of, Moser's claims, and his claims will be dismissed as moot. The motions will be denied in all other respects.

I. SUMMARY-JUDGMENT STANDARD

Summary judgment is appropriate "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. P. 56. The court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Rule 56 standard is unaffected by the filing of cross-motions for summary judgment. *See*

---

[1] John Merrill has replaced Jim Bennett as Alabama's Secretary of State and is automatically substituted as the official capacity defendant in this action. Fed. R. Civ. P. 25(d).

Gerling Global Reins. Corp. of Am. v. Gallagher, 267 F.3d 1228, 1233 (11th Cir. 2001).

II. FACTS

A. Alabama's Ballot-Access Scheme

Alabama law provides a prospective candidate with different routes onto the ballot, depending on whether the candidate runs as a member of a political party or as an independent. A political party is defined as an organization whose candidate received more than 20 % of the votes cast in the last general election in the relevant political subdivision. 1975 Ala. Code § 17-13-40. Candidates who run as a member of a political party have their names placed on the ballot after they prevail in their party's primary-election processes. 1975 Ala. Code § 17-9-3(a)(1).

Independent candidates, on the other hand, must seek to have their names placed on the ballot through signature petitions. Alabama law requires an independent candidate to gather a certain number of signatures of qualified electors--that is, voters registered in the relevant political subdivision and therefore eligible to vote for the candidate. Alabama law sets this signature threshold at 3 % of the number of voters who cast ballots for the office of Governor in the last general election in the political subdivision in which the candidate seeks to qualify. 1975 Ala. Code § 17-9-3(a)(3).

Any qualified elector may sign a petition regardless of whether the signer actually voted in Alabama's last gubernatorial election or intends to vote in the election in which the candidate wishes to

appear on the ballot. There is no requirement that a signer be unaffiliated with a political party, no prohibition on signers voting in a party primary, and no prohibition on signing multiple petitions. There is no fee for the Secretary of State to verify the signatures, and there is no requirement that the signature petition be notarized or witnessed. Since not all signatures on petitions will be valid, there is no limit on the number of signatures that a candidate may submit, and petitions may be submitted in parts, although no part may be submitted after the deadline.

State regulations require that any signature petition contain a header that with the "name of the prospective independent candidate, the date of the general election for which ballot access is sought, and the name of the office sought, including the district number, if applicable." Ala. Admin. Code R. § 820-2-4-.05.

Independent candidates must file their signature petitions with the Secretary of State's office by 5:00 p.m. on the date of the first primary election. 1975 Ala. Code § 17-9-3(a)(3).

B. The December 2013 Special Election

1.

On May 23, 2013, Representative Jo Bonner announced his retirement from the U.S. House of Representatives, effective August 15, 2013. That date was eventually moved up to August 2. His retirement left Alabama's First Congressional District, which is in southwestern Alabama, without a representative. Although the Governor had not yet announced a date

for a special election, Democratic, Republican, and independent candidates filed statements of organization from mid-June to early July.

Hall contacted the Secretary of State's office in early June to verify that he could begin collecting signatures for his independent candidacy in compliance with Alabama law. On June 7, Hall e-mailed the office with a draft petition to verify that it conformed to Alabama laws and regulations. He was concerned that the header on his signature petition might not conform, since the Candidate Filing Guide published on the Secretary of State's website, which he had consulted, stated that signature petitions must contain the "date of the general election for which ballot access is sought." Hall Decl. (doc. no. 25-1) at 6; Sec'y of State's Candidate Filing Guide (doc. no. 16-3) at 2; Ala. Admin. Code R. § 820-2-4-.05. At the time Hall contacted the Secretary of State's office, sample petitions had been posted on its website for regularly scheduled elections, but not for the special election. As the date of the special election had not been announced, it was impossible for Hall to include it on his signature petition.

On June 11, 2013, Alabama's Director of Elections reviewed Hall's draft petition and changed its header to indicate that it was a petition to place Hall on the ballot "in the Special General Election to be held on a date yet to be determined . . . ." Packard Aff. (doc. no. 23-1) at 3-4. The revised signature petition was sent to Hall, and he acknowledged its receipt the same day. This revised header appeared on the completed signature petition he eventually submitted.

On July 26, 2013, the dates for the special primary election and special general election were set by court order in *United States v. Alabama*, No. 2:12-cv-179-MHT (M.D. Ala.), a case seeking to compel Alabama to comply with the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. § 1973ff. UOCAVA provides that, no later than 45 days before a federal election, States must send ballots to military and overseas voters who have requested them. *See* 42 U.S.C. § 1973ff-1(a)(8)(A). The court order set the special primary election for September 24, 2013, and the special general election for December 17, 2013, because those dates would allow enough time to mail UOCAVA-compliant ballots for both elections.

The Secretary of State's office publicly announced the date of the special primary election and special general election three days later, on July 29, 2013. Hall did not learn of the date of the special primary election -- and, hence, the date his signature petition was due -- until that announcement was made.

The parties agree that meeting the 3 % signature requirement for Alabama's First Congressional District required at that time 5,938 valid signatures. They dispute, however, how much time Hall had to collect those signatures. Hall contends that independent candidates had 56 days to obtain the necessary signatures; he arrives at this number by calculating the time between the July 29 announcement of election dates and the September 24 petition deadline and excluding both the start and

end dates.[2] Hall uses July 29 as the start date because that is the earliest date an independent candidate could have begun gathering signatures using a signature petition that included the date of the election in its header. The Secretary argues, however, that Hall had 106 days to collect signatures, beginning on the day of the June 11 e-mail correspondence between Hall and the Secretary of State's office and ending on the September 24 petition deadline.

On or around June 11, 2013, Hall began gathering signatures and worked "tirelessly throughout the months of June and July" to collect signatures for his ballot petition. Hall Decl. (doc. no. 25-1) at 2. He attempted to gather signatures at places of business and at public events such as "charity runs, festivals, yard sales, concerts, sporting events, a gun show, and others." *Id.* He also used social and work contacts as well as friends to obtain signatures. He and his wife went to approximately 5,000 homes in an effort to obtain signatures. He was able to obtain roughly one signature for every 12 houses visited.

Eventually, Hall placed an advertisement to hire someone to gather signatures on his behalf, but he received only one response. Employing that signature collector would have cost him approximately $ 4.00 per signature, which he could not afford to pay. Hall

---

[2] Hall presumably excludes the start and end dates in order to reflect his belief that a candidate cannot reasonably be expected to gather signatures on either the day the election date is announced or the day on which the signatures are due by 5:00 p.m.

attests that his efforts to collect signatures were impaired by his inability, given the short lead time, to organize an effective signature drive. According to Hall, his efforts to obtain signatures were also impaired during the period preceding the July 29 announcement of the special election date because voters were unaware of the election and had no interest in it.

Hall timely filed a signature petition containing 2,835 signatures with the Secretary's office on September 24, 2013. Since this number was well short of the 5,938 signatures required, the Secretary's office informed him that it would not attempt to verify the signatures and that the number of signatures was insufficient to provide him with ballot access. After the September 24 deadline, Hall continued to collect signatures and was able to obtain an additional 451 signatures.

2.

Moser, like Hall, also wanted to run as an independent in the December 2013 special election. After Representative Bonner announced his retirement, Moser met with a friend, who had been the campaign coordinator in Alabama for Ron Paul and had managed Paul's signature campaign, to discuss strategies for Moser's signature petition. According to Moser, this friend attempted to contact over 100 of his former contacts from the Paul campaign to collect signatures for Moser and to set up a Facebook petition page. Despite those efforts, however, Moser and his associate were able to find only one volunteer, and he was able to obtain only 750 signatures by September 24. Moser, like Hall,

was concerned about collecting signatures before a date for the election had been announced because the Candidate Filing Guide from the Secretary of State's website stated that a signature petition must include the date of the election. Moser and his associate feared that any signatures they might collect before the date of the election was announced would be rejected as invalid upon submission.

3.

Joshua Cassity, the Chairman of the Constitution Party of Alabama, has also submitted a declaration in this case. He states that the Constitution Party's candidate was able to achieve ballot access for the 2010 general election for the House of Representatives in the First Congressional District. The Constitution Party knew that its signature petition was due in June of 2010 and began planning its signature petition in November 2009. After early efforts provided mixed results, the Constitution Party spent $ 12,000 to $ 15,000 to hire signature gatherers. With the help of the paid signature gatherers, the Constitution Party was able to meet the 3 % requirement and obtain ballot access for its candidate.

Cassity wanted to place a Constitution Party candidate on the ballot for the special election to fill Representative Bonner's seat but decided the party could not acquire the required signatures in the shortened timeframe for the special election. Like Moser, Cassity was concerned about gathering signatures using a petition without the date of the election on it as required by the Candidate Filing Guide. Although an employee of the Secretary of

State's office told Cassity to begin gathering signatures and then add the date of the election to the petition once it was announced, Cassity did not want to rely on an employee's suggestion when it was contradicted by the official materials contained on the Secretary of State's website. As a result, the Constitution Party did not attempt to gather signatures for the 2013 special election.

4.

Hall was the only independent candidate to submit signatures to the Secretary of State for the December 2013 special election. Because he did not meet the 3 % requirement, no independent candidate was on the ballot for the special election.

