No. 18-1362

In the
Supreme Court of the United States

JAMES HALL,
Petitioner,
v.
SECRETARY OF STATE OF ALABAMA,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner James Hall sought to run as an independent candidate in a 2013 special election for Alabama's First Congressional District, but he failed to obtain the roughly 6,000 signatures necessary to secure ballot access in the 106 days available. The election thus went forward without his name on the ballot. The last special election in this U.S. House District was more than 70 years ago, the Governor has discretion to set the dates for any special election such that each one is different, Hall has since affiliated with the Republican Party, and State law has been amended to allow independent candidates to start gathering ballot access signatures earlier than they could have under the 2013 regulations.

The question presented is whether Hall's challenge to the number of signatures required during the time allotted before the 2013 special election for Alabama's First Congressional District is moot.

RELATED CASES

Hall v. Merrill, No. 2:13-cv-663-MEF-TFM, U.S. District Court for the Middle District of Alabama. Judgment entered November 13, 2013.

Hall v. Secretary of State, State of Alabama, No. 13-15214, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered December 12, 2013.

Hall v. Bennett, No. 2:13-cv-663-MEF-TFM, U.S. District Court for the Middle District of Alabama. Judgment entered March 3, 2014.

Hall v. Merrill, No. 2:13-cv-663-MHT, U.S. District Court for the Middle District of Alabama. Judgment entered September 30, 2016.

Hall v. Secretary, State of Alabama, No. 16-16766, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered August 29, 2018.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

INTRODUCTION

This case is an exceptionally poor vehicle to address an unimportant issue that lower courts approach in fundamentally the same way. On May 23, 2013, Congressman Jo Bonner announced that he would resign from office that August. Bonner's resignation gave the Governor the opportunity to set the date for a special election for Alabama's First Congressional District—the first such election the district had seen in more than 70 years. Petitioner James Hall sought a spot on the ballot as an independent candidate. Thus, under then-extant State law, Hall needed to collect the signatures of 5,938 registered voters in the district (roughly 1.4% of such voters) within 106 days. Hall spent time but no money gathering signatures, failed to meet the signature requirement, and sued the Secretary of State. He argued that the number of signatures the State required to appear on the ballot for the 2013 election was too high in relation to the limited time he was given to gather signatures. The once-in-a-lifetime election then came and went without Hall on the ballot, and the Eleventh Circuit properly concluded that his claim was moot, for there is no "reasonable expectation that [Hall] would be subjected to the same action again." Pet.App.20a n.7 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)).

Hall argues that there is a split among the circuits over whether plaintiffs challenging ballot access requirements must show that there is "'a reasonable expectation' that they personally 'will be subjected to the same action again,'" Pet.11. But the split is either illusory, unimportant, or both, as the courts of appeals approach the question of mootness in ballot access

cases in fundamentally the same manner. In effect, the courts of appeals all apply a relaxed version of the same-plaintiff rule in such cases. Because elections are typically recurring, and candidate-plaintiffs typically run for political office again and again, plaintiffs can typically avoid mootness by asserting an intent to run again for a similar election. Hall contends that the Second and Eleventh Circuits have required a more substantial showing from plaintiffs, but numerous decisions from those courts establish that they are in line with their sister circuits. Hall next asserts that the Fifth, Sixth, and Ninth Circuits have dispensed with the same-plaintiff rule altogether in ballot access cases, but the Sixth and Ninth Circuits continue to apply the rule. And though the Fifth Circuit has relieved some candidate-plaintiffs from satisfying the same-plaintiff requirement, it has done so only in cases where plaintiffs could have easily met that requirement anyway.

Thus, Hall's purported split is at best academic, as the same-plaintiff rule is easily satisfied by any plaintiff in any circuit challenging ballot access regulations that are likely to be applied again under similar circumstances.

By the same token, Hall's challenge to the unique circumstances that applied to him during this once-in-a-lifetime special election for a specific U.S. House District would fail in any circuit. He challenged Alabama's 3% signature requirement as it applied (1) to himself alone, (2) in a special election, (3) for a U.S. House District, (4) with 106 days to collect signatures. And the Eleventh Circuit properly found the case moot following the special election, noting that because circumstances materially similar to these were

extremely unlikely to reoccur in Hall's lifetime, the court could "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." Pet.App.22a.

In any event, Hall's case is a poor vehicle for considering this issue. Even setting aside the same-plaintiff requirement, Hall's case is moot several times over. Most notably, a key regulation that delayed when Hall could start gathering signatures no longer exists. Had current regulations been in effect in 2013, Hall would have had significantly more time to gather signatures. And any decision on Hall's case would necessarily be constrained to facts concerning a regulation that no longer applies, meaning it would provide no benefit to Hall or any hypothetical candidate.

Finally, this Court already denied review of this issue only three years ago, in a case that was free of the numerous vehicle problems present here. *See Stop Reckless Economic Instability Caused by Democrats (Stop REID) v. FEC*, 814 F.3d 221 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 374 (2016). The Court should deny review again.

STATEMENT OF THE CASE

A. Alabama Law Requires Independent Candidates to Petition for Ballot Access

Alabama law provides two means to achieve ballot access. First, political parties that "have recently demonstrated substantial voter appeal," *Am. Party of Tex. v. White,* 415 U.S. 767, 783 n.16 (1974), such as

the Democratic and Republican Parties, may achieve ballot access based on their recent electoral performance. ALA. CODE § 17-13-40. Alternatively, independent candidates and political parties that have not demonstrated voter appeal through election results may seek ballot access via petition. ALA. CODE § 17-6-22.

