No. 18-___

IN THE

Supreme Court of the United States

JAMES HALL,

Petitioner,

v.

SECRETARY, STATE OF ALABAMA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

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

JURISDICTION

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

RELEVANT CONSTITUTIONAL PROVISION

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

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

INTRODUCTION

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

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REASONS FOR GRANTING THE WRIT

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

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

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

the plaintiff-challenger will run again in future elections.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. The Eleventh Circuit's decision is wrong.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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