C. Procedural Background

On September 17, 2013, Hall and Moser filed their complaint against the Secretary. In the complaint, as later amended, they requested (1) a declaratory judgment that the ballot-access scheme for the special election was unconstitutional, (2) a preliminary and permanent injunction prohibiting the Secretary from enforcing the ballot-access laws for the special election, (3) an order extending the filing deadline and decreasing the number of signatures required for them to be placed on the special-election ballot, (4) a preliminary and permanent injunction requiring the Secretary to certify Hall as an independent candidate on the special-election ballot, and (5) an award of attorney's fees and costs.

On November 2, 2013, while this litigation was pending, UOCAVA-compliant ballots for the

December special general election were mailed to overseas voters as required by federal law; they did not include Hall's name as a candidate. Since the Republican primary required a runoff on November 5, the UOCAVA-compliant ballot included the names of all the candidates who participated in the Republican runoff, so that overseas voters could receive their ballots in compliance with federal law but still vote for the winner of the Republican runoff, should they so choose. On November 13, after the runoff, updated ballots containing only the names of the candidates who were to appear in the general election were finalized; these ballots were mailed on November 19. Overseas voters were permitted to use the later ballots, if they received them in time, or the earlier ballots, if they did not. Hall requested that the court enter an injunction requiring the placement of his name on the updated ballot.

On November 13, the same day the updated ballots were sent to the printer, the court[3] held a hearing on Hall and Moser's motion for a temporary restraining order or preliminary injunction.[4] The court heard argument from the parties based on their written submissions and made an oral ruling from

---

[3] Until August 20, 2014, Judge Mark Fuller presided over this case. However, this court has reviewed the transcripts of all proceedings that took place before him.

[4] At the hearing, the court also briefly addressed the Secretary's motion to dismiss and, in the alternative, for summary judgment. The court denied that motion to the extent it sought dismissal of Hall and Moser's claims, instead construing the motion as solely one for summary judgment and taking it under advisement. That motion is now before the court.

the bench denying the motion. Among the reasons the court gave was that, because the UOCAVA-compliant ballots had already been mailed to overseas voters without Hall's name on them, requiring the State to issue a new ballot containing Hall's name would result in the special election having to be rescheduled. The court emphasized that rescheduling the special election would result in a great expense to the State, risk voter confusion, and increase the time Alabama's First Congressional District went without representation in Washington.

The next day, Hall and Moser filed an emergency appeal of the court's oral order. On December 12, 2013, the Eleventh Circuit Court of Appeals affirmed the court's ruling on the ground "that the injury to the public from the issuance of an injunction would far outweigh any injury appellants might suffer." *Hall v. Sec'y of State, Ala.*, 547 F. App'x 962, 963 (11th Cir. 2013) (per curiam).

Implicit in this court's and the appellate court's reasoning was the so-called *Purcell* principle. This principle of election law essentially means that, because of the risk of voter confusion, courts as a general rule should be reluctant to allow last-minute changes to the status quo. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). If the election challenger seeks to maintain the status quo, the *Purcell* principle could arguably weigh in favor of the challenger. And, of course, the *Purcell* principle should be considered along with all the other factors that courts use in determining whether to grant a temporary restraining order or a preliminary injunction.

The special general election was held on December 17, 2013. Republican Bradley Byrne was elected as the Representative for Alabama's First Congressional District. On December 26, 2013, the Secretary filed a motion to dismiss for lack of subject-matter jurisdiction, arguing that the case was mooted by the completion of the special election. The court rejected this argument, finding that the controversy fell within the "capable of repetition, yet evading review" exception to the mootness doctrine because there was a "demonstrated probability that the government will hold future special elections where independent candidates must comply with Alabama's 3 % signature requirement under a truncated petition deadline," and, therefore, that Hall and Moser had "established a reasonable expectation that future special elections in Alabama will burden the same constitutional rights and interests at issue here." *Hall v. Bennett*, 999 F. Supp. 2d 1266, 1270 (M.D. Ala. 2014) (Fuller, J.). Furthermore, the court found that Hall and Moser met the mootness exception's "same complaining party" requirement -- assuming, without deciding, that this requirement applied -- because there was a reasonable expectation that Hall and Moser would run as independent candidates or vote for independent candidates in future special elections. *Id.* at 1272.

III. DISCUSSION

Hall and Moser challenge Alabama's ballot-access scheme in the context of a special election timeframe. Specifically, they argue that Alabama's 3 % signature requirement and the shortened timeframe for meeting it violated their First and Fourteenth Amendment rights as candidates to associate and to

participate in the political process, and as voters to associate and to cast their votes for independent candidates, all without serving any compelling state interest. They also bring an as-applied challenge under the Equal Protection Clause, arguing that the Secretary discriminated against independent candidates such as themselves and in favor of major-party candidates in various ways.[5] These challenges are now before the court on the parties' cross-motions for summary judgment.

Because the December 2013 special election has already occurred, Hall's and Moser's earlier requests to be placed on the ballot for that election have become moot. They now request (1) a declaratory judgment stating that the 3 % signature requirement for independent candidates cannot constitutionally be enforced with respect to special elections to seats in the U.S. House of Representatives and (2) injunctive relief prohibiting the Secretary from enforcing the requirement with respect to a future special election to a House seat.

---

[5] The amended complaint also asserts that Alabama's ballot-access scheme violates Hall's and Moser's rights as candidates and voters under the Fifteenth Amendment. Am. Compl. (doc. no. 13-1) at 2-3. During the preliminary-injunction hearing, their counsel advised the court that they would drop the Fifteenth Amendment claim in an effort to proceed expeditiously, but that they would pursue this claim and seek additional discovery should Hall not be placed on the ballot through a preliminary injunction. Schoen Decl. (doc. no. 26-3) at 8–9. However, after the court denied their request for a preliminary injunction, they agreed to submit the case for review without further argument or discovery on the Fifteenth Amendment claim. Accordingly, the court finds that they have abandoned their Fifteenth Amendment claim.

A. Subject-Matter Jurisdiction

Before proceeding to the merits of this case, the court will address whether it possessed, and retains, subject-matter jurisdiction over Hall and Moser's claims. The Secretary identifies two facts that, he contends, bear on the court's jurisdiction and warrant reconsideration of the court's conclusion that Hall and Moser had presented and continued to present live controversies: (1) Moser was not registered to vote when the complaint was filed or when the special election was held, and (2), after the special election, Hall ran for office as a member of the Republican Party.

1. Moser

Moser originally brought suit as a voter and as a prospective candidate. Compl. (doc. no. 2) at 3-4. The Secretary argues that he lacked standing in either capacity.

First, the Secretary argues that Moser lacked standing to bring this suit as a voter because, at the time the suit commenced and at the time of the December 2013 special election, he was not registered to vote in Alabama. According to the affidavit of Alabama Director of Elections Edward Packard, Moser had been registered to vote in Baldwin County before 2009, but was purged from the voter rolls in January 2009 because he had not voted since the general election in 2004. Moser disputes that he has not voted since 2004; however, he has not offered any evidence to suggest that his name was on the voter rolls during the relevant time period. Because Moser has presented no evidence to rebut this contention,

the court credits it.[6] As Moser was not registered to vote, it is open to question whether he had standing to proceed as a voter. *Cf. Kelly v. Harris*, 331 F.3d 817, 820 (11th Cir. 2003) (concluding that the appellant had no standing to challenge the requirement that candidates who wished to run in the Democratic Party primary take a loyalty oath when, as a registered Republican, he was ineligible to vote in that primary).

Second, although the Secretary does not dispute that Moser did have standing to sue as a prospective candidate at the time the original complaint was filed, he argues that Moser abandoned that claim by later amending his complaint to explain that, due to the "insurmountable obstacle for his candidacy" created by the challenged provisions, he "ha[d] withdrawn from that effort and now [sought] to support the candidacy of Plaintiff Hall." Am. Compl. (doc. no. 13-1) at 5. Additionally, the amended complaint removed the claim for relief requesting to have Moser certified as an independent candidate on the Special Election ballot.[7] *Compare* Am. Compl. (doc. no. 13-1) at 18, *with* Compl. (doc. no. 2) at 9. Additionally, the Secretary notes, Moser's attorney

---

[6] Moser re-registered to vote on January 15, 2014. However, that fact does not affect his standing to proceed when the complaint and amended complaint were filed during 2013.

[7] Moser argues that his original complaint, in which he brought suit as both a voter and a candidate, is the operative pleading for purposes of assessing standing and that he had standing at that time to bring his claim as a candidate. This is true but quite beside the point; if he abandoned the claim he had standing to pursue, he cannot proceed on it or on another claim he did not have standing to pursue.

stated at the November 13 preliminary-injunction hearing that Moser's only "claims are his First and Fourteenth Amendment rights as a voter," and his "equal protection right . . . to vote for a candidate of his choice," because "he is not a candidate anymore." Mot. Hr'g Tr. (doc. no. 36) at 2:17-4:1. That said, these representations may have been intended to reflect only that Moser was not seeking a preliminary injunction placing him on that particular special election ballot, and not that he was no longer seeking any prospective relief as a prospective candidate, especially in light of Moser's subsequent submissions to the court indicating his future intent to run as an independent.