Candidates petitioning for ballot access in regularly-scheduled or special elections must gather signatures of registered voters in the State (for statewide offices) or in the relevant political subdivision (for other offices) numbering 3% of the ballots cast in that jurisdiction in the most recent gubernatorial election. ALA. CODE § 17-9-3(a)(3). Because not all registered voters actually participate in elections, the requirement only amounted to 1.4% of registered voters for the 2013 special election at issue here. Doc. 23-1 at ¶¶22-26.[1] Alabama's 3% signature requirement is less restrictive than several signature requirements upheld by this Court and other courts. *See Swanson v. Worley*, 490 F.3d 894, 899 (11th Cir. 2007).

The Eleventh Circuit has also recognized several "alleviating factors" of Alabama's ballot access scheme that "ameliorate any burden on the plaintiffs' constitutional rights." *Id.* at 904, 909. In addition to the relatively low signature requirement, voters may sign multiple petitions for different candidates and are not obligated to refrain from voting, or otherwise participating, in the electoral process of any other party. Doc. 23-2 at ¶4; *cf. Am. Party of Tex.*, 415 U.S. at 785 n.17 (upholding Texas law restricting the pool of persons qualified to sign the petitions to those who had

[1] "Doc." numbers correspond to district court docket entries.

not participated in the primary election). Moreover, there is no fee for signature verification, and signatures count (even if missing relevant voter information) so long as the Secretary can verify their identity. Doc. 23-2 at ¶4; *cf. Fulani v. Krivanek*, 973 F.2d 1539, 1540 (11th Cir. 1992) (upholding Florida law imposing fee for verifying signatures so long as not unduly burdensome). History demonstrates that diligent candidates and political parties achieve ballot access through petition. *See* Doc. 23-1 at ¶¶2-13; Doc. 23-1 at 10; Doc. 23-20 at ¶¶5–6; Doc. 23-21 at 16-17.

B. Former Congressman Jo Bonner's Resignation Announcement Leads to a Special Election in 2013

On May 23, 2013, then-Congressman Jo Bonner of Alabama's First Congressional District announced, with great notice, that he was resigning, effective August 15, 2013. Pet.App.48a.[2] It was then immediately clear that a special election would occur to fill the seat, and independent candidates, Republicans, and Democrats filed statements of organization before the special election date was announced. *Id.* at 48a-49a. The forthcoming vacancy was announced 124 days before the date set for filing ballot access petitions. *Id.* at 48a-51a.

Once Bonner vacated his seat, the Governor set the dates for the special election primary—which is also the date ballot access petitions are due—and the general election. *See* Doc. 23-4; *see also* ALA. CODE § 17-9-3. These dates were announced 56 days before

[2] Bonner later moved his resignation date to August 2 to allow the State to fill his seat by the end of the year. *See* Doc. 23-6.

petitions were due, promptly after Bonner vacated his seat. Pet.App.50a.

In 2013, Alabama's electoral regulations required independent candidates to identify on the ballot petition the specific election for which they were running as well as the election date. *See* Ala. Admin. Code R. 820-2-4-.05(l) (2001). In the context of special elections, the regulation had the effect of limiting the time for petitioning. After Hall inquired about the requirement, the Secretary of State granted him a special exception from it, which gave Hall 106 days to gather signatures before petitions were due. Pet.App.51a. In 2015, this election-date requirement was eliminated for independent candidates seeking ballot access in special elections, meaning that independent candidates now have in theory an unlimited amount of time to petition for a spot on a special election ballot. *See* Ala. Admin. Code R. 820-2-4-.05(l) (2015). But the regulation's application in 2013 shortened Hall's time to gather signatures by at least 18 days (the length of time between Bonner's announcement and Hall's special exception to begin gathering signatures).

C. Hall Unsuccessfully Attempts to Gain Ballot Access as an Independent Candidate

To achieve ballot access for the 2013 special election, independent candidates needed to submit the signatures of 5,938 voters—approximately 1.4% of registered voters in the district—by the day of the primary election. Pet.App.50a.

Hall gathered signatures during the 106 days he had under the old regulation, but he collected only "roughly one signature for every 12 houses" he canvassed. Pet.App.51a. Ultimately, after 3½ months of

campaigning, Hall obtained only 2,835 unverified signatures. *Id.* at 52a. As he failed to make a "preliminary showing of a significant modicum of support," the Secretary of State was unable to place him on the ballot. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); Pet.App.67a.

Hall asserted that he did not pay signature gatherers to help him obtain ballot access because, at $4-per-signature, the roughly $23,000 he would need to spend was "a prohibitive sum." Pet.4-5; *see also* 1st Am. Compl. ¶44 (explaining Hall's refusal to pay a signature-gatherer because "he is a person of limited financial means"). It is unclear whether Hall raised or spent any funds for his candidacy. *See* James Hall for Congress, *Committee Filings*, FED. ELECTION COMM'N (2014) (Hall filed no forms with the FEC except to organize and terminate his campaign).[3]

Meanwhile, other candidates attempting to secure ballot access through a party primary raised and spent substantial sums of money. The eventual winner of the Republican primary in this heavily Republican district, Bradley Byrne, raised about $241,000 and spent about $132,000 in the time period from July 1, 2013 to September 4, 2013.[4] Another Republican candidate, Wells Griffith, raised about $162,000 and spent about $75,000 during this time period.[5] Yet

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[3] FEC filings available at: https://bit.ly/2Yqf3Jx (last visited July 25, 2019).

[4] FEC document available at: https://bit.ly/2LGal4n (last visited July 25, 2019).

