No. 18-1362

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case shows why it is critical for this Court to clarify how mootness doctrine applies to election-law cases.

In a lengthy opinion, the district court addressed a common election-law provision—a signature requirement for independent candidates to get on the ballot—and held that Alabama's version of that requirement is unconstitutional as applied to off-season special elections for the U.S House. *See* Pet. App. 67a-84a. It explained in detail why practical differences between special elections and regularly scheduled elections require a different answer regarding the requirement's constitutionality. *See id.* at 71a-78a (distinguishing *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007)).[1]

The Eleventh Circuit wiped this decision off the books, leaving the constitutionality of Alabama's requirement as applied to special elections unsettled. Its theory was that petitioner's case is moot because the problem petitioner faced is not "capable of repetition." Pet. App. 5a. To reach that conclusion, the court of appeals "respectfully disagree[d]" with the Fifth, Eighth, and Ninth Circuits, *id.* 19a n.6, which would have reached the merits of petitioner's suit even without a showing that he himself would be subject to the signature requirement again. And it adopted an unusually stringent version of the "same-plaintiff requirement," deeming the requirement unsatisfied

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[1] Contrary to Alabama's characterization, petitioner challenged Alabama's requirement as applied to *special elections*, Pet. App. 89a-90a, not as applied "to himself alone," BIO 2.

even by petitioner's sworn declaration of intent to run in future special elections.

Despite the Eleventh Circuit's express disagreement with its sister circuits, Alabama claims that the conflict is "illusory" because "all circuits apply a relaxed version of the same-plaintiff requirement in election law cases." BIO 11. To the contrary: while Alabama accurately characterizes the rule in seven circuits, three other circuits do not apply the requirement at all, and still two more apply a rule that is hardly "relaxed." Pet. 11-18.

The heart of both Alabama's vehicle and merits arguments is an empirical claim: Special elections like the one involving petitioner are "once-in-a-lifetime" events, BIO 1, 2, 19. But even the Eleventh Circuit recognizes such elections occur more regularly than Alabama's hyperbole suggests. Pet. App. 6a n.3. In fact, in the 200 years since Alabama was admitted to the Union, it has held 29 special elections for U.S. House seats, meaning that "in any given year, there [has been] approximately a 14.6% probability that Alabama will hold a special election to fill a vacant House seat." Br. of Amicus Curiae Coalition for Free and Open Elections 10. In a typical Congress, more than a dozen seats are filled in special elections. *See* David R. Smith & Thomas L. Brunell, *Special Elections to the U.S. House of Representatives: A General Election Barometer?*, 35 Legis. Stud. Q. 283, 289 (2010).

And to the extent that Alabama claims that petitioner's case is moot for reasons beyond the same-plaintiff rule, those arguments pose no barrier to this Court's review—particularly where, as here, they are meritless.

I. The conflict among the circuits is real.

1. Alabama acknowledges that the Eleventh Circuit's embrace of the same-plaintiff requirement conflicts with the Fifth Circuit's repeated rejection of the requirement. BIO 14. But it claims that the Fifth Circuit has rejected the requirement "only in those election law cases where the plaintiff could have satisfied the requirement anyway." *Id.*

Alabama is wrong. In *Kucinich v. Texas Democratic Party*, 563 F.3d 161 (5th Cir. 2009), the court saw a "reasonable argument" that the plaintiff had "failed to satisfy" the same-plaintiff requirement. *Id.* at 164. But even though plaintiff's counsel expressly "declined" to represent that his client would "again be subject" to the challenged requirement, the court was "unwilling to dismiss the case as moot" because the law could be "applied in future elections." *Id.* at 165. So, too, in *Moore v. Hosemann*, 591 F.3d 741 (5th Cir. 2009), where the plaintiff's case was not moot despite "good reason" to believe he failed the same-plaintiff requirement. *Id.* at 744.

Alabama nevertheless asserts that the plaintiffs in *Kucinich* and *Moore* "easily could have satisfied the requirement, by simply stating they would again run for office in the next regularly scheduled election." BIO 18. But the critical point is that the plaintiffs *did not* make such statements, even when pressed—presumably because they could not do so truthfully. Yet the Fifth Circuit deemed their claims capable of repetition, and not moot, because the relevant requirements could be applied again to *other* candidates.