Moser also responds that, even if he does not have standing as a voter and has abandoned his claim as a candidate, he still has standing based on the violation of his "associational rights," including his right "to express his politics and to advocate for political positions, as a citizen, through an Independent candidate." Pls.' Resp. to Defs.' Suppl. Br. (doc. no. 65) at 5. While the court recognizes that Moser does have an interest in expressing his views and advocating for the candidate of his choice, Moser has not identified -- and the court has not found -- any authority for the proposition that injury to these interests alone is sufficient to confer standing to challenge ballot-access laws. Rather, a survey of the relevant case law indicates that individuals who challenge ballot-access laws can do so in one of two ways: as candidates or as voters. *See*, *e.g.*, *Clingman v. Beaver*, 544 U.S. 581 (2005); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Storer v. Brown*, 415 U.S. 724 (1974); *Am. Party of Tex. v. White*, 415 U.S.

767 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Baker v. Carr*, 369 U.S. 186 (1962); Swanson v. Worley, 490 F.3d 894 (11th Cir. 2007); *New Alliance Party of Ala. v. Hand*, 933 F.2d 1568 (11th Cir. 1991); *Bergland v. Harris*, 767 F.2d 1551 (11th Cir. 1985).

In any event the court need not resolve the issues that go to whether Moser has standing. Because Moser seeks exactly the same relief as Hall does, and because relief will be granted in Hall's favor, Moser would have nothing to gain from adjudication of his claims that he has not obtained through the vindication of one or more of Hall's. Moser's claims are therefore moot and will be dismissed.

2. Hall

The court turns next to Hall. The Secretary argues that Hall's claims are moot because he is currently affiliated with the Republican Party and because he ran as a Republican in a local election held after the special election. Hence, the Secretary asserts, Alabama's ballot-access laws for independent candidates no longer apply to Hall. Although the court has already rejected dismissal on a mootness ground, *see Hall v. Bennett*, 999 F. Supp. 2d 1266 (M.D. Ala. 2014) (Fuller, J.), the Secretary continues to press the argument in light of changed circumstances, and so the court addresses it here.

This court previously found that Hall's claims fall within the narrow exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." *See S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Election law cases routinely fall within this exception. A controversy is capable of

repetition, yet evading review where two requirements are met.

First, "the challenged action [must be] in its duration too short to be fully litigated." *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975) (per curiam). The parties have never disputed that the first prong of this test applies. *See Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005) ("Challenges to election laws are one of the quintessential categories of cases which usually fit this prong because litigation has only a few months before the remedy sought is rendered impossible by the occurrence of the relevant election.").

Second, and as pertinent here, a plaintiff must show a reasonable expectation or a demonstrated probability that the controversy will recur. *See Honig v. Doe*, 484 U.S. 305, 319-23 (1988). There is conflicting authority regarding whether a plaintiff must also establish a reasonable expectation that the controversy will recur as to the *same* plaintiff in election-law cases. *Compare Van Wie v. Pataki*, 267 F.3d 109, 114 (2nd Cir. 2001), *with Majors v. Abell*, 317 F.3d 719, 723 (7th Cir. 2003), *and Lawrence*, 430 F.3d at 372. The Eleventh Circuit has recently, and without any discussion of this conflict, stated that it was applying the 'same complaining party' requirement in an election-law case, *Arcia v. Florida Secretary of State*, 772 F.3d 1335, 1343 (11th Cir. 2014) (explaining that the requirement had been met because the defendant had "not offered to refrain from" reprising the complained-of voter-roll-purging practice in the future, and concluding, apparently on this basis alone, that "there is a reasonable expectation that the plaintiffs will be subject to the

same action again"). This court will follow *Arcia*'s lead and require Hall to show a reasonable expectation that he will again be subject, either as a candidate or as a voter, to the 3 % signature requirement for independent candidates during a special election.

Previously, the court rejected the Secretary's argument that the passage of the special election rendered the case moot, assuming without deciding that the 'same complaining party' requirement applied, and holding that Hall met it because it was reasonable to expect that Hall would run as an independent candidate in future special elections. That decision was based, in part, on a declaration submitted by Hall, wherein he stated that he intended to seek public office in Alabama as an independent candidate in a future special election. Hall Decl. (doc. no. 48-1) at 1 ("I intend to continue to seek elective office in Alabama in the future, including, but not limited to, the office of U.S. Representative, and I intend to seek such elective office as an independent candidate, whether such election is a Special Election or a regular election."). Hall also stated that he intends to vote for independent candidates in future special elections. *Id.* ("I also intend to cast my vote in Alabama for an independent candidate for elective office in each Special Election and regular election in which I am eligible to vote.").

Since then, however, Hall has affiliated himself with the Republican Party and has run for office on the Republican ticket. The Secretary presents evidence that, according to Republican Party guidelines, members may not simultaneously be a

Republican and also a member of another party or an independent. Therefore, the Secretary argues, Hall can no longer establish a reasonable expectation that he will run as an independent candidate in a future special election and, consequently, cannot show that he will be subject to the same challenged ballot-access laws in the future. Hall's decision to run as a Republican in a local election held after the special election at issue, though, does not significantly undermine his declaration of intent to run in the future as an independent. As a result, it does not alter the court's analysis. Hall is certainly free to affiliate with the Republican Party for now while retaining his right and persisting in his desire to run as an independent in the future. Nor is there any reason to believe this sort of party-swapping is unusual. Accordingly, the court finds that it is still reasonably likely that the controversy will recur as to Hall.

However, even if Hall were unlikely to run as an independent in the future, this still would not defeat the court's subject-matter jurisdiction. In his amended complaint, Hall brought suit not only as a candidate but also as a voter. Republican Party guidelines do not preclude registered Republicans from voting for independent candidates; indeed, it seems likely that they do so with some frequency. Considering Hall's declaration that he intends to vote for independent candidates in future special elections, the court finds it reasonably likely that his First and Fourteenth Amendment rights as a voter in future special elections would be burdened by the challenged laws.

Moreover, courts of appeals have found election-law controversies to be 'capable of repetition' with respect to individual plaintiffs even without any explicit statement by those plaintiffs (such as Hall has made) that they intended to run or vote again. *See Lawrence*, 430 F.2d at 371 ("Although Lawrence has not specifically stated that he plans to run in a future election, he is certainly capable of doing so, and under the circumstances it is reasonable to expect that he will do so. Neither is an explicit statement from Shilo necessary in order to reasonably expect that in a future election she will wish to vote for an independent candidate who did not decide to run until after the early filing deadline passed. The law at issue is still valid and applicable to both Lawrence and any independent candidate Shilo might wish to vote for in future election years. Therefore, the controversy is capable of repetition."). This court agrees with the Seventh Circuit that, "in an election case[,] the court will not keep interrogating the plaintiff to assess the likely trajectory of his political career," *Majors*, 317 F.3d at 723, at least so long as the plaintiff could again confront the challenged law in running for office or voting for another candidate, and tells the court, in a sworn statement, that he anticipates doing so. Hall's professed intention to run again as an independent and to vote again for an independent in a special election -- both of which he is perfectly capable of doing -- is enough to survive a mootness challenge.

Having found that this case continues to fall within the 'capable of repetition, yet evading review' exception to the mootness doctrine, the court proceeds to the merits of Hall's claims.

B. First and Fourteenth Amendment Political And Participation

1. Constitutional Framework

The First and Fourteenth Amendments afford all candidates vying for elected office, and their voting constituencies, the fundamental right to associate for political purposes and to participate in the electoral process. *See, e.g.*, *Clingman*, 544 U.S. at 586; *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Anderson*, 460 U.S. at 787–88; *Williams*, 393 U.S. at 30. Placing restrictions on candidates' and political parties' access to the ballot interferes with their right to associate for political purposes and the rights of qualified voters to cast their votes for the candidates of their choice. *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) (citing *Williams*, 393 U.S. at 30); *see also Norman v. Reed*, 502 U.S. 279, 288 (1992); *Anderson*, 460 U.S. at 786; *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). Ballot-access requirements that place more burdensome restrictions on certain types of candidates than on others implicate rights under the Equal Protection Clause as well. *See Williams*, 393 U.S. at 30–31.

States, however, have "important and compelling interests in regulating the election process and in having ballot access requirements." *Swanson v. Worley*, 490 F.3d 902 (11th Cir. 2007) (quoting *Green v. Mortham*, 155 F.3d 1332, 1335 (11th Cir. 1998)). Most significantly, States have an "important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of political organization's candidates on the

ballot." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). And, similarly, cases have "establish[ed] with unmistakable clarity that States have an 'undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot.'" *Munro*, 479 U.S. at 194 (quoting *Anderson*, 460 U.S. at 788-89, n.9). Ballot-access laws requiring preliminary showings serve to prevent "confusion, deception, and even frustration of the democratic process at the general election." *Jenness*, 403 U.S. at 442.

