

No. 18-1362

IN THE
Supreme Court of the United States

JAMES HALL,
Petitioner,

v.

JOHN H. MERRILL, ALABAMA SECRETARY OF STATE,
Respondent.

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

**BRIEF OF *AMICUS CURIAE* THE
COALITION FOR FREE AND OPEN
ELECTIONS IN SUPPORT OF PETITIONER**

COLLEEN E. ROH SINZDAK
Counsel of Record
ERIN R. CHAPMAN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
colleen.sinzdak@hoganlovells.com

Counsel for Amicus Curiae

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STATEMENT OF INTEREST

The Coalition for Free and Open Elections (COFOE) is a nonprofit advocacy organization dedicated to the idea that full and fair access to the electoral process is central to democracy.¹ COFOE is a group of independents and representatives from alternative parties. Since the 1980s, the group has supported efforts to remove barriers to ballot access that prevent non-major-party candidates and would-be voters from fully participating in the political process.

The third-party candidates and voters that make up COFOE's constituency have an interest in the question presented, because ballot-access laws uniquely affect their ability to participate in elections. The Alabama law at issue here illustrates why: The law gives political parties that received 20 percent of the vote cast in the last general election an automatic place on the ballot, but candidates who want to run under the banner of another party or as an independent are first forced to gather signatures. *See* Pet. App. 1a-2a; Ala. Code § 17-9-3(a)(3), (b). In Petitioner's case, he was required to collect 5,938 signatures in 106 days, while the Democratic and Republican candidates had to collect none. *See* Pet.

¹ No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than amicus curiae, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of amicus curiae's intent to submit this brief at least 10 days before it was due, and all parties have consented to the filing of this brief.

App. 25a (Pryor, J., dissenting); Ala. Code § 17-9-3(b). Answering the question presented will determine whether challenges to restrictive ballot-access laws like Alabama’s will be over before they even begin. COFOE has an interest in seeing that these constitutional challenges are decided on the merits.

INTRODUCTION AND SUMMARY OF ARGUMENT

Special elections start suddenly and end quickly, leaving little time for a candidate to challenge the rules of the race before it ends. Candidates who question the constitutionality of state laws governing special elections face a dilemma: Sue before a special election is declared when there is plenty of time to litigate and risk the case being deemed unripe, or sue once the election is called and risk that the lawsuit will outlast the election, rendering the case moot? Traditionally, the “capable of repetition, yet evading review” exception to mootness has offered a way out of this bind. *S. Pac. Terminal Co. v. Interstate Commerce Comm’n*, 219 U.S. 498, 515 (1911). Under that exception, a plaintiff can escape mootness if she can show (1) that the event or action that precipitated the suit will repeat, and (2) that when it does repeat there is a significant risk that timely judicial remedies will not be available. *See, e.g., Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam).

The question presented in this case concerns whether plaintiffs challenging ballot-access restrictions must also satisfy an additional requirement—the so-called “same complaining party” requirement—by showing that they will personally “be subjected to the same action again.” *Id.* As the

petition explains, the courts of appeals have answered that question in markedly different ways. *See* Pet. 11-19. Those approaches range from dispensing entirely with a same-plaintiff requirement to demanding significant evidence in order to satisfy it, as the Eleventh Circuit did below. *See id.*

Resolving this split and soundly rejecting the Eleventh Circuit's approach is critically important. Special elections, like the one at issue here, occur with great frequency: Nationwide, a congressional special election is held roughly once every 68 days, and Respondent's state, Alabama, holds one roughly every five years. During the most recent session of Congress, special elections were held to fill vacancies in 17 seats. And last year alone states held 99 special elections to fill vacancies in their state legislatures.

Under the Eleventh Circuit's approach, it will be exceedingly difficult to challenge the constitutionality of the state laws that govern these elections. It is unlikely that a challenge to a particular election could be fully litigated before the election occurs, and the Eleventh Circuit's stringent standard means that candidates will no longer be able to take advantage of the mootness exception that was custom made for cases like these where the underlying dispute is not just capable of, but highly susceptible to, repetition.

In other words, the Eleventh Circuit's standard will essentially exempt state special election laws from judicial review, raising the very real threat that members of Congress will be routinely elected through procedures that violate the Constitution itself. That threat is particularly grave because special elections play an important part in strength-

ening our democracy by bringing new candidates—and hence new perspectives, new ideas, and new constituencies—into office. The Court’s intervention is urgently needed.

ARGUMENT

I. CERTIORARI IS NECESSARY BECAUSE SPECIAL ELECTIONS HAPPEN WITH GREAT FREQUENCY.

In the decision below, the Eleventh Circuit held that Petitioner’s case was moot. Pet. App. 3a. The court of appeals reasoned 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.* at 7a. Because of that holding, the Court blocked review of the important question of whether Alabama’s 3% signature requirement violated Hall’s First and Fourteenth Amendment rights when it was applied during a special election—a question that the district court answered in the affirmative. *Id.* at 2a-3a, 46a. And, unless this Court grants certiorari, the decision will likely prevent any meaningful review of special election laws in the Eleventh Circuit and the Second Circuit, which has a similarly strict standard. *See* Pet. at 14-15.