[5] FEC document available at: https://bit.ly/2JQct7s (last visited July 25, 2019).

another Republican, Dean Young, spent approximately $55,000 during this time period.[6] Even the winner of the uncompetitive Democratic primary raised approximately $6,650 and spent $5,650 ahead of the primary. *Id.*[7] To earn a spot on the general election ballot, Byrne had to win a primary runoff in which more than 72,000 people voted.[8]

D. Hall Files Suit, and the Eleventh Circuit Determines His Case is Moot

Roughly four months after Bonner announced his pending resignation and more than three months after Hall began gathering signatures, Hall filed suit in the Middle District of Alabama. Pet.App.54a. He challenged Alabama's 3% signature requirement as applied to the timeframe of the 2013 special election, arguing that it violated his constitutional rights as a candidate and voter. *Id.* Although Hall's complaint requested "a preliminary and permanent injunction," Doc.2 at 9, Hall did not move for a preliminary injunction until more than a month after the signature deadline had passed. Doc. 25. The district court denied his motion for a preliminary injunction placing him on the ballot, and the Eleventh Circuit affirmed. Pet.App.55a-56a. Among the reasons the district court gave when denying the motion was that Hall waited to move for a preliminary injunction until after

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[6] FEC document available at: https://bit.ly/2GsZs1R (last visited July 25, 2019).

[7] FEC document available at: https://bit.ly/2Y7Q2DN (last visited July 25, 2019).

[8] Theresa Seiger, *Final Results from Tuesday's AL-01 Special Runoff Election*, AL.com (Nov. 6, 2013), https://bit.ly/2YvNTwX (last visited July 30, 2019).

ballots had already been mailed to overseas voters. *Id.* at 56a.

Since the election, the Secretary of State has raised three mootness arguments. First, the Secretary argued, the Governor has the sole authority to set election dates and petition deadlines. ALA. CODE § 17-15-1. Therefore, the amount of time an independent candidate has to gather signatures depends on when a representative resigns and how the Governor decides to exercise her discretion. Thus, future special elections will likely operate on a different timeframe than the 2013 special election. *Id.* Second, the Secretary argued, special elections for Alabama's First Congressional District are so rare that there is no reasonable expectation that Hall will ever be similarly affected by the signature requirement in his lifetime. Doc.41. Third, Hall has since run for office and actively campaigned as a Republican, and in doing so, certified that he is a Republican who "endorse[s] and will actively support the principles and policies of the Republican Party." Doc.62-1 at 6. Given that Hall certified he was a Republican only about two weeks after submitting a sworn declaration of his intent to seek elective office as an independent candidate, the Secretary argued there was no reasonable expectation Hall would again be subject to similar circumstances as in 2013. Doc.66 at 2; *see* Doc.48-1.

The district court disagreed with the Secretary's mootness arguments and ruled that Alabama's ballot access scheme was unconstitutional as applied to the specific circumstances and timeframe of the 2013 special election. Pet.App.62a, 66a, 88a. The district court's ruling was both narrow and broad. First, the court declined to "hold that that the 3% signature

requirement can never be enforced," holding instead that "it cannot be enforced in the context of an off-season special election occurring on a similarly limited timeframe." Pet.App.88a. But the court also purported to enter "relief extending to *all* prospective independent candidates, and not just to Hall." Pet.App.87a-88a (emphasis added). Despite issuing this declaratory judgment, the district court acknowledged that "this is a problem that should be addressed legislatively." Pet.App.88a.

The Secretary appealed the district court's decision. Before oral argument, the Eleventh Circuit flagged an additional mootness issue. 11th Cir. Memo. To Counsel Re: Mootness (Nov. 21, 2017). The court noted that the regulation limiting Hall's time to gather signatures in advance of the 2013 special election had been changed and now provides candidates unlimited time to gather signatures ahead of the petition deadline. *Id.*

The Eleventh Circuit held that Hall's case was moot "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." *Id.* at 22a. The court reasoned that special elections in Alabama's First Congressional District are so rare that there could be no reasonable expectation that Hall would again participate in another one in his lifetime, either as a candidate or a voter. Pet.App.20a. And the court declined to credit Hall's statement that if a special election for a U.S. Congressional seat were to arise in another part of the state, on very short notice, Hall would run in that election. *Id.* at 20a-21a. The Eleventh Circuit, "confident"

Hall's case was moot on these grounds, did not address other reasons the case might be moot. *Id.*

REASONS FOR DENYING THE PETITION

I. There Is No Meaningful Split Among the Courts of Appeals on This Issue.

The capable-of-repetition-yet-evading-review exception to mootness "applies where (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." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (*WRTL*) (internal quotation omitted). Hall asserts that there is a three-way split among the circuits as to how or even whether to apply the second prong of that test in election law cases. *See* Pet.11-19. But that split is merely academic, if not illusory. The fact is that all circuits apply a relaxed version of the same-plaintiff requirement in election law cases, to the point where the requirement is quite easy to satisfy. *See* Pet.App.15a ("several scholars have suggested that the [same-plaintiff requirement] is applied in a rather relaxed manner"). Hall does not dispute that the First, Third, Fourth, Seventh, Eighth, Tenth, and D.C. Circuits adjudicate cases in this manner.

Hall contends that the Second and Eleventh Circuits have departed from these circuits by ratcheting up the showing a candidate must make to meet the same-plaintiff rule. But this assertion is belied by decisions from those courts applying a standard as relaxed as any of their sister circuits.

That leaves the Fifth, Sixth, and Ninth Circuits, which Hall asserts have dispensed with the same-plaintiff rule in election law cases. But despite some loose language in a few opinions, the requirement is clearly alive and well in the Sixth and Ninth Circuits. And while the Fifth Circuit may have concluded that application of the same-plaintiff requirement is so relaxed that it may no longer apply at all in certain election law cases, the court applies this approach only in cases where a plaintiff could easily meet the same-plaintiff rule that governs in every other circuit.