The Supreme Court has established an analytical framework for balancing the interests of political parties, candidates, and voters in engaging in the political process with the interests of States in conducting fair and effective elections. Under this framework, 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 plaintiff seeks to vindicate." *Anderson*, 460 U.S. at 789. Second, the court must "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* Third, "the court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*

In this analysis, "the burden is on the state to 'put forward' the 'precise interests . . . [that are] justifications for the burden imposed by its rule,'" and to "explain the relationship between these interests" and the challenged provision. *Fulani*, 973 F.2d at 1544 (quoting *Anderson*, 460 U.S. at 789). "The State

must introduce evidence to justify both the interests the State asserts and the burdens the State imposes on those seeking ballot access." *Bergland*, 767 F.2d at 1554.

Courts are to determine the appropriate level of scrutiny based on the seriousness of the burden imposed. "Regulations imposing severe burdens . . . must be narrowly tailored and advance a compelling state interest," while "[l]esser burdens . . . trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358–59 (1997) (citations and internal quotation marks omitted).[8]

---

[8] Hall suggests that the court should not apply the approach outlined in *Timmons*. He contends that, because the ballot-access restriction at issue here imposes a greater burden on independent candidates during a special election (and its collapsed timeframe) than during a general election, the State must show that the interests justifying the restriction are commensurately greater in the context of a special, as opposed to a regular, election. In support of this argument, Hall cites *Jones v. McGuffage*, 921 F. Supp. 2d 888 (N.D. Ill. 2013) (Tharp, J.).

In *Jones*, the plaintiffs raised a claim similar to the one Hall advances here, challenging the application of a signature requirement during the special election held to fill Representative Jesse Jackson, Jr.'s congressional seat in Illinois. For a regular election, independent candidates were required to submit petitions with the signatures of at least 5 % of voters within a 90-day petitioning window. *Id.* at 898. However, during the special election, independent candidates were afforded only 62 days to collect the same number of signatures. *Id.* The court preliminarily enjoined the State from enforcing the law and reduced the number of signatures required, in order to lessen the burden, explaining that although

Eleventh Circuit case law offers helpful direction as to what sorts of ballot-access laws impose severe burdens, and what sorts do not. A ballot-access law imposes a severe burden if it "'freeze[s]' the status quo by effectively barring all candidates other than those of the major parties" and does not "provide a realistic means of ballot access." *Libertarian Party of Fla.,* 710 F.2d at 793 (quoting *Jenness*, 403 U.S. at 439). If, however, a "reasonably diligent [] candidate [can] be expected to satisfy the signature requirements," then the burden is not severe, and the

---

the 5 % requirement was constitutional during a regular election, "because of the increased burden [during a special election], the state necessarily must offer some increased justification for its decision to truncate the signature-gathering period while leaving all other requirements in place." *Id.*

Hall's argument (and this language drawn from *Jones*) would make sense only if Hall had shown that Alabama's ballot-access scheme for independent candidates during regular elections represented a constitutional boundary-line, such that any greater burden or any lesser justification would tip the law into unconstitutional territory. He has not shown, and no court has held, as much. It is true that a particularly burdensome requirement must be met by a particularly significant justification. It is nonsensical, though, to contend that each and every time a State prevails in defending a ballot-access law by offering up a strong justification for the restriction, the constitutional floor is ratcheted upwards. *See Libertarian Party of Fla. v. State of Fla.*, 710 F.2d 790,793 (11th Cir. 1983) (recognizing that any given signature threshold is "'necessarily arbitrary'" and "impossible to defend . . . as either compelled or least drastic" (citation omitted)); *see also Green v. Mortham*, 155 F.3d 1332, 1339 (11th Cir. 1998) ("There is a range of fees and signature requirements that are constitutional, and the . . . legislature is free to choose its ballot access requirements from that constitutional spectrum.").

State's interests will generally be a sufficient justification. *Id.* (quoting *Storer*, 415 U.S. at 742).

2. Burden Imposed

Under this framework, the court must first assess whether the 3 % signature requirement for independent candidates in the context of a special election constitutes a severe burden or whether it is a reasonable, non-discriminatory regulation.

The parties agree that Alabama's 3 % signature requirement does not impose a severe burden in the context of a regularly scheduled election. *See Swanson*, 490 F.3d at 896 (recently upholding Alabama's ballot-access scheme in regular elections). Because Alabama's election scheme has not meaningfully changed since the decision in *Swanson*, the Eleventh Circuit's application of the Supreme Court's balancing test to Alabama's 3 % signature requirement in *Swanson* provides a good starting point for the court's analysis in this case.

In *Swanson*, the Eleventh Circuit held that Alabama's 3 % signature requirement, by itself and in combination with Alabama's June filing deadline, did not violate the First and Fourteenth Amendments. *Id.* at 903–10. In reaching this conclusion, it focused on *Jenness v. Fortson*, in which the Supreme Court upheld Georgia's 5 % signature requirement for regular elections in combination with a June filing deadline. *Id.* at 906. The Eleventh Circuit reasoned that Alabama's ballot-access scheme was permissible because it was less restrictive than Georgia's. *Id.* For example, whereas Georgia required prospective independent candidates to submit the signatures of 5 % of all *registered* voters, Alabama

required the signatures of only 3 % of *actual* voters. *Id.* The relative timeframe for collecting signatures in Georgia, 180 days, also was significantly shorter than the timeframe in Alabama, which the court characterized as being "unlimited." *Id.* Finally, the June deadline for filing signatures did not put independent candidates at a disadvantage as compared to major-party candidates, who faced a primary election on that date. *Id.*

The appellate court placed significant weight on the Alabama law's inclusion of many of the same "alleviating factors"--factors that eased the burden of gathering signatures--as were present in a previously upheld Florida scheme for regular elections. *See Libertarian Party of Fla.*, 710 F.2d at 793. The *Swanson* court particularly emphasized that the Alabama scheme, unlike the schemes in Florida and Georgia, imposed a submission deadline but no start date, and, therefore, no limit on the time period for gathering signatures. This "unlimited petition window" meant "a diligent independent or minor party candidate could meet the filing deadline by collecting signatures many months" in advance, thus significantly lessening the scheme's burden. *Swanson*, 490 F.3d at 909.

Thus, the *Swanson* court held in the context of regular elections that Alabama's 3 % signature requirement was a reasonable, non-discriminatory regulation that fell within the "spectrum of constitutional legislative choices" and did not impose a "severe burden." *Id.* at 907, 910.

The Secretary does acknowledge that the truncated special-election schedule increased the

burden imposed by Alabama's 3 % signature requirement -- as compared to the burden deemed not "severe" in Swanson -- by reducing the time Hall could gather signatures. However, according to the Secretary, reducing the time Hall had to petition did not necessarily render the burden imposed by the 3 % signature requirement severe. Rather, the Secretary argues that the burden imposed by the ballot-access requirements was less severe than the burdens at issue in *Jenness* and *Libertarian Party of Florida* and, therefore, permissible as a matter of law.

To reach this conclusion, the Secretary urges the court to compare the percentages of voters' signatures required per day to satisfy the ballot-access requirements in *Jenness* and *Libertarian Party of Florida* to the percentage of voters' signatures required per day to get on the ballot in Alabama's special election. In *Jenness*, the Supreme Court upheld a regime requiring independent candidates in regular elections to obtain signatures from 5 % of registered voters in 180 days, 403 U.S. at 440-42, and, in *Libertarian Party of Florida*, the Eleventh Circuit upheld a regime requiring independent candidates in regular elections to obtain signatures from 3 % of registered voters in 188 days, 710 F.2d at 790, 794. In this case, Hall was required to obtain signatures from 3 % of qualified electors who voted in the last gubernatorial election -- the Secretary calculates this to amount to 1.4 % of registered voters -- in 106 days, the amount of time the Secretary argues Hall had to petition. The Secretary argues that, even taking Hall's contention -- that he had only 56 days -- as true, the burden imposed during the special election was still less

onerous than that imposed by the ballot-access law upheld in *Jenness*. Thus, according to the Secretary, the Alabama regime does not, as a matter of law, impose a severe burden. *See Swanson*, 490 F.3d at 907 (upholding a 3 % signature requirement because a 5 % requirement, in combination with an even earlier deadline, had been upheld in *Jenness*).

The Secretary's calculation, however, ignores the Supreme Court decision in *Anderson*, which requires the court to consider cumulatively the burdens imposed by the overall scheme, and not mechanically to compare percentages of signatures required per day. *See Anderson*, 460 U.S. at 788; *see also Clingman*, 544 U.S. at 607-08 ("A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition.") (O'Connor, J., concurring). The Secretary's approach is precisely the sort of "litmus-paper test" analysis the Supreme Court prohibits. *Anderson*, 460 U.S. at 789; *see also id.* at 789-90 ("The results of this evaluation will not be automatic; as we have recognized, there is no substitute for the hard judgment that must be made." (citation and internal quotation marks omitted)).

Such a mechanical approach does not adequately address the often significant differences between elections. In other words, there are 'elections,' and there are 'elections.' As everyone knows, there are elections for President and Governor, where voter interest and voting likelihood are likely highest. There are election for other statewide federal and state offices where voter interest and voting likelihood may be lower but still relatively great.