That will have a major effect on our democracy: Special elections are used to fill the vacancies that occur when members die or resign before the end of their term. *See Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 5-6 & n.4 (1982) (listing methods of filling seats); U.S. Const. art. I, § 2, cl. 4; *id.* amend. XVII. Although exactly when and where a

vacancy will occur is uncertain, the fact that vacancies will regularly occur is not. Consequently, across the country special elections play an important and recurring role in the way voters choose their representatives.

A. Special Elections Have Been A Frequent Occurrence Since The Founding.

Special elections date back to the Founding. The constitution calls for special elections “[w]hen vacancies happen” in the House. U.S. Const. art. I, § 2, cl. 4. There were two special elections for the House in the first congressional session. *See* Michael J. Dubin, *United States Congressional Elections, 1788-1997*, at xvii (1998). Since then, every session of Congress has had at least three special elections for the House of Representatives; and there have been as many as twenty-seven during a single session.² Since 1788 there have been 1,491 special elections held to fill vacant House seats, a rate of between six and seven special elections a year.³

² *See* Dubin, *supra*, at xvii; *Vacancies and Successors, 1997 to Present*, U.S. House of Representatives, <https://history.house.gov/Institution/Vacancies-Successors/Vacancies-Successors/> (last visited May 29, 2019).

³ There were 1,392 special elections for House Seats from 1778-1996. *See* Dubin, *supra*, at xvii (sum total of special elections between 1st and 104th Congresses). From 1997 to the end of 2018 there were 99 special elections for House seats. *See Vacancies and Successors, 1997 to Present, supra* note 2 (sum total between 105th and 115th Congresses); *accord* H. Gibbs Knotts & Jordan M. Ragusa, *The Nationalization of Special Elections for the U.S. House of Representatives*, 26 *J. Elections, Pub. Opinion & Parties* 22, 22 (2016) (Between 1900 and 2008

Nor are special elections limited to the House. With the passage of the Seventeenth Amendment in 1913 and the beginning of the direct election of senators, states started to regularly fill Senate vacancies through special elections as well. *See* U.S. Const. amend. XVII.⁴ As many as nine special Senate elections have been held during a single session.⁵ In the one hundred years since the Seventeenth Amendment was fully implemented, there have been 159 special elections to the U.S. Senate, averaging between one and two each year.⁶

there was an average of 12.3 special House elections each Congressional session.).

⁴ *See also* *Electing Senators: A Historical Perspective*, U.S. Senate, https://www.senate.gov/general/Features/ElectingSenators_AHistoricalPerspective.htm (last visited May 29, 2019).

⁵ *See* Dubin, *supra*, at xviii; *see infra* note 6 (listing Senate special elections since 1997).

⁶ Since 1914, all Senate seats “have been chosen by direct popular election.” *Electing Senators: A Historical Perspective*, *supra* note 4. Senate terms are 6 years, so all Senate seats were not filled by direct popular election until after the election of 1918 and the beginning of the 66th Congress. *See id.*; *Congress Profiles: 66th Congress (1919-1921)*, U.S. House of Representatives, <https://history.house.gov/Congressional-Overview/Profiles/66th/> (last visited May 29, 2019). There were 142 special elections for Senate seats from 1919 through the end of 1996. *See* Dubin, *supra*, at xviii (sum total from 66th session through 104th session). Between 1997 and the end of 2018 there were 17. *See* Kevin Sack, *Former Governor to Replace Georgia Senator*, N.Y. Times (July 25, 2000), <https://www.nytimes.com/2000/07/25/us/former-governor-to-replace-georgia-senator.html> (Georgia 2000); *Missouri History: United States Senators* at n.25, Mo. Sec’y State, <https://www.sos.mo.gov/archives/history/historicallistings/ussen>

ators (last visited May 29, 2019) (Missouri 2002); *Election Results 2008: Wyoming*, N.Y. Times (Dec. 9, 2008), <https://www.nytimes.com/elections/2008/results/states/wyoming.html> (Wyoming 2008); *Election Results 2008: Mississippi*, N.Y. Times (Dec. 9, 2008), <https://www.nytimes.com/elections/2008/results/states/mississippi.html> (Mississippi 2008); Michael Cooper, *G.O.P. Senate Victory Stuns Democrats*, N.Y. Times (Jan. 19, 2010), <https://www.nytimes.com/2010/01/20/us/politics/20election.html> (Massachusetts 2010); Susan Saulny, *Republican Kirk Wins Obama's Old Senate Seat*, N.Y. Times (Nov. 3, 2010), <https://www.nytimes.com/2010/11/03/us/politics/03illinois.html> (Illinois 2010); The NewsHour, *Interview with Delaware Senator-Elect Chris Coons*, Real Clear Politics (Nov. 11, 2010), https://www.realclearpolitics.com/2010/11/11/interview_with_delaware_senator-elect_chris_coons_245692.html (Delaware 2010); Editorial, *Kirsten Gillibrand for New York*, N.Y. Times (Oct. 20, 2012), <https://www.nytimes.com/2012/10/21/opinion/sunday/kirsten-gillibrand-for-us-senate-from-new-york.html> (New York 2010); *West Virginia special election reporting: Senate vacancy*, Fed. Election Comm'n (Aug. 2, 2010), <https://www.fec.gov/updates/west-virginia-special-election-reporting-senate-vacancy/> (West Virginia 2010); Katharine Q. Seelye, *Democrat Wins Special Election for Kerry's Senate Seat*, N.Y. Times (June 25, 2013), <https://www.nytimes.com/2013/06/26/us/massachusetts-special-senate-election.html> (Massachusetts 2013); Matt Friedman, *Booker defeats Lonigan in special U.S. Senate election*, NJ.com (Oct. 17, 2013), https://www.nj.com/politics/2013/10/cory_booker_beats_steve_lonigan_in_us_senate_election.html (New Jersey 2013); David Dykes, *Tim Scott wins historic Senate election*, Greenville News (updated Nov. 4, 2014, 7:38 PM), <https://www.greenvilleonline.com/story/news/politics/2014/11/04/tim-scott-wins-historic-senate-election/18490375/> (South Carolina 2014); *United States Senate special election in Hawaii, 2014*, Ballotpedia, https://ballotpedia.org/United_States_Senate_special_election_in_Hawaii_2014 (last visited May 29, 2019) (Hawai'i 2014); *United States Senate special election in Oklahoma, 2014*, Ballotpedia, <https://ballotpedia.org/>