A. The Fifth, Sixth, and Ninth Circuits Generally Apply a Relaxed Same-Plaintiff Requirement.

Hall agrees that most circuits apply the same-plaintiff rule, albeit in a relaxed form. *See* Pet.15-18. He asserts, however, that the Fifth, Sixth, and Ninth Circuits have lowered the bar so far in election law cases that it no longer exists. Decisions from the Sixth and Ninth Circuits, however, make clear that those courts still retain the same-plaintiff rule, and to the extent the Fifth Circuit takes a different tact, it does so only in cases where nearly any plaintiff could meet the requirement.

Hall's argument as to the Sixth Circuit (at Pet.13) turns on one line from *Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005). But that language is likely dicta, as the court had already held that the plaintiff had satisfied the same-plaintiff requirement, and the Sixth Circuit has repeatedly applied the same-plaintiff requirement in election law cases, both before and after *Lawrence*. *See, e.g.*, *In re: 2016 Primary Election*, 836 F.3d 584, 588-89 (6th Cir. 2016)

(dismissing case for failing same-plaintiff requirement because the complaining party could not be identified); *Tigret v. Cooper*, 595 F. App'x 554, 557-68 (6th Cir. 2014) (dismissing case for failing same-plaintiff requirement because elections for consolidation of city and county governments "are not regularly scheduled and do not occur frequently" so there was no reasonable expectation of future injury to same plaintiffs); *see also Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329 (6th Cir. 2016) (expressly acknowledging the same-plaintiff requirement was satisfied); *Speer v. City of Oregon*, 847 F.2d 310, 311-12 (6th Cir. 1988) ("Because Speer cannot again be subjected to the claimed illegality, we are persuaded that her claim should be deemed moot.").

Nor has the Ninth Circuit eliminated the same-plaintiff requirement in election law cases. Hall (at 14) points to language from *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000), but before the court opined on the existence of the requirement, the court specifically found that "Schaefer's claim [wa]s capable of repetition because in the future California *would deny him* or any other resident the right to file a declaration of candidacy." *Id.* at 1033 (emphasis added). In any event, the Ninth Circuit has continued to apply the same-plaintiff rule in election law cases, also dismissing cases where the requirement was not met. *See, e.g.*, *Akina v. Hawaii*, 835 F.3d 1003 (9th Cir. 2016) (per curiam) (dismissing plaintiffs' appeal of preliminary injunction over election practices for failing same-plaintiff requirement because it was unlikely a similar election would ever reoccur); *Newcomb v. U.S. Office of Special Counsel*, 550 F. App'x 532 (9th Cir. 2013) (dismissing even though the "cloud of Hatch

Act enforcement" hindered plaintiff's election to a school board because he indicated he would no longer run in such elections, meaning the injury was "not capable of repetition," even though other federal employees could run in such elections); *see also, e.g.*, *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010) (expressly acknowledging the same-plaintiff requirement was satisfied); *Wolfson v. Brammer*, 616 F.3d 1045 (9th Cir. 2010) (same); *Padilla v. Lever*, 463 F.3d 1046 (9th Cir. 2006) (same).

The Ninth Circuit has even expressly questioned whether *Schaefer* is good law. In *Wolfson*, the Ninth Circuit, after finding Wolfson had "more than sufficient evidence" to satisfy the same-plaintiff test, wrote that "[a]lthough the parties have vigorously disputed the viability, meaning, and import of *Schaefer*, we need not weigh in on the matter…. We therefore leave for another case the significance of *Schaefer* in this Circuit." 616 F.3d at 1055-56.

While the Fifth Circuit has eliminated the same-plaintiff requirement in *some* election law cases, it has done so only in those election law cases where the plaintiff could have satisfied the requirement anyway—and retained the requirement in cases where the plaintiff might not. *See, e.g.*, *Libertarian Party v. Dardenne*, 595 F.3d 215, 218 n.6 (5th Cir. 2010) (explaining that not all election law cases "automatically fall[]" under the exception to the same-plaintiff requirement). In order to invoke the exception to the same-plaintiff requirement, a plaintiff must show that "the challenged illegality will again occur" and that "other individuals *certainly* will be affected by the continuing existence of the challenged provision." *Catholic Leadership Coalition of Texas v. Reisman*, 764

F.3d 409, 424 (5th Cir. 2014) (emphasis added) (internal quotations omitted). In other words, the plaintiff must show that the challenged law *will* injure someone else again in a materially similar way. While this approach appears out-of-sync with the other circuits, the practical effect is that cases will almost always survive or be dismissed exactly the same in the Fifth Circuit as in other circuits.

B. The Second and Eleventh Circuits, Like Other Circuits, Apply a Relaxed Same-Plaintiff Requirement.

Hall tries to manufacture a split by asserting that the Second and Eleventh Circuits have departed from other circuits by "demand[ing] significant evidence that a candidate-plaintiff will again suffer the complained of injury." Pet.14. But numerous decisions from these courts prove otherwise.

To the extent the Second Circuit ever "demand[ed] significant evidence" that an injury would reoccur, it dropped such demands following this Court's decisions in more recent election law cases. Pet.14. Hall relies on the Second Circuit's decision in *Van Wie v. Pataki*, 267 F.3d 109 (2d Cir. 2001), in which the court disregarded plaintiffs' assertion that they would again participate in presidential primaries in the same way. But since 2001, this Court has clarified the application of the same-plaintiff requirement in election law cases in *WRTL*, 551 U.S. 449, and *Davis v. FEC*, 554 U.S. 724 (2008).