The one case Alabama cites to support its claim that the circuit has employed a same-plaintiff rule is *Libertarian Party v. Dardenne*, 595 F.3d 215 (5th Cir. 2010). BIO 14. That case shows no such thing. It simply rejects the proposition that an election law case "automatically falls under the 'capable of repetition, yet evading review' exception." 595 F.3d at 218 n.6. *Dardenne* differed from "most election law cases," *id.*, because the plaintiffs were challenging an unprecedented, unilateral decision by an election official to *disregard* a statutory deadline, *see id.* at 218. But when a plaintiff challenges "a governmental action done pursuant to an election statute"—like the challenge to Ala. Code § 17-9-3(a)(3) at issue in petitioner's case—his case is not moot in the Fifth Circuit "because courts will assume that the government will enforce the same statute in the future," 595 F.3d at 218 n.6.

2. Alabama disputes petitioner's claim that the Sixth and Ninth Circuits also dispense with the same-plaintiff requirement. *See* BIO 12-15. Again, Alabama is mistaken.

a. Alabama claims that petitioner's argument regarding the Sixth Circuit "turns on one line from *Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005)." BIO 12. Alabama confuses the petition's quotation of the decision's holding with the Sixth Circuit's more extensive analysis. Only after examining *Honig v. Doe*, 484 U.S. 305 (1988), *Rosario v. Rockefeller*, 410 U.S. 752 (1973), and *Dunn v. Blumstein*, 405 U.S. 330 (1972), did the Sixth Circuit announce that "even when" it is "clear" that the current plaintiffs will "not suffer the same harm in the future," a case is not moot if "future independent

congressional candidates will suffer the same harm Plaintiffs are alleging," *Lawrence*, 430 F.3d at 372.

Alabama is equally mistaken to claim that *Lawrence*'s analysis is "likely dicta" because the Sixth Circuit has "repeatedly applied the same-plaintiff requirement," BIO 12. None of the four cases it cites supports that proposition.

Ohio Council 8 v. Husted, 814 F.3d 329, 334 (6th Cir. 2016), stands simply for the unexceptionable proposition that satisfying the same-plaintiff test is *sufficient* to avoid mootness. It in no way undermines *Lawrence*'s statement that satisfying that test is not *necessary*.

In re: 2016 Primary Election, 836 F.3d 584 (6th Cir. 2016), explicitly refused to decide to decide any mootness question, relying instead on a lack of Article III standing. *See id.* at 588-89 (declining an invitation "to resolve the case on mootness, not standing, grounds").

Tigret v. Cooper, 595 Fed. Appx. 554 (6th Cir. 2014), involved a municipal consolidation election, not an election involving candidates and thus does not bear on the question presented.

And *Speer v. City of Oregon*, 847 F.2d 310 (6th Cir. 1988), long predates *Lawrence* and distinguished cases dispensing with the same-plaintiff requirement on the grounds they they involved federal, not municipal, elections, *id.* at 312 n.3.

Tellingly, district courts within the Sixth Circuit do not share Alabama's uncertainty about the state of the court's precedent. They continue to adhere to *Lawrence*'s rejection of the same-plaintiff requirement. *See, e.g.*, *Bormuth v. Johnson*, 2017 WL

82977, at *2 (E.D. Mich.), *appeal dismissed*, 2017 WL 3401276 (6th Cir. 2017); *Fuente v. Democratic Party of Tennessee*, 2016 WL 7395797, at *4–5 (M.D. Tenn.), *report and recommendation adopted*, 2016 WL 7386490 (M.D. Tenn. 2016).

b. As for the Ninth Circuit, Alabama's argument rests on a misquotation of the foundational case, *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000). That case involved California's refusal to place nonresidents on the ballot in congressional races. Alabama claims that the Ninth Circuit "specifically found that 'Schaefer's claim is capable of repetition because in the future California *would deny him* or any other resident the right to file a declaration of candidacy.'" BIO 13 (quoting *Schaefer*, 215 F.3d at 1033) (emphasis in BIO).