All told, there have been 1,667 special elections held to fill vacant House or Senate seats.⁷ Since 1959, when Congress reached its modern size of 535 members, there have been 318 congressional special elections.⁸ That amounts to roughly 10 to 11 special elections during each congressional session, for an average of one special election every 68 days.⁹ Dur-

United_States_Senate_special_election_in_Oklahoma,_2014 (last visited May 29, 2019) (Oklahoma 2014); Matthew Bloch et al., *Alabama Election Results: Doug Jones Defeats Roy Moore in U.S. Senate Race*, N.Y. Times (Dec. 12, 2017, 11:59 PM), <https://www.nytimes.com/elections/results/alabama-senate-special-election-roy-moore-doug-jones> (Alabama 2017); Simone Pathé, *Tina Smith Wins Minnesota Special Election for Franken Seat*, Roll Call (Nov. 6, 2018, 11:19 PM), <https://www.rollcall.com/news/politics/tina-smith-wins-minnesota-special-election-franken-seat> (Minnesota 2018); *United States Senate special election in Mississippi, 2018*, Ballotpedia, https://ballotpedia.org/United_States_Senate_special_election_in_Mississippi,_2018 (last visited May 29, 2019) (Mississippi 2018).

⁷ This total includes the 17 Senate special elections held between the 59th and the 65th sessions of Congress before the Seventeenth Amendment was fully implemented. See Dubin, *supra*, at xviii; see also *supra* note 6.

⁸ Hawai'i was admitted as a state in 1959 and sent its first congressional delegation to the 86th Congress. See H.R. Doc. No. 108-222, at 417 & n.9 (2005). That increased the number of senators to its modern number, 100. See *id.* There were 170 House and 32 Senate special elections between the 86th and the 104th sessions of Congress. See Dubin, *supra*, xvii-xviii (sum total). There were 99 House and 17 Senate special elections between the 105th and 115th sessions of Congress. See *supra* notes 3, 6.

⁹ 318 special elections between 1959 and 2018 amounts to 5.39 special elections every 365 days. 365 divided by 5.39 is 67.72,

ing the most recent full session of Congress, special elections were held even more regularly—an average of once every 43 days—to fill a staggering 17 vacancies.¹⁰

Special elections are not limited to Congress. In 2018, 99 special elections were held to fill vacant seats in state legislatures nationwide; the year before there were 98.¹¹ That means a special election for a state legislative seat is held roughly once every four days.¹²

B. Alabama Itself Often Holds Special Elections.

To see the frequency of special elections, look no further than Alabama. Since Alabama first sent a

meaning that a congressional special election is held on average once every 67.72 days.

¹⁰ There were 14 vacancies in the House that were filled by special election. *See Vacancies and Successors, 115th Congress (2017-2019)*, U.S. House of Representatives, <https://history.house.gov/Institution/Vacancies-Successors/115/> (last visited May 29, 2019). Special elections were held to fill three Senate vacancies. *See supra* note 6 (Alabama, Minnesota, and Mississippi held special elections). Seventeen special elections in 730 days (or the length of a two-year Congressional session) amount to a special election, on average, once every 42.94 days.

¹¹ *See State legislative special elections, 2018*, Ballotpedia, https://ballotpedia.org/State_legislative_special_elections,_2018#Historical_data (last visited May 29, 2019); *State legislative special elections, 2017*, Ballotpedia, https://ballotpedia.org/State_legislative_special_elections,_2017 (last visited May 29, 2019).