In *WRTL*, this Court found the same-plaintiff requirement satisfied because plaintiff "credibly claimed" it would again participate in an election in the same way and "there [wa]s no reason to believe

that the FEC" would refrain from again causing an injury. 551 U.S. at 463. In *Davis*, this Court found the requirement satisfied based solely on "a public statement" expressing plaintiff's intent to repeat his actions. 554 U.S. at 736.

The Second Circuit has acknowledged these precedents and since found that a plaintiff's statements that he would again suffer a similar injury is sufficient to satisfy the same-plaintiff requirement in election law cases. *See Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 692 (2d Cir. 2013) (finding the same-plaintiff rule met because "[t]his case is like *Wisconsin Right to Life*"); *see also Van Allen v. Cuomo*, 621 F.3d 244, 247 (2d Cir. 2010) (suggesting a case would not be moot if plaintiff had alleged he would again suffer injury).

Sloan v. Caruso, 566 Fed. App'x 98 (2d Cir. 2014), does not show that a candidate-plaintiff's statement he would run again is insufficient to satisfy the same-plaintiff requirement. *Contra* Pet.15. Rather, that case merely demonstrates that the Second Circuit will not credit objectively unreasonable statements of future intent to participate in similar elections. The plaintiff in *Sloan* failed to appear on the ballot due to his own procedural error, by ignoring New York's requirement that witnesses to a Republican nominating petition be registered Republicans. *Id.* at 98-99. In light of the obvious fact that a candidate would not repeat this error in good faith, the Second Circuit correctly found the likelihood the same situation would again arise to be a "mere theoretical possibility." *Id.* at 99.

Hall's contentions regarding the Eleventh Circuit are likewise baseless. The Eleventh Circuit has never demanded "significant evidence" that a candidate-plaintiff in an election law case will again suffer injury. In *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007), Alabama's 3% signature requirement for ballot access was challenged in the context of regularly-scheduled elections, as opposed to special elections on a specific timeframe. The Eleventh Circuit determined that plaintiffs satisfied the same-plaintiff requirement because even "absent plaintiffs' expressed intent to run again, plaintiffs are certainly capable of doing so, and it is reasonable to expect that they will do so in the future." *Id.* at 905 n.13. Likewise, in *Arcia v. Florida Secretary of State*, the court set a low bar for plaintiffs, which they cleared merely because the Florida Secretary of State had "not offered to refrain from" election practices similar to those that caused plaintiffs' original injury. 772 F.3d 1335, 1343 (11th Cir. 2014).

Hall's problem was that he could not clear even this low bar, because his alleged injury is both very specific and very rare. The Eleventh Circuit correctly determined that it was unreasonable to conclude that Hall would ever again have the opportunity to participate in a special election like the previous one in his House district or in another House district. Hall does not identify a circuit that has considered a challenge like his to election laws as applied in *only* special elections. Any circuit, however, would find his case moot, for the unique facts of his case show that the purported harms caused by the 2013 special election are unlikely to ever befall him or even a hypothetical candidate. *See* Part II.

II. This Case Is a Poor Vehicle for Resolving This Unimportant Question.

A. The Question Presented Is Unimportant.

Because the same-plaintiff requirement is easily satisfied, similar ballot access challenges tend to result in similar outcomes, no matter which circuit decides the case. Thus, any purported disagreement among the circuits on whether to apply the requirement is unlikely to have any practical effect on litigants.

Consider every case Hall cites as purportedly dispensing with the same-plaintiff requirement. Some of these cases suggested eliminating the same-plaintiff requirement only *after* finding that plaintiff satisfied the requirement. *See Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006); *Lawrence*, 430 F.3d at 371 (6th Cir.); *Schaefer*, 215 F.3d at 1033 (9th Cir.). The other cases featured plaintiffs who easily could have satisfied the requirement, by simply stating they would again run for office in the next regularly scheduled election or circulate another ballot initiative. *See Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 165 (5th Cir. 2009); *Moore v. Hosemann*, 591 F.3d 741, 744 (5th Cir. 2009); *Caruso v. Yamhill Cty.*, 422 F.3d 848, 854 (9th Cir. 2005).

In general, plaintiffs will satisfy the same-plaintiff requirement when challenging election laws that will be regularly applied, because it is almost always reasonable to assume candidates will again participate in

recurring elections. *See, e.g.*, *Platt v. Board of Comm'rs on Grievances and Discipline of Ohio Supreme Court*, 769 F.3d 447, 453 (6th Cir. 2014) ("[C]hallenges by a former candidate are typically capable of repetition because the plaintiff retains the right to run for judicial office again." (internal quotations omitted)); Pet.App.8a (noting that "ballot access restrictions during a regular election cycle … would almost certainly repeat every few years, presenting [those] politicians with repeated opportunities to run"). In contrast, Hall's challenge is to the specific application of a ballot access law on a specific timeframe for a once-in-a-lifetime special election that may never reoccur. Pet.App.8a.

Indeed, Hall's case demonstrates that the circuits fundamentally agree on how to determine mootness in election law cases. Hall asserts that in the Fifth, Sixth, and Ninth Circuits, his case "would have continued because those circuits have dispensed with the same-plaintiff requirement altogether." Pet.24. But this Court "has never held that a mere physical or theoretical possibility was sufficient to satisfy the [capable of repetition, yet evading review] test." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). And consistent with this Court's teaching, these circuits continue to require that there be a reasonable expectation the injury will reoccur within a meaningful timeframe.

In the Fifth Circuit, for example, Hall's case would have been subject to the same-plaintiff requirement. Because there is no way to predict when, or if, special elections for U.S. House seats in Alabama will reoccur, much less that independent candidates will again be subject to the 3% signature requirement on a similar timeframe, Hall cannot show that "the challenged

illegality will again occur" and that "other individuals *certainly* will be affected by the continuing existence of the challenged provision." *Catholic Leadership Coalition*, 764 F.3d at 424 (emphasis added). Hall's case thus would have been moot in the Fifth Circuit.