But the Ninth Circuit actually rested its decision on the finding that "in the future California would deny him or any other *nonresident* the right to file a declaration of candidacy," BIO 13 (emphasis added). After the election at issue, Schaefer had apparently moved to California. *Schaefer*, 215 F.3d at 1033, n.1. Thus, there could be no "reasonable expectation" that *he* would be "subject to the same action again," *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam), because he was no longer a member of the class to whom the law applied (nonresidents). The passage to which Alabama refers goes to the fact that

the statute continued to exist and not to whether Schaefer would again face it.[2]

Alabama's reliance on *Akina v. Hawaii*, 835 F.3d 1003 (9th Cir.2016) (per curiam), and *Newcomb v. U.S. Office of Special Counsel*, 550 Fed. Appx. 532 (9th Cir. 2013) (unpublished and nonprecedential), as examples of the Ninth Circuit applying a same-plaintiff rule, BIO 13-14, is also misplaced.

Akina involved a challenge to an election to be conducted by a Hawaiian nonprofit corporation, using state grant funds. While the case was pending, the corporation cancelled the election and dissolved. 835 F.3d at 1009. By the time the case reached the Ninth Circuit, it was at most possible that a "different group" might someday try to hold a comparable election. *Id.* at 1010. The case thus had nothing to do with a same-*plaintiff* requirement. The litigation could not continue because any future challenge would involve an election conducted by a different *defendant*.

As for *Newcomb*, the court never mentions the same-plaintiff rule. Moreover, the case became moot due to the plaintiff's unilateral actions, and not because of an intervening election. *See* 550 Fed. Appx. at 533.

Finally, the citation of Ninth Circuit cases where the same-plaintiff test was satisfied, *see* BIO 14, is

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[2] Alabama is wrong to suggest that *Schaefer* is not good law, BIO 14. All the Ninth Circuit said in *Wolfson v. Brammer*, 616 F.3d 1045 (9th Cir. 2010), was that given the plaintiff's indication that he intended to run for office again in the future, the court did not need to address "the significance of *Schaefer*," *id.* at 1056.

irrelevant to the question whether plaintiffs in the Circuit are *required* to satisfy the test. They are not.

3. Alabama agrees with petitioner that seven other circuits adjudicate election law cases under a "version of the same-plaintiff requirement" that is "quite easy to satisfy." BIO 11. As the petition explains, those circuits "fully credit statements of intent to run again as satisfying the test." Pet. 16.

But Alabama's attempt (BIO 15-17) to insert the Eleventh and Second Circuits into this group is unavailing. In this case, the Eleventh Circuit refused to credit petitioner's sworn statement that he would run in future congressional special elections anywhere in the State. *See* Pet. App. 21a.

And Alabama is wrong to suggest that *Sloan v. Caruso*, 566 Fed. Appx. 98 (2d Cir. 2014), "does not show" (BIO 16) the Second Circuit also refusing to credit a candidate-plaintiff's statement. *Sloan* did not involve a "procedural error" that the plaintiff "would not repeat," BIO 16. Rather, it involved noncompliance with New York's requirement that signatures be witnessed by a party member—the very requirement whose constitutionality the lawsuit challenged. And the court in *Sloan* expressly relied on *Van Wie v. Pataki*, 267 F.3d 109 (2d Cir. 2001), which Alabama concedes "disregarded plaintiffs' assertion that they would again participate" in future elections, BIO 15. *See Sloan*, 566 Fed. Appx. at 99.

II. Alabama's other arguments against review are meritless.

1. In both its leadoff vehicle argument and its defense of the Eleventh Circuit's decision, Alabama relies on the empirical proposition that special

elections are so rare, and so distinctive from one another, that any unconstitutional restriction on candidates is not "capable of repetition." It argues that the question presented is unimportant because the same-plaintiff requirement has no practical effect in cases involving regularly scheduled elections, and special elections like the one in which petitioner sought to run occur "once in a lifetime." BIO 18-19. And it responds to the petition's reliance on *Moore v. Ogilvie*, 394 U.S. 814 (1969), and *Storer v. Brown*, 415 U.S. 724 (1974), *see* Pet. 25, by arguing that those cases involved "regularly occurring elections," BIO 27, while special elections are "rare events," *id.* at 28.

The Fifth, Sixth, and Ninth Circuit cases cited in the petition, and discussed above, show that the same-plaintiff rule in fact has bite in cases involving regularly scheduled elections. But Alabama is also wrong that special elections are rare. To the contrary: they occur frequently, both in Alabama and nationwide. *See* Br. of Amicus Curiae Coalition for Free and Open Elections 5-11. *See also supra* page 2.