¹² 365 days divided by 98 special elections means one election occurs roughly once every 3.72 days.

voting congressional delegation to the House of Representatives in 1819,¹³ Alabama has held 29 special elections to fill vacant House seats: in 1838, 1844, twice in 1846, 1880, 1882, twice in 1883, 1894, 1900, 1904, 1908, twice in 1914, 1919, 1920, 1921, 1923, 1928, 1933, 1935, 1938, 1940, 1941, 1944, 1947, 1972, 1989, and 2013.¹⁴ These special elections occur with sufficient frequency that, in any given year, there is approximately a 14.6% probability that Alabama will hold a special election to fill a vacant House seat.¹⁵

Special elections for open Senate seats also occur with some regularity in the State. After the passage of the Seventeenth Amendment, Alabama became only the second state to hold a special election to fill a vacant Senate seat. *See Electing Senators: A Historical Perspective*, *supra* note 4; Dubin, *supra*, at

¹³ See H.R. Doc. No. 108-222, at 86 & n.5.

¹⁴ Dubin, *supra*, at 119, 137, 143, 248, 255, 263, 302, 329, 346, 364, 395, 428, 438, 448, 468, 498, 508, 520, 530, 539, 548, 567, 675, 764; *Vacancies and Successors, 113th Congress (2013-2015)*, U.S. House of Representatives, <https://history.house.gov/Institution/Vacancies-Successors/113/> (last visited May 29, 2019).

¹⁵ To discuss the frequency of congressional elections, this brief utilizes the commonly used recurrence interval formula. We have divided the number of years in the relevant period by the number of events—here, special elections—to get the recurrence interval. *See generally* Eric M. Baer, *Recurrence Interval*, Sci. Educ. Res. Ctr. Carleton Coll., <https://serc.carleton.edu/quantskills/methods/quantlit/RInt.html> (last visited May 29, 2019). To determine the odds of a special election occurring in the same period, we have taken the inverse of the recurrence interval—that is, one divided by the recurrence interval. *See id.*

396. Including that contest, Alabama has held a total of six special elections to fill vacant Senate seats in 1914, 1920, 1938, 1946, 1978, and 2017.¹⁶

In total, Alabama has held 35 special elections to fill vacant House or Senate seats.¹⁷ Of these congressional elections, 23 occurred after Alabama began selecting its entire congressional delegation through election in 1913.¹⁸ Since that time, Alabama has held a special election for an open congressional seat roughly once every 4.57 years, meaning there is approximately a 21.9% probability in any given year that there will be a Congressional special election in Alabama.¹⁹

Alabama also frequently holds special elections to fill vacancies in its state legislature. State law requires a special election “[w]hen a vacancy occurs in the office of senator or representative in the Legislature.” Ala. Code § 17-15-1(1). These happen often. In 2018, Alabama held three, and in the last five years, Alabama held ten, an average of two per year.²⁰

¹⁶ See Dubin, *supra*, at 396, 429, 521, 559, 706; Matthew Bloch et al., *supra* note 6.

¹⁷ See *supra* notes 14, 16 and accompanying text.

¹⁸ See *id.*

¹⁹ The 105 years between 1913 and 2018, divided by 23 special elections, equals 4.57 years between special elections. The inverse of the recurrence interval of 4.57 is 21.9%. See Baer, *supra* note 15.

²⁰ See *Alabama state legislative special elections, 2018*, Ballotpedia, https://ballotpedia.org/Alabama_state_legislative_special_electi

C. Leaving The Eleventh Circuit’s Decision In Place Will Hobble Courts’ Ability To Review The Constitutionality Of Special Elections.

Because special elections occur often—and occur often in Alabama alone—the Eleventh Circuit’s decision will have a major effect. Since Hall filed suit, district courts in the Eleventh Circuit have issued multiple opinions concerning the rules that apply in special elections. See *Thompson v. Alabama*, No. 2:16-CV-783-WKW, 2017 WL 3223915, at *1 (M.D. Ala. July 28, 2017) (challenge to felon-disenfranchisement standard brought before special election); *Georgia State Conference NAACP v. Georgia*, No. 1:17-cv-1397-TCB, 2017 WL 9435558, at *1 (N.D. Ga. May 4, 2017) (challenge to voter registration rules as applied to runoff special election); *United States v. Georgia*, 952 F. Supp. 2d 1318, 1320-21 (N.D. Ga. 2013) (challenge to Georgia’s rules regarding absentee voting by service members that apply in runoff elections, including runoffs following special elections), *judgment vacated and appeal*

ons, 2018 (last visited May 29, 2019); *Alabama state legislative special elections, 2017* Ballotpedia, https://ballotpedia.org/Alabama_state_legislative_special_elections_2017 (last visited May 29, 2019) (one special election); *Alabama state legislative special elections, 2016*, Ballotpedia, https://ballotpedia.org/Alabama_state_legislative_special_elections_2016 (last visited May 29, 2019) (three); *State legislative special elections, 2015* Ballotpedia, https://ballotpedia.org/State_legislative_special_elections_2015 (last visited May 29, 2019) (none); *Alabama state legislative special elections, 2014* Ballotpedia, https://ballotpedia.org/Alabama_state_legislative_special_elections_2014 (last visited May 29, 2019) (three).

dismissed as moot, 778 F.3d 1202 (11th Cir. 2015). In cases like these, an election will almost always occur before the district court can enter a final, appealable judgment on the merits. *See, e.g., Thompson v. Alabama*, 293 F. Supp. 3d 1313, 1313, 1333 (M.D. Ala. 2017) (opinion on merits of motion to dismiss entered five months after special election). Under the Eleventh Circuit's cramped understanding of the capable-of-repetition exception, there will be no opportunity to keep alive similar cases challenging either rules that only apply during special elections or the application of general rules in a special election. That means that such decisions will be effectively shielded from appellate review. Leaving the split unresolved will thus render important constitutional challenges unreviewable, which will in turn diminish the credibility of the results from those elections.