The Sixth Circuit has already heard a case very similar to Hall's and dismissed that case as moot. *Tigret v. Cooper*, 595 F. App'x 554 (6th Cir. 2014), concerned a Tennessee law permitting cities and counties to consolidate into one jurisdiction by referendum. Tenn. Const. art. XI, § 9. In 2010, immediately before one such referendum was held, residents and voters from Memphis challenged Tennessee's consolidation law. The referendum failed, and a Sixth Circuit panel found plaintiffs' ongoing case moot because it was only a "mere physical or theoretical possibility" the situation would reoccur. *Tigret*, 595 F. App'x at 558. Although the Sixth Circuit acknowledged that mootness determinations are "somewhat relaxed in election cases," the consolidation referendum "differs from other elections courts have reviewed," for "unlike in most elections, consolidation elections are not regularly scheduled and do not occur frequently." *Id.* Because only three such consolidation elections had occurred in Memphis in the past century, and the previous one was nearly 40 years prior, "[i]t is possible that the next consolidation election will not occur again for another half-century." *Id.* at 557-58.

The Ninth Circuit's recent ruling in *Akina v. Hawaii*, 835 F.3d 1003 (2016) (per curiam), likewise indicates that Hall's case would be moot in that circuit. In 2015, Hawaii sought, with the help of a nonprofit, to form a convention to vote on Native Hawaiian self-determination, pursuant to a state law. *Akina*, 835

F.3d at 1008. Delegates were to be restricted to Native Hawaiians. *Id.* Residents sued, challenging the delegate-selection process as unconstitutional, and appealed the district court's denial of a preliminary injunction halting the election. *Id.* at 1009. Because Hawaii and the nonprofit had since cancelled the election, and the nonprofit had dissolved, the Ninth Circuit held the residents' interlocutory appeal moot. *Id.* at 1010-11. Specifically, the Ninth Circuit found that "it remains unclear what such an election would look like, who would hold it, and *when it would take place, if at all,*" and so "there is no reasonable expectation that the plaintiffs will be subject to the same injury again." *Id.* at 1009, 1011 (emphasis added).

Because no one can predict under what circumstances another special election in Alabama's 1st Congressional District will reoccur, if at all, a ruling on Hall's case "would amount to an impermissible advisory opinion that would, at most, guide any future … efforts." *Akina*, 835 F.3d at 1011. And because the purportedly lenient Fifth, Sixth, and Ninth Circuits would likely find Hall's case moot, the question he presents is merely academic and does not merit this Court's review.

B. Hall's Case Is Moot Several Times Over.

Beyond failing the same-plaintiff requirement for the reasons stated by the Eleventh Circuit, there are other significant jurisdictional issues with Hall's case that render it moot in other ways.

First, the regulation that limited Hall's time to gather ballot signatures in the 2013 special election has been amended. Under the State regulation in effect at the time of the 2013 special election,

independent candidates seeking ballot access needed to gather signatures on petitions indicating the date of the special election. Ala. Admin. Code R. 820-2-4-.05(l) (2001). But because the Governor could not schedule the special election until the House seat was vacant, more than two months passed between when the vacancy was announced and when Governor set the date of the special election. *See* Pet.App.48a-50a. Hall asked the Secretary whether he could begin collecting signatures before the special election was scheduled, and 18 days after the vacancy announcement, the Secretary approved Hall's request to use petitions that did not list the date of the special election. *Id.* at 49a. Accordingly, although the vacancy was announced 124 days before the petition deadline, Hall had only 106 days to gather signatures. *Id.* at 48a-51a. Moreover, Hall argues that the relevant timeframe here is the "56 days" between the petition deadline and "the date … the special election had been set." Pet.4; *see also* Pet.App.50a ("Hall contends that independent candidates had 56 days to obtain the necessary signatures.").

But in 2015, Alabama's ballot access regulations were amended to allow independent candidates to gather signatures for special elections without knowing the date of those elections. Ala. Admin. Code R. 820-2-4-.05(l) (2015). Thus, if the unique events of 2013 reoccurred today, Hall would have 124 days between the announcement of the vacancy and the ultimate deadline for filing his petition. And in theory, Hall would have an unlimited amount of time to gather petitions for the election. "[T]he necessary effect of the enactment of this [regulation] is to make the cause a moot one," *United States v.*

Alaska S.S. Co., 253 U.S. 113, 115 (1920), for as Judge William Pryor explained during oral argument, "whether [the regulatory change] is a big difference or not, it's a different case." *See* 11th Cir. Oral Arg. at 4:05-4:12.[9]

The fact is, the regulatory change is "a big difference" because independent candidates now have theoretically unlimited time to gather signatures for the next special election. This line of reasoning was crucial to the Eleventh Circuit's holding that Alabama's 3% signature requirement is constitutional in regularly-scheduled elections. *See Swanson*, 490 F.3d at 906, 909-10 (upholding Alabama's 3% signature requirement in part because of "the unlimited time to gather signatures"); *see also* Pet.App.72a (noting that "the *Swanson* court particularly emphasized that the Alabama scheme" imposed "no limit on the time period for gathering signatures"). Hall himself, in attempting to distinguish his case from *Swanson*, explained that he had only a "significantly truncated time period" for gathering signatures for special elections, while "the time period for independents to gather signatures in a regular election year in Alabama" is "unlimited." Hall CA11 Br. 12; *see also* Pet.30 ("Here, Hall had at most 106 days—as compared to the unlimited timeframe for regular elections.").