There are elections for non-statewide federal and state offices and for local offices were voter interests and voting likelihood may be, relatively speaking, significantly lower. There are elections held on the Tuesday after the first Monday in November, that is, 'election day,' when voters are most likely accustomed to voting. And there are elections in other months when voters are likely much less accustomed, and thus less likely, to vote. There are also regular elections that recur at stated intervals fixed by law, and thus when voters are more likely accustomed to voting, and there are special elections, for which there are no predetermined dates. When it comes to voter interest and voting likelihood in a special election, therefore, it is one thing for the special election to be piggybacked onto a regular election for a statewide federal or state office on 'election day'; it is quite another thing when it is held by itself 'off season,' that is, on a day other than election day. The general circumstances in which the signature requirement can occur are many and can vary significantly. And it is against this backdrop that the court now considers the specific circumstances presented.

This court must undertake an examination of the evidence in the record, and draw a full picture, to determine whether a reasonably diligent candidate could have been expected to satisfy the 3 % signature requirement within the petitioning time allotted for the special election here; if not, the law imposes a severe burden. Applying the proper test, the court finds that the challenged ballot-access laws, in the context of the special election set here, did impose a severe burden.

First, the 3 % signature requirement imposed a substantially heavier burden on Hall than it would have during a regular election like the ones at issue in *Swanson* and the cases it discusses. In addition to the truncated petitioning window, the lack of preparation time and low voter interest characteristic of off-season special as compared to regular elections combined to make it impossible for a reasonably diligent candidate, such as Hall, to satisfy the 3 % requirement.

To begin with, the evidence is clear that Hall was a reasonably diligent candidate. Within three weeks of Representative Bonner's announcement of his retirement, Hall had begun to collect petition signatures (indeed, he contacted the Secretary of State's office to begin the process two weeks after the announcement). Hall worked "tirelessly" for two months to obtain the requisite number of signatures by visiting numerous businesses and soliciting at public events including "charity runs, festivals, yard sales, concerts, sporting events, a gun show, and others." Hall Decl. (doc. no. 25-1) at 2. He received assistance from social and work contacts and friends, and he and his wife knocked on about 5,000 doors. Although the response rate was far from insubstantial -- he obtained one signature for every dozen houses visited -- he would have had to knock on over 71,000 doors to obtain the required number of signatures from canvassing alone. Although Hall placed an ad for a paid signature-gatherer, the only person who responded would have charged about $ 4.00 per signature; at this rate, it would have cost him a prohibitive sum -- over $ 23,000 -- to get the

bare minimum number of signatures. *See* Hall Decl. (doc. no. 25-1) at 3.

Moreover, the amount of time Hall had to collect signatures was dramatically reduced from the time available in the regular-election context. Although the parties dispute how many days Hall had to petition in the December 2013 special election, it is undisputed that his time was not unlimited. In contrast, in a regularly scheduled election, there is no required start date or limited period for collecting signatures, and such regular elections are held at regular intervals with the dates and deadlines predetermined. *See Swanson*, 490 F.3d at 904. Indeed, it appears that an independent candidate wishing to run in a regular election a decade from now can, under Alabama law, begin petitioning today. In a special election, however, a prospective independent candidate cannot begin collecting signatures until a vacancy is announced. Further, because the Secretary of State's regulations state that the petition used must have the date of the special election on it, candidates seeking to comply with the letter of the law must wait until the date for the special election is revealed to begin petitioning. In upholding the 3 % signature requirement in the context of a regular election, the *Swanson* court singled out the unlimited petitioning time as a particularly important factor alleviating the burden imposed. 490 F.3d at 910. The truncated timeframe in this special election, whether it was 56 or 106

days, materially distinguishes this case from *Swanson*.[9]

Second and relatedly, Hall's ability to petition was further burdened by the lack of preparation time in advance of the off-season special election. The preparation required for a successful signature drive can be significant and take many months; candidates must raise funds, organize their campaigns, and recruit and train campaign staff, including volunteer or paid signature-gatherers. Prospective independent candidates in a regular election not only have unlimited petitioning time -- they also have unlimited time to prepare to petition. In a special election, however, independent candidates, who cannot rely on party infrastructure to support their efforts, do not have "any period of time . . . to meaningfully prepare for the arduous signature drive." Winger Decl. (doc. no. 25-4) at 4.[10] This was certainly the case in the

---

[9] Cassity, the Chairman of the Alabama Constitution Party, concurred that this short period for signature-collection would make it very difficult for an independent candidate to meet the threshold. "Notwithstanding our great desire to run a Constitution Party candidate in the Special Election for the seat Mr. Bonner vacated, we ultimately concluded that the combination of the short time frame and the number of signatures required would make it virtually impossible for any small party [or] independent candidate to gain access to the ballot and certainly made it impossible for our Party and we abandoned our efforts, based solely on this very severe burden imposed by the signature requirement and the short time frame (a time frame which we could not even ascertain until the very end of July or beginning of August)." Cassity Decl. (doc. no. 25-3) at 4.

[10] The Secretary challenges Winger's expert testimony. The court declines to consider Winger's testimony to the extent he engages in legal analysis or draws legal conclusions. However,

December 2013 special election; Hall could not have predicted Bonner's resignation and, therefore, could not have begun to prepare until a short time before the special election. He and Moser specifically stated that this hampered their efforts to collect signatures.

Third, Hall encountered difficulty obtaining signatures because voters were less aware of or interested in the election before the date of the special election was announced on July 29, 2014. Hall stated in his declaration that low voter interest was particularly burdensome early in his signature campaign. *See* Hall Suppl. Decl. (doc. no. 26-1) at 2 ("When I first started trying to obtain signatures before the Governor announced that the Special Election would be held and on what dates the primaries and general Special Election would be held, I found it especially hard to obtain signatures because people did not seem to know about the Special Election or have any interest in it. I had to

---

the court disagrees with the Secretary that the remainder of Winger's testimony fails to satisfy Federal Rule of Evidence 702. Since 1960, Winger has devoted considerable time to researching and to writing about state election laws. Winger is the editor of *Ballot Access News*, in which he documents the history and application of ballot-access laws in the United States, and he is the author of numerous articles on the topic. Courts around the country, including courts in this district, have qualified Winger as an expert to testify about the effect of ballot-access laws. *See, e.g.*, *Swanson*, 490 F.3d at 898. Based on his knowledge and experience, Winger is certainly qualified to discuss the history of ballot-access laws in Alabama, how they compare to ballot-access laws in other States, and how a truncated special-election schedule affects prospective independent candidates' access to the ballot, both generally and in this special election.

explain the situation and further explain that we did not yet know when the election I was asking to be on [the] ballot for would be held. This led many people just to dismiss me without any interest in signing."); *see also* Winger Suppl. Decl. (doc. no. 26-2) at 7 ("[B]efore the Special Election and its dates were announced by the Governor, gathering ballot signatures for an independent candidate in Mr. Hall's situation would be much more difficult because of the lack of interest and focus among citizens in general."). As other courts have noted, voter apathy is high months before a primary election and, especially for independent and minor party candidates, support may not "coalesce until comparatively late in the cycle." *Clingman*, 544 U.S. at 607 (citing *Anderson*, 450 U.S. at 791–92). Voter apathy may impose less of a burden in a regular election, where independent candidates have unlimited time to petition. However, in an off-season special election, where prospective candidates are under time pressure to collect signatures, the lack of interest or awareness early in a signature drive is especially burdensome.

Finally, the court looks to history--whether any independent candidates have succeeded in gathering enough signatures to appear on a special election ballot--as an indicator of whether the 3 % requirement "'freeze[s]' the status quo by effectively barring all candidates other than those of the major parties" when applied in a special election. *See Libertarian Party of Fla.*, 710 F.2d at 793 (quoting *Jenness*, 403 U.S. at 439). "Past experience will be a helpful, if not always unerring guide: it will be one thing if independent candidates have qualified with

regularity and quite a different matter if they have not." *Storer*, 415 U.S. at 742.

The ballot-access history here supports the conclusion that the 3 % requirement imposes a severe burden in the context of special elections. While an independent or minor-party candidate has been able to comply with the signature requirement in general elections in the First Congressional District in the past, no independent candidate has met Alabama's signature and deadline requirement in either of the last two special congressional elections, including in 1989, when the signature requirement was only 1 %. Indeed, since ballots were first printed by the State in 1893, no independent candidate has ever appeared on the ballot in any congressional special election in the State.[11] Winger Second Suppl. Decl. (doc. no. 29-1) at 1-3.

The Secretary has not offered any evidence to rebut the testimony submitted by Hall demonstrating that the burden of Alabama's 3 % signature requirement was severe. All the Secretary offers is

---

[11] Hall also brings the court's attention to the ballot-access laws of Alabama's neighboring States. According to Winger, in a special election for Congress, Georgia and Florida require no signatures for independent candidates, and in Mississippi and Tennessee, only 25 signatures are required. Winger Decl. (doc. no. 25-4) at 4. While the contrast is stark, the Eleventh Circuit has repeatedly rejected the argument that the ballot-access regimes of other States are relevant when inquiring into the constitutionality of the regime at issue. *See*, *e.g.*, *Swanson*, 490 F.3d at 910 (disregarding Winger's testimony that Alabama has the "second toughest ballot access restrictions" among all States in the 2002 election, because "the legislative choices of other states are irrelevant" (citing *Libertarian Party of Fla.*, 710 F.2d at 794)).

the suggestion, unsupported by any evidence, that Hall's inability to obtain the requisite number of signatures is also consistent with the possibility that he lacked a "significant modicum of support." State Defs.' Mot. to Dismiss or for Summ. J. (doc. no. 23) at 27 (quoting *Jenness*, 403 U.S. at 442).