This outcome would be especially troubling in cases like Petitioner's that involve elections to the House of Representatives. The Framers "tenaciously fought for and established at the Constitutional Convention" that the House was to be "elected 'by the People,'" directly and democratically. *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964). Sending representatives to the House via elections whose constitutionality is both uncertain and unreviewable would undermine that democratic vision. The Court should not allow it.

II. RESOLVING THE SPLIT IS CRITICALLY IMPORTANT BECAUSE SPECIAL ELECTIONS ENRICH OUR DEMOCRACY BY BRINGING IN NEW CANDIDATES.

By insulating third-party ballot-access restrictions from review, the minority approach to the capable-of-repetition analysis that the Eleventh Circuit adopted below hurts candidates, parties, and voters. Left unreviewed, unconstitutional ballot-access restrictions will deter third-party candidates from running for office—an outcome that will hurt candidates, voters, and democracy. Moreover, the increased possibility that unlawful restrictions will be allowed to stand is particularly harmful to third-party candidates from underrepresented backgrounds, who have historically made great gains during special elections.

A. Special Elections Offer A Rare Opportunity To Bring New Viewpoints Into Office.

1. The deck is stacked in favor of incumbents. *See, e.g.*, Ronald Keith Gaddie & Charles S. Bullock, III, *Elections to Open Seats in the U.S. House: Where the Action Is* 1 (2000). They usually have more money, more experience, and more name recognition than their opponents.²¹ That means that when incumbents run, they almost always win. In 2018, for example, 84 percent of incumbent Senators won their races; while in the House, 91 percent did. *Reelection Rates Over the Years*, *supra* note 21.

²¹ *See* *Reelection Rates Over the Years*, Ctr. for Responsive Politics, <https://www.opensecrets.org/overview/reelect.php> (last visited May 29, 2019).

Those odds make opposing a sitting Congress member's reelection bid a political suicide mission.

But special elections are a new candidate's dream. With no incumbent running for reelection, they offer a rare opportunity for new candidates to prove themselves without having to battle the distorting advantages of incumbency. Special elections thus present a rare opportunity for new candidates and new ideas to prevail.

Historically, this has been especially true for third-party and independent candidates. For the better part of two centuries, candidates that struggled to fit comfortably into the mold of one of the two major parties have succeeded in special elections. Nineteenth century education-reformer Horace Mann won his congressional seat through a special election.²² Before he launched a third-party campaign for president, Ron Paul won his House seat in a special election.²³ So did iconoclast Barbara Lee, who famously was the only member of Congress to vote against the post-9/11 authorization for the use of military force.²⁴ And Independent Bernie Sanders first ran for Senate during a special election.²⁵

²² See Dubin, *supra*, at 149; Lawrence A. Cremin, *Horace Mann*, Encyclopedia Britannica, <https://www.britannica.com/biography/Horace-Mann> (last updated Apr. 30, 2019).

²³ See Dubin, *supra*, at 694; *Ron Paul*, Encyclopedia Britannica, <https://www.britannica.com/biography/Ron-Paul> (last visited May 29, 2019).

²⁴ See *Vacancies and Successors, 105th Congress (1997-1999)*, U.S. House of Representatives, <https://history.house.gov/Institution/Vacancies-Successors/105/> (last visited May 29,

2. Facilitating the participation of third party candidates is not just good for the candidates, it is good for democracy. For one, third parties have proven to be a “fertile” source of new policy ideas—including women’s suffrage, the eight-hour work day, and the graduated income tax. *See Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) (Campaigns are “a means of disseminating ideas.”); Steven J. Rosenstone et al., *Third Parties in America* 8 (1984); Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 Harv. J. Legis. 167, 169 (1991). By championing new or neglected ideas that have not yet “made their way into the political mainstream,” independent candidates push mainstream political discourse forward, preventing stagnation. *Anderson*, 460 U.S. at 794; *see also Sweezy v. New Hampshire ex rel. Wyman*, 354 U.S. 234, 250-251 (1957) (plurality opinion).

Third-party candidates also allow political discourse to better reflect the full range of voters’ values. In a two-party system, not all voters will feel like their views are represented by one of the two major parties. *See Sweezy*, 354 U.S. at 250-251 (plurality opinion) (“All political ideas cannot and

2019); Austin Wright, *How Barbara Lee Became an Army of One*, Politico Mag. (July 30, 2017), <https://www.politico.com/magazine/story/2017/07/30/how-barbara-lee-became-an-army-of-one-215434>.

²⁵ *See* Chris Graff, *Bernie Sanders: Still a Maverick*, Politico (Feb. 7, 2007), <https://www.politico.com/story/2007/02/bernie-sanders-still-a-maverick-002690>.

should not be channeled into the programs of our two major parties.”). One 2016 survey found that sixty-one percent of Americans surveyed felt that neither of the two major political parties represent their views.²⁶ Almost two thirds of Americans report that they would prefer to have a third political party to choose from.²⁷ Third-party candidates increase the likelihood that these voters will have a candidate to vote for who reflects their values.