Of course, Hall may protest that he is unlikely to collect signatures for a special election that may never again occur in his lifetime. But that merely underscores how unlikely it is that a federal court could ever

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[9]Available at: https://bit.ly/2LDzMDX (last visited July 25, 2019).

provide him any meaningful relief in this challenge to the unique signature requirements and timeframe for an exceedingly rare special election.

Hall's case is further moot for two other reasons not reached by the Eleventh Circuit. First, the Governor has complete discretion when setting election dates and petition deadlines. ALA. CODE § 17-15-1. Hall thus cannot demonstrate that anyone will again be subject to Alabama's 3% signature requirement for a Congressional special election on a timeframe similar to the one used in 2013. Merely showing that the State "will have an opportunity to act in the same allegedly unlawful manner in the future" is not enough to establish a "reasonable expectation" that the controversy will reoccur. *Libertarian Party*, 595 F.3d at 217.

Second, although Hall's challenge was premised on his status as an independent candidate, after he filed his suit, Hall actively affiliated with the Republican Party, even running for office as a Republican. Pet.App.64a. Indeed, just two weeks after submitting a sworn declaration to the district court averring that he "intend[ed] to seek elective office in Alabama in the future … as an independent candidate," Doc.48-1, Hall declared his candidacy for the Republican nomination for a seat in the Alabama Legislature, Doc.62-1 at 6. Hall certified that he was a Republican and that he "endorse[s] and will actively support the principles and policies of the Republican Party." *Id.* According to Republican Party guidelines, members may not simultaneously be affiliated with the Republican Party and be an independent. Pet.App.64a-65a. It is thus unreasonable to expect Hall to be subject to

Alabama's 3% signature requirement again in another special election in the same way he was in 2013.

Finally, Hall's lead argument for his case being an "ideal vehicle" for this question is that the parties have never disputed the case is "evading review." Pet.23. But "legal disputes involving election laws almost always take more time to resolve than the election cycle permits." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 584 (6th Cir. 2006). Thus, nearly any election law case involving mootness will have indisputably evaded review, but almost no such case will come with the multiple other mootness problems afflicting Hall's case.

Indeed, this Court was recently presented with a better vehicle to consider the question Hall presents, but the Court still denied certiorari. *See Stop Reckless Economic Instability Caused by Democrats (Stop REID) v. FEC*, 814 F.3d 221 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 374 (2016). The petition in *Stop REID* asked the Court to consider whether there is "an 'election law' exception to the same-plaintiff requirement of the 'capable of repetition, yet evading review' doctrine." Pet. at i, *Stop REID v. FEC*, No. 16-109 (U.S. July 21, 2016). And petitioner's case did not suffer from the multitude of other mootness problems present here. Even so, the Court did not think the question merited review then, and nothing that has happened in the past three years has made the question any more cert-worthy now.

III. The Eleventh Circuit's Decision Is Correct.

A. This Court Has Not Exempted Election Law Cases from Any "Reasonable Expectation" Requirement to Avoid Mootness.

"Article III of the Constitution limits federal-court jurisdiction to 'cases' and 'controversies,'" and "an actual controversy" must "be extant at all stages of review, not merely at the time the complaint is filed." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016). Thus, once a court is no longer "capable of granting the relief petitioner seeks," his case is moot unless the capable-of-repetition-yet-evading-review exception to mootness applies. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1975 (2016). And "[t]hat exception applies 'only in exceptional situations,' where (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.* (quoting *Spencer v. Kemna,* 523 U.S. 1, 17 (1998)) (cleaned up).

Hall asserts that the "best reading" of this Court's precedent shows that the Court has eliminated the same-plaintiff requirement in election law cases. Pet.25. But this Court has never allowed a challenge to an election law (or any other law, for that matter) to survive mootness when a plaintiff failed the same-plaintiff test. To be sure, in 1974, the Court permitted the challenge in *Storer v. Brown*, 415 U.S. 724, to survive without explicitly holding whether the same-plaintiff requirement was satisfied. But since then, this Court has repeatedly and explicitly applied a same-plaintiff requirement in election law cases. *See,*

e.g., *Davis v. FEC*, 554 U.S. 724 (2008); *FEC v. WRTL*, 551 U.S. 449 (2007); *Norman v. Reed*, 502 U.S. 279 (1992); *Meyer v. Grant*, 486 U.S. 414 (1988); *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Richardson v. Ramirez*, 418 U.S. 24 (1974).

Hall cites four cases as implicitly eliminating the same-plaintiff requirement. Pet.25. But two of these cases were class actions that satisfied the same-plaintiff requirement under the theory that at least one member of the class could reasonably expect to suffer repeated injury. *See Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972) (holding that "Blumstein has standing to challenge [residency requirements] as a member of the class of people affected by the presently written statute); *Rosario v. Rockefeller*, 410 U.S. 752, 755-56 nn.4-5 (1973) (noting case was class action and relying on *Blumstein* when holding case was not moot); *see also Sosna v. Iowa*, 419 U.S. 393, 401 (1975) ("Although the controversy is no longer alive as to appellant Sosna, it remains very much alive for the class of persons she has been certified to represent."); *Weinstein*, 423 U.S. at 149 ("In the absence of a class action, the 'capable of repetition, yet evading review' doctrine [requires] . . . a reasonable expectation that the same complaining party would be subjected to the same action again.").

The Eleventh Circuit correctly recognized that the other two cases Hall relied on to support his election law exception to the same-plaintiff requirement involved candidate-plaintiffs who easily satisfied the same-plaintiff requirement because their past candidacies provided a reasonable expectation they would run again in regularly occurring elections.