The court does not agree. Hall's efforts were futile not because he was a particularly unappealing candidate -- indeed, he was able to obtain over 2,000 signatures -- but because a truncated petitioning window, lack of preparation time, and low voter interest combined to create a severely burdensome ballot-access scheme offering reasonably diligent independent candidates no realistic means of ballot access.

Because the "Constitution requires that access to the electorate be real, not 'merely theoretical,'" requirements for ballot access "demanded [by the State] may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot." *Party of Tex. v. White*, 415 U.S. 767, 783 (1974) (quoting *Jenness*, 403 U.S. at 439). In light of the evidence Hall has presented -- that he was diligent in attempting to gather signatures, but unsuccessful in light of the dramatically shortened timeframe, the lack of preparation time, and low voter awareness and interest before the date of the election was announced -- the court concludes that Alabama's 3 % signature requirement, in the context of an off-season special election, imposes a severe burden, and, indeed, does not afford independent candidates "real" access to the ballot.

3. The State's Interests

Having found the burden on Hall's constitutional rights to be severe, the court can uphold the regulation in the context of special elections as presented here only if it is "narrowly tailored and advance[s] a compelling state interest." *Timmons*, 520 U.S. at 358. The Secretary advances the following interests as justification for the 3 % signature requirement (and accompanying deadline for petition submission) in the context of special elections: (1) ensuring that independent and minor-party candidates have a significant modicum of support, (2) eliminating party splintering and factionalism, (3) encouraging fair treatment between independent and minor-party candidates and major party candidates, and (4) having sufficient time to verify signatures.

The interests put forth by the Secretary are undoubtedly important. *See Swanson*, 490 F.3d at 910–912. However, the court need not decide whether these interests are 'compelling' because, even if they are, the Secretary has not shown that the 3 % signature requirement is narrowly tailored to advance these interests. The Secretary need not prove that it would be impossible to serve these interests without the 3 % signature requirement; however, he must justify "the extent to which [these] interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789; *see also Munro*, 479 U.S. at 194-96.

The Secretary has failed to provide any evidence or explanation as to why applying the 3 % signature requirement in the context of special elections as

presented here is necessary to achieve the interests articulated. Although he need not prove that this is the precise threshold below which the State's interests would not be served, *see Libertarian Party of Fla.*, 710 F.2d at 793, he has offered no evidence to suggest that even dramatically lower thresholds (such as the 1 % signature requirement previously in place) would not adequately have served these interests during a special election. Because he has failed to meet his burden, *Fulani*, 973 F.2d at 1544, the court finds that the ballot-access laws are not narrowly tailored to advance a compelling interest.

Thus, summary judgment will be granted in favor of Hall on his First and Fourteenth Amendment claim.

C. Equal Protection

Hall also asserts that his constitutional right to equal protection was violated by the Secretary's actions, although he gives this argument short shrift in his briefing. In the Eleventh Circuit, "equal protection challenges to state ballot-access laws are considered under the *Anderson* test" -- that is, "a balancing test that ranges from strict scrutiny to a rational-basis analysis, depending" on whether or not the burden imposed by the laws is severe. *Fulani*, 973 F.2d at 1543. As explained below, Hall has failed to show the existence of a genuine dispute as to whether his right to equal protection was violated.

It is well established that providing ballot access to political parties through the primary-election process and to independent candidates through signature petitions does not violate the Equal Protection Clause of the Fourteenth Amendment.

Jenness, 403 U.S. at 440–42. Rather, such laws provide two constitutionally permissible alternative means of ballot access; neither method "can be assumed to be inherently more burdensome than the other." *Id.* at 441.

Perhaps in light of this case law, Hall does not appear to argue that the shortened timeframe rendered the ballot-access process for independent candidates inherently more burdensome than that available to party candidates. Instead, he points to discrete actions by the Secretary that he contends discriminated in favor of political parties and against independent candidates. Hall contends that the Secretary discriminated against independent candidates, first, by allowing Democratic candidates to be certified one hour past their deadline, and, second, by creating a special "Instant Primary Ballot" for UOCAVA voters.

Hall first notes that the Secretary allowed the Democratic Party to certify candidates one hour after the deadline had passed, but did not agree to reduce the number of signatures needed for independent candidates to qualify. The Secretary explained, reasonably, that he made the exception for the Democratic Party because the party head had not been informed of the exact deadline. In any case, the extension the Democratic Party received was de minimis, and Hall nowhere suggests that such marginal flexibility was denied to, or would have benefited, any independent candidate. If he had been a few signatures short and was denied an extra hour to gather them, Hall's equal protection argument might hold more water. Here, differential treatment (if indeed there was any) did not impose a significant

burden and had a rational basis. Indeed, the record also demonstrates that the Secretary's office made an accommodation for Hall as well by providing him with a unique signature petition header, instead of requiring him to submit petitions with the election date on them.

The creation of the "Instant Primary Ballots" likewise did not impermissibly discriminate in favor of political party candidates. These absentee ballots, sent to military and overseas voters, had to list the names of all Republican candidates participating in the primary runoff because federal law required the ballots to be mailed before the winner of the runoff was known. Although the inclusion of multiple Republican candidates on the ballot undoubtedly placed the eventual party nominee at a significant disadvantage, it is true that the eventual losers of the runoff obtained, in a technical sense, some advantage over independent candidates in that they were allowed to appear on the ballot despite not being their party's nominee and without submitting the petition signatures required of an independent candidate. In a practical sense, however, the eventual losers of the runoff were not given a free pass; they had already demonstrated a (very) significant modicum of support by receiving a sufficient share of the votes in the initial primary to warrant participation in the runoff.

If mere affiliation with a major party ordinarily earned a candidate other than that party's nominee a place on the UOCAVA ballot, that might raise significant equal protection concerns. The court need not decide whether the burden imposed on independent candidates in such a case would be

severe, however, because in the context of the primary runoff, the actions of the Secretary were unquestionably justified and would pass strict scrutiny. Including Republican runoff candidates on the instant ballot permitted the State to comply with federal law. Had all the Republican candidates participating in the runoff not been included, military and overseas voters wishing to cast their votes for the Republican candidate would have had to write in that candidate's name (and election administrators would have had to count numerous write-in ballots by hand). Indeed, it is doubtful that the federal court then tasked with protecting the UOCAVA rights of military and overseas votes would have accepted this alternative.

Other than by applying the 3 % signature requirement, there is no indication that the Secretary acted in an unconstitutional manner towards independent candidates in general or towards Hall in particular. Thus, summary judgment will be granted in favor of the Secretary on Hall's equal protection claim.

IV. Appropriate Relief

Hall requests a declaratory judgment that the 3 % signature requirement for independent candidates cannot constitutionally be enforced with respect to future off-season special elections to seats in the U.S. House of Representatives. He also seeks an injunction prohibiting the Secretary from enforcing the 3 % requirement.

According to his filings, Hall seeks both facial and as-applied relief. Facial relief -- that is, relief extending to all prospective independent candidates,

and not just to Hall -- is appropriate here. Nevertheless, that facial relief is limited. The court does not hold that the 3 % signature requirement can never be enforced, only that it cannot be enforced in the context of an off-season special election occurring on a similarly limited timeframe. Given the Secretary's concession at oral argument that, typically, off-season special elections will be held on an even shorter timeline than occurred in the December 2013 election in which Hall attempted to stand as a candidate, this may prove to be a distinction without a difference. *See* Mot. Hr'g Tr. (doc. no. 71) at 33:18-23. However, the court recognizes that a special election could theoretically be held with much more lead time, and that this might alter the court's analysis as to the severity of the burden imposed on independent candidates seeking access to the ballot. (Nevertheless, it is evident that this is a problem that should be addressed legislatively, either to accommodate the specific but typical off-season special election presented here or, more generally, all reasonably conceivable types of special elections, including the one here.)

In the court's view, declaratory relief is sufficient, in light of the court's confidence that the Secretary will act accordingly.

An appropriate judgment will be entered.

DONE, this 30th day of September, 2016.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

APPENDIX C

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

JAMES HALL, *et al.*, Plaintiffs, v. JIM BENNETT, Alabama Secretary of State, in his official capacity, Defendant.	)	CASE NO.: 2:13-cv-663 (WO – Publish)

MEMORANDUM OPINION AND ORDER

Now before the Court is Defendant Secretary Jim Bennett's ("Bennett") Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. #41) filed on December 26, 2013. Bennett contends that the claims in this matter are moot because the subject election has concluded, and, therefore, the Court no longer has subject matter jurisdiction to hear the case. The Court disagrees and, for the reasons set forth below, finds that Bennett's motion is due to be DENIED.