Alternative parties and candidates can also decrease voter apathy. See Bradley A. Smith, *supra*, at 169. Would-be third-party candidates and voters are often “people who have tried to exert influence within one of the major parties . . . [and] failed.” *Anderson*, 460 U.S. at 805 (internal quotation marks and citation omitted). The prospect of voting for a third-party candidate allows those “disaffected” voters “who disagree with the major parties and their policies” to participate in elections, while still expressing their discontent with the major parties. *Williams v. Rhodes*, 393 U.S. 23, 32-33 (1968). In this way, third-party candidates provide “important channels through which political dissent is aired.” *Id.* at 39 (Douglas, J., concurring).

²⁶ David Smith, *Most Americans do not feel represented by Democrats or Republicans – survey*, The Guardian (Oct. 25, 2016, 5:49 PM), <https://www.theguardian.com/us-news/2016/oct/25/american-political-parties-democrats-republicans-representation-survey>.

²⁷ Lydia Saad, *Perceived Need for Third Major Party Remains High in U.S.*, Gallup (Sept. 27, 2017), <https://news.gallup.com/poll/219953/perceived-need-third-major-party-remains-high.aspx>.

Under some circumstances, third-party candidates can also increase voter turnout. For instance, if a third-party candidate makes an election more competitive than it otherwise would be, the closeness of the race may tend to increase voter turnout. See Gary W. Cox & Michael C. Munger, *Closeness, Expenditures, and Turnout in the 1982 U.S. House Elections*, 83 Am. Pol. Sci. Rev. 217, 217-226 (1989).

By increasing competition for disaffected voters, third-party candidates can also push candidates and parties to be more responsive to voters' preferences. Increasing competition for House seats incentivizes members to legislate in a way that reflects the views of their constituents or risk getting voted out of office. In recent years, elected officials who represent more competitive districts have indeed been more responsive to their constituents. See John D. Griffin, *Electoral Competition and Democratic Responsiveness: A Defense of the Marginality Hypothesis*, 68 J. Pol. 911, 918-920 (2006). Similarly, third-party candidates force major parties to be more responsive. See Bradley A. Smith, *supra*, at 169. For example, after Ross Perot won nearly 19 percent of the vote for president with his singular focus on a balanced budget, both Democrats and Republicans courted his supporters by backing legislation to balance the budget.²⁸

Major parties also benefit when third-party candidacies alert them to new voting blocks that can be

²⁸ See Katie McNally, *The Third-Party Impact on American Politics*, UVAToday (Aug. 3, 2016), <https://news.virginia.edu/content/third-party-impact-american-politics>.

wooded by a party willing to take on a particular issue. *See* Bradley A. Smith, *supra*, at 169 n.8. For instance, after the 2016 election, the Democratic Party moved to the left to appeal to supporters of Independent Bernie Sanders. *See* McNally, *supra* note 28.

Finally, independent candidates often “serve[] as a rallying-point for like-minded citizens.” *Anderson*, 460 U.S. at 788. By bringing these citizens together, even unsuccessful candidates allow their supporters to build connections and networks of organizers that can outlast any individual election. In this way, even when they lose, independent candidates “undeniably” have an influence. *Illinois State Bd. of Elections*, 440 U.S. at 186. For these reasons, insulating ballot-access rules from review would hurt not only third-party candidates, but also voters, parties, and democracy.

B. Special Elections Diversify Congress.

Special elections have also been essential to increasing the number of members of historically underrepresented groups in Congress. *See* David L. Nixon & R. Darcy, *Special Elections and the Growth of Women’s Representation in the U.S. House of Representatives*, 16 *Women & Pol.* 99, 99 (1996). It is not hard to understand how: Because incumbents have held their seats longer than their challengers, they are more likely to reflect the demographics of an America of old; and in practice that means they are more likely to be male and white and straight.²⁹ In

²⁹ *See* A.W. Geiger et al., *The changing face of Congress in 6 charts*, Pew Research Ctr. (Feb. 15, 2019),

other words, incumbency contributes to a kind of representational lag whereby the diversity of congressional representatives lags behind the diversity of the country. The numbers back this up. In 1981, when the national population was roughly 20 percent nonwhite, Congress was only 6 percent nonwhite; in 2001, when 31 percent of the nation was nonwhite, only 12 percent of Congress was; and in 2019, while 39 percent of the nation's population is nonwhite, only 22 percent of Congress is.³⁰ As elections without incumbent candidates, special elections thus offer a rare opportunity for voters to make Congress more diverse and more representative of the country at large.

This has been especially true for female candidates. Two of the first four women elected to Congress won their seats in special elections.³¹ Each of those women was elected to fill the seat vacated by her late

<https://www.pewresearch.org/fact-tank/2019/02/15/the-changing-face-of-congress/>.