Pet.App.7a-8a, 13a-14a (discussing *Storer*, 415 U.S. at 724, and *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969)).

Elimination of the same-plaintiff requirement would be fundamentally inconsistent with this Court's Article III jurisprudence. The "capable of repetition, yet evading review exception" exists as a means for courts to provide prospective relief to specific plaintiffs who may again suffer the same injury. After all, courts can adjudicate cases about only "the plaintiffs' particular legal rights." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). And if the court cannot grant "any effectual relief" to the prevailing party, its decision on the legality of the matter is merely advisory. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). Article III courts "do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before" them. *Princeton Univ. v. Schmid*, 455 U.S. 100 (1982) (per curiam).

B. The Eleventh Circuit Properly Assessed Mootness in the Context of This Special Election.

The Eleventh Circuit correctly evaluated the mootness of Hall's case in light of the fact that he challenged only Alabama's 3% signature requirement as applied to special elections for U.S. House seats on a specific timeframe.

The last special election in Alabama's First Congressional District before 2013 was in 1935, and special elections for U.S. House seats in other districts of the State have likewise been rare events. Pet.App.8a. Acknowledging this, the Eleventh Circuit properly found that there was no reasonable expectation that

Hall will again participate in a special election in his home district in his lifetime, since one is not likely to occur. *Id.* at 5a. Moreover, given the infrequency and unpredictability of special elections, and the difficulty associated with a last-minute move across the state for a "person of limited financial means," First Am. Compl. ¶44, the Eleventh Circuit found there also was no reasonable expectation that Hall would run as an independent in a future special election outside his house district. Pet.App.21a. In the absence of any suggestion that Hall was willing to move to another district upon the announcement of a mid-term U.S. House vacancy, Hall's unsupported statement that he would again participate in a special election as an independent in any district could not give rise to a "reasonable expectation" that he would face the alleged harms of 2013 again, especially when he has since run for office as a Republican. *See id.* at 21a, 59a.

Hall claims that "[o]ther courts consistently treat special and regularly-scheduled elections interchangeably with respect to analysis of mootness." Pet.31. But none of the cases Hall cites helps him.

First, *ACLU of Ohio, Inc. v. Taft*, 385 F.3d 641 (6th Cir. 2004), merely demonstrates the flaw in Hall's particular challenge. In that case, the ACLU filed suit on behalf of its members, who would otherwise have standing to sue in their own right. *Id.* at 646. Thus, a reasonable expectation existed that the injury would reoccur to some member of the organization, even if not to any individual plaintiff specifically. *Cf. Sosna*, 419 U.S. at 401. In contrast, Hall sued only on his own behalf, making it much less likely that the harm he identified would again befall a plaintiff in this case.

Next, *Schaefer* is irrelevant because the Ninth Circuit there found a reasonable expectation the law would be applied against the plaintiff again in the same way in *both* special and regularly-scheduled elections. *See Schaefer*, 215 F.3d at 1034 n.2; *see also* Pet.App.19a n.6 ("[A]lthough *Schaefer* involved a special election, the opinion suggests that the challenged residency requirement would apply with equal or greater force during regular election cycles."). Meanwhile, Hall's challenge is only to the application of Alabama's 3% signature requirement to special elections for U.S. House districts on a specific timeframe. Pet.App.2a.

The last three cases Hall musters are similarly inapposite. *Acosta v. Democratic City Committee*, 288 F. Supp. 3d 597 (E.D. Pa. 2018), sheds no light on this case, as plaintiffs' claims of voter intimidation did not turn at all on whether the election was special or regularly scheduled. *Gill v. Galvin* merely "[a]ssum[ed] *arguendo* that" plaintiff's claims were "capable of repetition yet evad[ing] review," before dismissing the claims on other grounds. No. CV 16-11720-DJC, 2017 WL 2221185, at *4 (D. Mass. May 19, 2017). And *Constitution Party of Missouri. v. St. Louis County* is distinguishable from Hall's case by the simple fact that the court found "a reasonable probability that" a vacancy on city council would "present itself in the future," No. 4:15-CV-207 RLW, 2015 WL 3908377, at *3 (E.D. Mo. June 25, 2015), while there is little chance that Hall will again have the opportunity to run for a special election for the U.S. House.

C. The Eleventh Circuit Has Not Insulated Ballot Access Challenges from Judicial Review.

Hall contends that the Eleventh Circuit's "rule would leave ballot access restrictions 'effectively immune from judicial review and correction' in any case involving an individual plaintiff." Pet.31. But that ignores the fact that Alabama's 3% signature requirement already faced judicial scrutiny in a case involving individual plaintiffs on a different timeframe and set of circumstances. *See Swanson*, 490 F.3d 894 (11th Cir. 2007).

Moreover, to the extent that the Eleventh Circuit's ruling in this case affects mootness considerations in future election law cases, it does so only for uniquely fact-bound challenges like Hall's, which are about as likely to arise as another special election in Alabama's First Congressional District.

Finally, as the Eleventh Circuit noted, Hall could have tried to avoid mootness problems by bringing his claim on behalf of a class. Pet.App.23a-24a. That route 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 … would be adequately represented by vigorous advocacy." Pet.App.24a.

Hall asserts that "there is simply no way to get a class certified in a case like this," Pet.31, and as proof, he cites a study finding that "it takes on average 3.9 months to certify a class." Pet.32. But in this case, Hall learned of the upcoming election four months before it occurred, leaving him adequate time to file a class action. And plaintiffs have a long history of

using class actions to satisfy the same-plaintiff requirement in election law contexts. *See, e.g.*, *Rosario*, 410 U.S. 752; *Blumstein*, 405 U.S. 330. The Court thus need not, and should not, create an election law exception to Article III.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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