This is a ballot access case filed by two prospective independent candidates, James Hall and N. C. "Clint" Moser, Jr. (collectively, "Plaintiffs"), who were unable to meet state signature requirements and, as a result, were precluded from running in the December 2013 special election to fill a vacant United States House of Representatives seat in Alabama's First Congressional District (hereinafter, the "Special Election"). Plaintiffs bring as applied and facial

challenges to the constitutionality of Alabama's ballot access scheme as applied to special elections, arguing that the 3% signature requirement coupled with the truncated time frame inherent in a special election imposes an unconstitutionally severe burden on their First Amendment rights to engage in political speech.[1] In their First Amended Complaint, Plaintiffs sought a preliminary injunction requiring the State to place Plaintiffs on the ballot in addition to declaratory relief and a permanent injunction against future enforcement of Alabama's ballot access laws as they apply to special elections. After a hearing on November 19, 2013, the Court denied Plaintiffs request for a preliminary injunction or temporary restraining order. The Eleventh Circuit Court of Appeals affirmed the Court's ruling on December 12, 2013. (Doc. #39.) The Special Election was then held on December 17, 2013, and Congressman Bradley Byrne was duly elected. Bennett filed the instant motion to dismiss on December 26, 2013, arguing that, because the Special Election had been held, Plaintiffs claims are moot and the Court should dismiss the action for lack of subject matter jurisdiction. (Doc. #41.)

It is undisputed that the case is moot as to Plaintiffs' claims for a preliminary injunction. However, a case may be moot as to some issues and not as to others. *See Powell v. McCormack*, 395 U.S. 486, 497 (1969). Accordingly, the issue before the

---

[1] Plaintiffs also list several other side-effects of the truncated time frame that further burden their speech, including the lack of "ramp up" time to organize a signature drive and the inability to campaign because they are having to devote all resources to obtaining signatures.

Court is whether Plaintiffs' claims for a permanent injunction and declaratory judgment are mooted by the passage of the Special Election.

As the Eleventh Circuit has explained:

> The doctrine of mootness derives directly from the case-or-controversy limitation because an action that is moot cannot be characterized as an active case or controversy. A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. As [the Eleventh Circuit] has explained, put another way, a case is moot when it no longer presents a live controversy with respect to which the Court can give meaningful relief. If events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief, then the case is moot and must be dismissed. Indeed, dismissal is required because mootness is jurisdictional. Any decision on the merits of a moot case or issue would be an impermissible advisory opinion.

Al Najjar v. Ashcroft, 273 F.3d 1330, 1336 (11th Cir. 2001) (alteration to original) (citations and internal quotation marks omitted). The passage of an election does not necessarily render a ballot access challenge moot. *See, e.g.*, *Norman v. Reed*, 502 U.S. 279, 287–88 (1992); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969). After an election is held, a controversy is not considered moot if the issue presented is one that is

capable of repetition, yet evading review. *See S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). A controversy is capable of repetition, yet evading review where: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147 (1975) (per curiam); *see also Sierra Club v. Martin*, 110 F.3d 1551, 1554 (11th Cir. 1997). The parties do not dispute whether the first prong has been met, and the Court agrees that it has. *See, e.g.*, *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005) (citing *Morse v. Republican Party of Va.*, 517 U.S. 186, 235 (1996); *Reed*, 502 U.S. at 287–88; *Speer v. City of Oregon*, 847 F.2d 310, 311 (6th Cir. 1988) ("Challenges to election laws are one of the quintessential categories of cases which usually fit this prong because litigation has only a few months before the remedy sought is rendered impossible the occurrence of a relevant election.")). The parties dispute only whether the second prong—whether there is a reasonable expectation that the current dispute will recur—is met.

To satisfy the second prong of the test, there must only be a reasonable expectation or a demonstrated probability of reoccurrence of the controversy, but a party need not establish that the recurrence was more probable than not. *See Honig v. Doe*, 484 U.S. 305, 318 (1988) ("Our concern in these cases, as in all others involving potentially moot claims, was whether the controversy was *capable* of repetition and not, as the dissent seems to insist, whether the claimant had demonstrated that the

recurrence of the dispute was more probable than not."). However, "[t]he remote possibility that an event might recur is not enough to overcome mootness, and even likely recurrence is insufficient if there would be an ample opportunity for review at that time." *Al Najjar*, 273 F.3d at 1336. Courts routinely find that election law disputes satisfy the second prong of the "capable of repetition, yet evading review" test. Indeed, the Eleventh Circuit has stated that "it is well settled that ballot access challenges fall under the 'capable of repetition yet evading review' exception to the mootness doctrine." *Swanson v. Worley*, 490 F.3d 894, 903 (11th Cir. 2007).[2] This is because even though an election has concluded, the burden imposed by a challenged ballot access scheme remains the same for future elections and, therefore, continues to adversely affect the parties' rights and interests. *See, e.g.*, *Moore*, 394 U.S. at 816 ("But while the 1968 election is over, the burden . . . allowed to be placed on the nomination of candidates for statewide offices remains and controls future elections . . ."); *Reed*, 502 U.S. at 288 ("There would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if we should fail to resolve the constitutional issues that arose in 1990.").

Bennett argues that the second prong has not been met because, in contrast to regularly scheduled

---

[2] It is worth noting that *Swanson* also involved a challenge to the same signature requirement challenged by Plaintiffs in this case. In *Swanson*, however, the challenge was brought in the context of a regularly scheduled election, whereas the challenge in this case is in the context of, and as applied to, a special election.

elections, there is not a reasonable expectation that there will be future special elections with signature requirements that impose equally severe burdens on Plaintiffs' First Amendment rights. Unlike regularly scheduled elections, special elections are only held when an elected office becomes vacant mid-term. Ala. Code § 17-15-1. Furthermore, whereas independent candidates have a statutorily set time-frame to meet the 3% signature requirement in regularly scheduled elections , in special elections, Alabama law vests power with the Governor to set elections dates and petition deadlines. *See id.* When a vacancy arises mid-term and a special election is held, the amount of time a prospective independent candidate has to meet the signature requirement varies depending on how the Governor chooses to structure the election. Because the truncated time frame to gather signatures is set by the Governor, and, therefore, will likely be different for each future special election, Bennett argues that Plaintiffs' claims are not capable of repetition, and any possibility that a future special election would impose the same constitutional burden is too remote, speculative or theoretical.

In support of his position, Bennett cites to two cases, both of which the Court finds distinguishable from the instant case. First, Bennett cites to *Super Tire Engineering Company v. McCorkle*, 416 U.S. 115 (1974). In *Super Tire*, the Supreme Court held that the termination of a strike did not moot the employers' challenge to a New Jersey statute that extended public assistance benefits to striking workers. *Id.* at 116. In reaching this decision, the Supreme Court distinguished its holdings in two prior cases, *Oil Workers Union v. Missouri*, 161 U.S.

363 (1960), and *Harris v. Battle*, 348 U.S. 803 (1954), which involved challenges to state statutes that authorized the Governor to take immediate possession of a public utility in the event of a strike. The Court explained that, whereas in *Super Tire* the policy of extending benefits was "fixed and definite" and would necessarily recur in the event of a strike, in *Oil Workers* and *Harris*, the challenged government action depended on "the distant contingencies of another strike and the discretionary act of [the Governor]." *Super Tire*, 416 U.S. at 123. Due to these contingencies, the Court characterized the threat of government action in *Oil Workers* and *Harris* as "two steps removed from reality" and "so remote and speculative that there was no tangible prejudice to the existing interests of the parties." *Id.* (citing *Oil Workers*, 361 U.S. at 371).

Bennett contends that, like *Oil Workers* and *Harris*, the threat of future injury in this case is also "two steps removed from reality." According to Bennett, in order for the harm to recur, "Plaintiffs need both a special election (a strike) and the Governor to exercise his discretion in a particular manner (a seizure)" but that the likelihood of these "distant contingencies" occurring is too remote and speculative. (Doc. #41.) Moreover, Bennett argues that the specific petition deadline, and, consequently, the exact number of days given to independent candidates to collect signatures, is left to the Governor's discretion and making it reasonable to expect that same or similar time frames will be imposed on candidates in future special elections.

Bennett's likening of *Oil Workers* and *Harris* to this case is misplaced.[3] While the potential harm in this case is contingent on the occurrence of another special election, and the exact time frame in which a potential independent candidate has to comply with the signature requirement is contingent on the Governor's discretion, it can hardly be said that these contingencies are "distant." *See Super Tire*, 416 U.S. at 123. Alabama has a long history of holding special elections to fill vacant state and federal legislative positions, and the statute requires the Governor to hold a special election should a vacancy arise. *See* Ala. Code § 17-15-1; *see also* State of Alabama Proclamation (Doc. #23-4) ("under the Constitution and laws of the State of Alabama, it is my duty as Governor, by proclamation, to call and set the dates of all related special elections . . ."); Second Declaration of Richard Winger (Doc. #19-1) (listing Special Elections held in Alabama for Vacant United States Congressional seats since 1893). Once the special election is called, the Governor must set the election schedule and petition deadlines for independent candidates. *See* Ala. Code § 17-15-2. This, by itself, distinguishes *Oil Workers* and *Harris* from the present case because the challenged statute here does not give the Governor discretion over whether to call and to set deadlines in a special election when a vacancy arises. Thus, the occurrence of a special election under these circumstances is a much less "distant contingency" than the seizure of

---

[3] The Court also notes that *Oil Workers* and *Harris* are further distinguishable from this case because they do not deal with election law challenges, much less suits involving ballot access or signature requirements.

an industry. Moreover, these special election petitioning deadlines will necessarily require independent candidates to submit petitions in a time frame that is shorter than they would have had in a regularly scheduled election.[4] Therefore, a similar infringement on Plaintiffs' First Amendments rights can be reasonably expected regardless of how the Governor uses his discretion in setting the actual deadlines.