³⁰ Katherine Tully-McManus, *Women Elected at Historic Levels, But No Surprise Here: White Men Dominate 116th Congress*, Roll Call (Nov. 7, 2018, 10:43 AM), <https://www.rollcall.com/news/politics/congress-women-historic-levels>; Kristen Bialik, *For the fifth time in a row, the new Congress is the most racially and ethnically diverse ever*, Pew Research Ctr. (Feb. 8, 2019), <https://www.pewresearch.org/fact-tank/2019/02/08/for-the-fifth-time-in-a-row-the-new-congress-is-the-most-racially-and-ethnically-diverse-ever/>.

³¹ *Women Representatives and Senators by Congress, 1917-Present* at nn.2-3, U.S. House of Representatives, <https://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Data/Women-Representatives-and-Senators-by-Congress/> (last visited May 29, 2019).

husband or father, which began a long tradition of women entering Congress via special election after a male family member's death.³² Indeed, until 1946 when Helen Mankin won her seat, all of the women elected to Congress via special election were elected to serve out the remainder of their late husband or father's terms. *Compare supra* note 32, *with infra* note 34. Since 1987, the proportion of daughters and widows has decreased, but the importance of special elections as a pathway for women to win a seat in Congress has not.³³

Today, women are more likely to run in a special election. *See* Gaddie & Bullock, *supra*, at 159-160. And not only are women more likely to run in special elections, they are more likely to win. In one study,

³² The following female members of Congress succeeded their late husbands or, in two instances, their late fathers: Winifred Huck (succeeded father, not husband), Mae Nolan, Florence Kahn, Edith Norse Rogers, Pearl Oldfield, Effiegene Wingo, Willa Eslick, Marian Clarke, Rose Long, Elizabeth Gasque, Frances Bolton, Florence Gibbs, Clara McMillan, Margaret Chase Smith, Veronica Boland, Katherine Byron, Willa Fulmer, Vera Bushfield, Vera Buchanan, Maude Kee, Mary Farrington, Kathryn Granahan, Maurine Neuberger, Catherine Norrell, Louise Reece, Corinne Riley, Lera Thomas, Elizabeth Andrews, Corrine Claiborne (Lindy) Boggs, Cardiss Collins, Shirley Pettis, Jean Ashbrook, Sala Burton, Cathy Long, Susan Molinari (succeeded father, not husband), Jo Ann Emerson, Mary Bono, Lois Capps, and Doris Matsui. *Id.* at nn.2-11, 13-19, 21-23, 26, 28-34, 36-38, 43, 46-47, 52, 58, 60-61, 71.

³³ Since 1987, only 5 of the 38 women who have won special elections—13 percent—have won a seat previously held by their late husband or father. *Compare supra* note 32, *with infra* note 34 (counting from Nancy Pelosi's election in 1987).

female candidates had a success rate of 3.4% in a race against an incumbent, but a 61.1% success rate in special elections in which they entered. Nixon & Darcy, *supra*, at 101-102.

Of the 365 women who had served in Congress through the end of the 115th Congress, 76 of them, or 21 percent, won their seats through special elections.³⁴ And at various points the proportion of

³⁴ The following female members won their seat by special election: Winnifred Huck, Mae Nolan, Florence Kahn, Edith Norse Rogers, Pearl Oldfield, Effiegene Wingo, Willa Eslick, Marian Clarke, Rose Long, Elizabeth Gasque, Frances Bolton, Florence Gibbs, Clara McMillan, Margaret Chase Smith, Veronica Boland, Katherine Byron, Willa Fulmer, Helen Mankin, Vera Bushfield, Vera Buchanan, Maude Kee, Hazel Abel, Mary Farrington, Kathryn Granahan, Maurine Neuberger, Catherine Norrell, Louise Reece, Corinne Riley, Lera Thomas, Elizabeth Andrews, Corrine Claiborne (Lindy) Boggs, Cardiss Collins, Shirley Pettis, Jean Ashbrook, Katie Beatrice Hall, Barbara Kennelly, Sala Burton, Cathy Long, Nancy Pelosi, Jill Long, Patsy Mink, Susan Molinari, Ileana Ros-Lehtinen, Eva Clayton, Dianne Feinstein, Kay Bailey Hutchison, Jo Ann Emerson, Juanita Millender-McDonald, Mary Bono, Lois Capps, Barbara Lee, Heather Wilson, Diane Edith Watson, Stephanie Herseth, Doris Matsui, Jean Schmidt, Shelley Sekula Gibbs, Donna Edwards, Marsha Fudge, Laura Richardson, Jackie Speier, Niki Tsongas, Judy Chu, Suzanne Bonamici, Suzan K. DelBene, Janice Hahn, Kathleen C. Hochul, Alma Adams, Katherine Clark, Robin Kelly, Colleen Hanabusa, Karen Handel, Brenda Jones, Debbie Lesko, Mary Gay Scanlon, and Susan Wild. *Women Representatives and Senators by Congress, 1917-Present*, *supra* note 31, at nn.2-11, 13-24, 26, 28-34, 36-38, 43-53, 55-61, 63, 65, 69-73, 76-77, 79-83, 88-89, 91, 93-95, 97, 99, 101, 103-104, 106, 109; *Women in Congress*, U.S. House of Representatives, <https://history.house.gov/Exhibition-and-Publications/WIC/Women-in-Congress/> (last visited May 29, 2019).