In any event, Alabama's suggestion that the same-plaintiff requirement is more likely to pose mootness problems for cases involving special elections makes this case a *good* vehicle for answering the question presented. Resolution of the question presented is clearly outcome determinative.

2. Alabama's other arguments as to why this case is moot were not addressed by the Eleventh Circuit and can be left for remand. But they are meritless in any event.

First, the 2015 change to a regulation governing whether a petition must contain the date on which the

election occurred does not matter to the ongoing vitality of petitioner's claim. *Contra* BIO 21-23. While the prior version of the regulation formally required candidates to indicate the date of the election on signature petitions, Alabama expressly waived that requirement here. Pet. App. 49a. So the unconstitutional burden petitioner faced was not a product of the regulation.

More fundamentally, the district court's opinion makes clear that whatever might be "theoretically" true about the amount of time a candidate has to gather signatures, BIO 23, the time for gathering signatures to get on a special election ballot is sharply constrained by real-world considerations that are entirely independent of the rules governing the petition form itself. *See* Pet. App. 74a-82a.

Second, Alabama's suggestion that no future candidate will face "a timeframe similar to the one used in 2013," BIO 24, gets things backwards. Alabama insisted below that the timeframe here was "unique[ly]" *favorable* to aspiring candidates because Rep. Bonner gave notice of his intention to resign long before the vacancy actually occurred. State Deft's Mot. to Dismiss 10, ECF No. 23. *See also* Pltff's Supp. Submission at 2-7, ECF No. 73 (providing additional evidence regarding special election timeframes).

Given that that the 2013 timeframe imposed a "severe" and unjustifiable burden on independent candidates, Pet. App. 71a-84a, *a fortiori* any shorter timeframe will do so. That makes this case a particularly good vehicle.

And it does not matter to the mootness inquiry that future special elections may occur under

somewhat different circumstances. As the court below acknowledged, this Court has explained that a plaintiff "need not show that every 'legally relevant' characteristic in the case will recur" to avoid mootness. Pet. App. 4a.

Third, Alabama is mistaken that petitioner's decision to run for a local office as a Republican shows that it is "unreasonable" to expect him to run for Congress as an independent, BIO 24. If this Court were to answer the question presented in petitioner's favor, this fact would not matter at all. Alabama cannot seriously dispute that "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." Pet. App. 65a. And the district court was right to observe that "this sort of party-swapping" is hardly "unusual." *Id.* Think Lisa Murkowski or Justin Amash or Joe Lieberman. If this Court were either to dispense with the same-plaintiff rule or to adopt the "relaxed" version that applies in most circuits, this case would not be moot. *See* Pet. 14, 18.

3. Alabama is also wrong that *Stop Reckless Econ. Instability Caused by Democrats v. FEC*, 814 F.3d 221 (4th Cir. 2016), was a better vehicle, BIO 25. As the Solicitor General pointed out, both lower courts in that case had "questioned petitioners' standing." Br. in Opp. 16, *Stop Reckless Econ. Instability Caused by Democrats v. FEC* (No. 16-109). The "potential for finding a jurisdictional defect on that basis" would have "impede[d] consideration" of the contours of mootness doctrine. *Id.* Here, by contrast, no one has ever questioned petitioner's standing.

Moreover, in *Stop Reckless Econ. Instability*, the district court had rejected all of the petitioners' claims on the merits, and the court of appeals had agreed on the one claim it reached. Thus, as it came to this Court, there was little reason to believe that resolving the mootness issue in the petitioners' favor would gain them any relief. By contrast, in this case, the district court granted summary judgment to petitioner on his First Amendment claim. Thus, the denial of certiorari in *Stop Reckless Econ. Instability* provides no reason to deny review here.

4. Finally, Alabama is wrong that the possibility of a class action avoids the mootness problem a stringent same-plaintiff requirement otherwise poses. *Contra* BIO 31-32. While class actions are feasible for some kinds of claims, they are not always available, and litigation over class certification issues will consume both party and judicial resources needlessly. *See also* Pet. 31-33 (explaining why challenges to special election rules are particularly bad candidates for class-action treatment).

In short, this case presents the right opportunity for this Court to resolve a question that divides the courts of appeals and to ensure that important recurring constitutional issues involving election law will not evade review.

CONCLUSION

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

Respectfully submitted,

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