Further, it is not necessary for Plaintiffs to establish a reasonable probability that a future truncated special election schedule will involve the exact same number of days as in this Special Election, or that a potential future special election will be held to fill a vacancy in Alabama's First Congressional District. To impose this requirement would effectively bar relief for alleged constitutional violations arising from Alabama's ballot access laws as applied to special elections because it is highly unlikely independent candidates will be subject to the exact same petition deadlines as Plaintiffs were in this case. *See Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1216 n.5 (11th Cir. 2009) (citing *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) ("Requiring repetition of every 'legally relevant' characteristic of an as-applied challenge—down to the last detail—would effectively overrule this statement by making this exception unavailable for virtually all as-applied challenges."). All that is required is "governmental

---

[4] Courts have characterized the time frame for independent candidates to petition in a regularly scheduled election as being "unlimited." *See Worley*, 490 F.3d at 904.

action directly affecting, and continuing to affect, the behavior of citizens in our society." *Super Tire*, 416 U.S. at 126. In the Court's opinion, Plaintiffs have met this requirement because they have established a reasonable expectation that future special elections in Alabama will burden the same constitutional rights and interests at issue here, as there is a demonstrated probability that the government will hold future special elections where independent candidates must comply with Alabama's 3% signature requirement under a truncated petition deadline.

Bennett's reliance on *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 188 (1979), is also misplaced. In that case, the Chicago Election Board (Chicago Board) set the signature requirement and filing deadlines applicable to independent candidates and new political parties in the January 1977 special mayoral election to fill the vacancy created by the death of Mayor Richard J. Daley. An independent candidate, new political parties, and voters sued arguing (1) that the discrepancy between the signature requirements for state and city elections violated equal protection and (2) that the shortened petition deadlines were unconstitutionally burdensome. *Id.* at 178. The Chicago Board entered into a settlement agreement with Plaintiffs on the second claim. *Id.* at 180. The State Board of Education (State Board) was excluded from the settlement and challenged the Chicago Board's authority to enter into it. *Id.* at 180. Both the Seventh Circuit Court of Appeals and the Supreme Court dismissed the State Board's claim as moot because the election had concluded. *Id.* The Supreme

Court reasoned that although the issue evaded review, there was "no evidence creating a reasonable expectation that the Chicago Board will repeat its purportedly unauthorized actions in subsequent election." Moreover, "[t]he Chicago Board's entry into a settlement agreement reflected neither a policy it had determined to continue nor even a consistent pattern of behavior." *Id.* at 188. "And the Chicago Board's action patently was not a matter of statutory prescription, as was the case in other election decisions . . ." *Id.* (internal citations omitted).

Bennett argues that the Court's reasoning in *Illinois State Board of Education* further supports his argument that because the specific deadlines are set by the Governor, and therefore, are "not a matter of statutory prescription," it cannot reasonably be expected for the current controversy to recur in the future. The Court rejects this argument for much the same reasons it rejected adopting the logic in *Oil Workers* and *Harris*. Because special elections occur with relative frequency, and because a shortened petition deadline necessarily raises the same constitutional issues as those challenged here, it can be said that, unlike the settlement decision in *Illinois State Board of Education*, the Alabama ballot access scheme reflects both "a policy [the government] had determined to continue" and "a consistent pattern of behavior." *See id.* at 188. In fact, *Illinois State Board of Education* appears to support the Plaintiffs' position, as the Court implicitly found that the plaintiffs' first constitutional claim—that the discrepancy between city and state ballot access requirements violated the Equal Protection Clause—was not mooted by the passage of the special election.

Other courts have similarly found controversies involving challenges to state special election procedure were not mooted when the special election concluded, which lends further support to the Court's conclusion that the case before it is not moot. *See Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *ACLU of Ohio v. Taft*, 385 F.3d 614 (6th Cir. 2004).

Finally, Bennett contends that in order for the capable of repetition, yet evading review exception to apply, there must be a reasonable expectation that the same two independent candidate plaintiffs, specifically Hall and Moser, will be subject to the same constitutional burden in a future special election. *See Weinstein,* 423 U.S. at 147 ("there was a reasonable expectation that the ***same complaining party*** would be subjected to the ***same action*** again") (emphasis added); *Norman*, 502 U.S. at 288 ("there would be every reason to expect the ***same parties*** to generate a similar, future controversy") (emphasis added). The Court acknowledges that there is conflicting law in the circuits on this issue and that there is no Eleventh Circuit case that directly resolves the conflict. *Compare Van Wie v. Pataki*, 267 F.3d 109, 114 (2nd Cir. 2001) (noting that "a tension has arisen" between cases strictly applying a "same complaining party" requirement and other cases not applying this requirement "in such a stringent manner" and ultimately holding that "in the absence of a class action, there must be a reasonable expectation that the *same* complaining party would encounter the challenged action in the future"), *with Majors v. Abell*, 317 F.3d 719, 723 (7th Cir. 2003) ("[W]hile canonical statements of the exception to

mootness for cases capable of repetition yet evading review require that the dispute giving rise to the case be capable of repetition *by the same plaintiff*, the courts, perhaps to avoid complicating lawsuits with incessant interruptions to assure the continued existence of a live controversy, do not interpret the requirement literally, at least in abortion and election cases.") (internal citations omitted), *and Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005) ("Courts have applied the capable of repetition yet evading review exception to hear challenges to election laws even when the nature of the law made it clear the plaintiff would not suffer the same harm in the future.") (citations omitted). However, he Court does not need to resolve this conflict because Plaintiffs are able to meet the "same party requirement."

Plaintiffs have established that there is a reasonable expectation the controversy would recur as to themselves, the same complaining parties. Both Hall and Moser have submitted declarations stating that they intend to continue to seek public office in Alabama as an independent candidate in either a special election or regular election and that they intend to vote for future independent candidates in each special or regular election in which they are eligible to vote. (Docs. #48-1, 48-2.) This is sufficient evidence for the Court to find that it is reasonable to expect that both Plaintiffs will run as independent candidates or vote for independent candidates in the future; therefore, the controversy is capable of repetition as to these Plaintiffs. Even absent this evidence, the Court finds that it is reasonably likely for Plaintiffs themselves to be involved in the same

controversy in future special elections. *See Lawrence*, 430 F.3d at 371 ("[A]lthought [the plaintiff] has not specifically stated that he plans to run in a future election, he is certainly capable of doing so, and under the circumstances it is reasonable to expect that he will do so."); *Majors*, 317 F.3d at 723 ("[I]n an election case the court will not keep interrogating the plaintiff to assess the likely trajectory of his political career.").

As both parties noted in their briefs, the Court preemptively resolved the issue currently before it during the November 19, 2013, preliminary injunction hearing. At the hearing, the Court made clear that:

> Regardless of what happens, unless there's a ruling by the Eleventh Circuit which stays this general election on December the 17th, if, in fact, this case were to come back to me after the general election, should Mr. Schoen take up this appeal, **I don't want to hear from the state that the issue is moot because the election already occurred**. I think there's case law after case law that says that - - even the *Worley* case, I believe, says that even though the election has taken place, there's still a justiciable controversy, and the only thing we're looking at is whether or not Mr. Hall's and Mr. Moser's rights have been affected. And that's what I would be looking at at that point.

Nothing has changed since this hearing. At the least, the Court has jurisdiction to hear any allegations for damages arising out of alleged violations of 42 U.S.C.

§ 1983, which would entitle Plaintiffs to at least nominal damages.[5] Furthermore, for the reasons stated above, the Court retains subject matter jurisdiction to hear the as-applied and facial challenges to Alabama's signature requirements as applied in the recent Special Election for the purpose of issuing a permanent injunction or declaratory judgment. Accordingly, it is hereby ORDERED as follows:

1. Bennett's Motion to Dismiss (Doc. #41) is DENIED.

2. Plaintiffs' Request for Oral Argument (Doc. #51), which the Court construes as a motion for a hearing, is DENIED AS MOOT.

3. The stay imposed on January 27, 2014 is LIFTED.

4. A status conference is set in this case for March 12, 2014 at 10:00 A.M. by conference call arranged by counsel for the Defendant.

DONE this the 3rd day of March, 2014.

/s/ Mark E. Fuller
UNITED STATES DISTRICT JUDGE

[5] In their response brief (Doc. #44), Plaintiffs make clear they intend to file a motion for leave to file a Second Amended Complaint adding a damages claim for the violation of their rights as a result of being kept off the ballot in the December 17, 2013 Special Election.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-16766-CC

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

Plaintiffs – Appellees,

versus

SECRETARY, STATE OF ALABAMA,

Defendant – Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

[December 13, 2018]

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, JILL PRYOR and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

[illegible]
UNITED STATES CIRCUIT JUDGE

ORD-42