women who won seats in special elections was even higher. For instance, between 1980 and 1992, one third of all women who entered the House of Representatives did so through a special election. See Nixon & Darcy, *supra*, at 99. It is therefore unsurprising that many female leaders in the House and Senate won their seats in special elections, including Senate Judiciary Committee Ranking Member Dianne Feinstein, presidential candidate Kirsten Gillibrand, and Speaker of the House Nancy Pelosi.³⁵

Minority candidates have also had particular success in special elections. Of the 154 African Americans to ever serve in Congress, 28 of them—or 18 percent—were elected through a special election.³⁶

³⁵ See Dubin, *supra*, at 754, 775; Editorial, *Kirsten Gillibrand for New York*, *supra* note 6; *Dianne Feinstein: Biography*, U.S. Senate, <https://www.feinstein.senate.gov/public/index.cfm/biography> (last visited May 29, 2019); Shane Goldmacher, *Kirsten Gillibrand Officially Enters 2020 Democratic Race*, N.Y. Times (Mar. 17, 2019), <https://www.nytimes.com/2019/03/17/us/politics/gillibrand-2020-announce.html>; *Nancy Pelosi: Full Biography*, U.S. House of Representatives, <https://pelosi.house.gov/biography-0> (last visited May 29, 2019).

³⁶ The following African American members of Congress were elected via special election: Alma Adams, Lucien Edward Blackwell, Cory Anthony Booker, George Kenneth Butterfield, Jr., André Carson, Eva Clayton, Cardiss Collins, George Washington Collins, George William Crockett, Jr., Elijah Eugene Cummings, Donna Edwards, Dwight Evans, Walter Edward Fauntroy, Marcia F. Fudge, Katie Beatrice Hall, Charles Arthur Hayes, Jesse L. Jackson, Jr., Brenda Jones, Robin Kelly, Barbara Lee, Gregory W. Meeks, Juanita Millender-McDonald, Donald Milford Payne, Jr., Laura Richardson, Bennie Thompson, Alton R. Waldon, Jr., Craig Anthony Wash-

Those members include former Chairs of the Congressional Black Caucus Cardiss Collins, Elijah Eugene Cummings, Barbara Lee, and Walter Edward Fauntroy, and current presidential candidate Cory Booker.³⁷

This is true for candidates from both major parties and every ideology. Of the seven women on the House Democratic leadership team, three of them were elected by special election.³⁸ And the first four women to enter Congress through special elections were Republicans.³⁹ More recently, Karen Handel won her seat in a special election after she famously led the Susan G. Komen for the Cure organization to defund Planned Parenthood⁴⁰; and Donald Trump

ington, and Diane Watson. Ida A. Brudnick & Jennifer E. Manning, Cong. Research Serv., RL30378, *African American Members of the United States Congress: 1870-2018*, at i, 17-18, 20, 23-25, 28-29, 31-37, 39-40, 43, 45, 47-49 (updated Dec. 28, 2018), available at <https://www.senate.gov/CRSpubs/617f17bb-61e9-40bb-b301-50f48fd239fc.pdf>.

³⁷ *Id.* at 18, 24-25, 29, 37; Nick Corasaniti & Shane Goldmacher, *Cory Booker Announces Presidential Bid, Joining Most Diverse Field Ever*, N.Y. Times (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/us/politics/cory-booker-2020.html>.

³⁸ Compare Lindsey McPherson, *House Democrats' New Elected Leadership Team Is More Progressive and Diverse*, Roll Call (Dec. 4, 2018, 5:05 AM), <https://www.rollcall.com/news/politics/new-democratic-elected-leadership-team-is-more-progressive-and-diverse>, with *supra* note 34 (Katherine Clark, Nancy Pelosi, and Barbara Lee).

³⁹ See *Women Representatives and Senators by Congress, 1917-Present*, *supra* note 31, at nn.2-5.

⁴⁰ See *supra* note 34; Laura Bassett, *Karen Handel, Susan G. Komen's Anti-Abortion VP, Drove Decision To Defund Planned*

recorded a robocall for Debbie Lesko during her victorious special election bid.⁴¹

Special elections have thus played an essential role in increasing the number of third party candidates, women, and people of color in Congress. Insulating challenges to restrictive ballot-access measures from judicial review during special elections would deal our democracy a double blow: increasing the likelihood of unconstitutional elections, and decreasing the integrity of precisely the type of election that is most likely to diversify and enrich our democracy.

Parenthood, Huffington Post (updated Feb. 6, 2012), https://www.huffpost.com/entry/karen-handel-susan-g-komen-decision-defund-planned-parenthood_n_1255948.

⁴¹ See *supra* note 34; Dan Merica, *Democrats aren't expecting an Arizona miracle, but their eyes are on November*, CNN (updated Apr. 18, 2018, 2:42 PM), <https://edition.cnn.com/2018/04/18/politics/democrats-arizona-special-election-november/index.html>.

CONCLUSION

This Court should grant the writ and reverse.

Respectfully submitted,

COLLEEN E. ROH SINZDAK

Counsel of Record

ERIN R. CHAPMAN

HOGAN LOVELLS US LLP

555 Thirteenth Street, N.W.

Washington, D.C. 20004

(202) 637-5600

colleen.sinzdak@hoganlovells.com

Counsel for Amicus Curiae

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