No. _____

In The

Supreme Court of the United States

LIBERTARIAN PARTY, *et al.*,

Petitioners,

v.

JAY DARDENNE,
Louisiana Secretary of State,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state officials sued in their official capacities for prospective relief under 42 U.S.C. § 1983 and *Ex parte Young,* 209 U.S. 123 (1908), are subject to service of process as individuals under Rule 4(e) or must be served as states under Rule 4(j).

2. Whether the Fifth Circuit erred by requiring that Petitioners submit evidence to overcome a motion to dismiss based on mootness under Rule 12(b).

3. Whether the Fifth Circuit erroneously determined that Petitioners' challenge to Louisiana's exclusion of their presidential candidates from the 2008 ballot is moot because it is not "capable of repetition yet evading review."

LIST OF PARTIES

The names of the Petitioners are:

Libertarian Party, Libertarian Party of Louisiana, Bob Barr, Wayne Root, Socialist Party USA, and Brian Moore.

The name of the Respondent is:

Jay Dardenne, in his official capacity as Louisiana Secretary of State.

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PETITION FOR WRIT OF CERTIORARI

Petitioners seek a Writ of Certiorari to review a final judgment of the United States Court of Appeals for the Fifth Circuit (entered January 21, 2010 with rehearing denied on March 15, 2010), affirming the District Court's dismissal of Petitioner's Complaint under Federal Rule of Civil Procedure 12(b) and denying Petitioners' motion for costs and attorney's fees under Federal Rule of Civil Procedure 4(d).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Haynes, Stewart and Dennis, JJ.) is reported at 595 F.3d 215 (5th Cir. 2010), and is included in the Appendix. *See* App., *infra*, at 1. The final judgment of the United States District Court for the Middle District of Louisiana is not reported and is reproduced in the Appendix. *See* App., *infra*, at 10.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 21, 2010. Rehearing was denied on March 15, 2010. *See* App., *infra,* at 26. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

U.S. Const., art. II, § 1, cl. 2:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors,. . . .

La. Rev. Stat. § 18:401.1:

> A. Due to the possibility of an emergency or common disaster occurring before or during a regularly scheduled or special election, and in order to ensure maximum citizen participation in the electoral process and provide a safe and orderly procedure for persons seeking to qualify or exercise their right to vote, to minimize to whatever degree possible a person's exposure to danger during declared states of emergency, and to protect the integrity of the electoral process, it is hereby found and declared to be necessary to designate a procedure for the emergency suspension or delay and rescheduling of qualifying, early voting, and elections.
>
> B. The governor may, upon issuance of an executive order declaring a state of emergency or impending emergency, suspend or delay any qualifying of candidates, early voting, or elections. The governor shall take such action only upon the certification of the secretary of state that a state of emergency exists. A clerk of court, as the chief election officer of the parish, may bring to the attention of the secretary of state any difficulties

> occurring in his parish due to natural disasters.

La. Rev. Stat. § 29:724.D(1):

> In addition to any other powers conferred upon the governor by law, he may do any or all of the following:
>
> Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency.

Federal Rule of Civil Procedure 4(d):

> **Waiving Service.**
>
> **(1)** ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons.
>
> . . .
>
> **(2)** ***Failure to Waive.*** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the

United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

. . .

Federal Rule of Civil Procedure 4(e):

Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

> **(C)** delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Federal Rule of Civil Procedure 4(j):

> **Serving a Foreign, State, or Local Government.**
>
> . . .
>
> **(2)** ***State or Local Government.*** A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:
>
> **(A)** delivering a copy of the summons and of the complaint to its chief executive officer; or
>
> **(B)** serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

STATEMENT OF THE CASE

Petitioners filed suit under 42 U.S.C. § 1983, Article II, § 1, cl. 2, of the United States Constitution, and the First and Fourteenth Amendments, against Respondent, Louisiana's Secretary of State, in his official capacity, on September 15, 2008. They sought prospective relief, claiming that the Secretary had unconstitutionally refused their qualifying papers for Louisiana's presidential ballot.

Hurricane Gustav hit Louisiana over the 2008 Labor Day weekend. It closed the state's offices on the day presidential qualifying papers were due, September 2, 2008, *see* La. Rev. Stat. § 18:1253(E), and for several days thereafter. For this reason, the Governor of Louisiana, acting pursuant to an express delegation of power from the Legislature, *see* La. Rev. Stat. § 29:724.D(1), on August 29, 2008, issued an Executive Order (BJ 08-92) extending deadlines in all "legal, administrative and regulatory proceedings" to September 12, 2008. Petitioners, the Libertarian Party of Louisiana and Socialist Party USA, filed their qualifying papers with the Secretary by this September 12, 2008 deadline.

Upon reopening on Monday, September 8, 2008, however, the Secretary announced a different deadline – September 8 – for presidential qualifying papers. Because they had no warning, were still suffering from the aftermath of Hurricane Gustav, and had relied on the Governor's previously announced September 12 deadline, neither the Libertarian nor Socialist Parties qualified their presidential candidates by this date.

Petitioners' complained that the Secretary lacked constitutional authority under Article II, § 1, cl. 2, of the United States Constitution to establish a deadline, let alone shorten the one put in place by the Governor pursuant to his statutory authority. Article II delegates to the state "Legislature" the power to regulate presidential elections. *See Bush v. Gore,* 531 U.S. 98, 111 (2000) (C.J., concurring); *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 77

(2000); *Libertarian Party of Ohio v. Brunner,* 567 F. Supp. 2d 1006, 1011 (S.D. Ohio 2008) (holding that secretary of state has no authority under Article II to set deadline in presidential election).

Faced with a natural disaster that closed the state's offices from September 1 through September 7, 2008, Petitioners argued below, Louisiana's Governor properly exercised authority delegated to him by the Legislature. The Secretary, in contrast, possessed no delegated authority to establish a deadline, and ignored Louisiana's two statutory delegations to the Governor to establish emergency deadlines. *See* La. Rev. Stat. § 29:724.D(1); *id.* § 18:401.1.

The District Court issued a preliminary injunction on September 22, 2008 placing the Libertarian Party's presidential ticket on the ballot.[1] *See* App., *infra,* at 12. The Secretary took an emergency appeal on September 25, 2008. *Id.* The Fifth Circuit on September 26, 2008 stayed the injunction. *Id.* The Libertarian Party sought emergency relief from this Court, but the Court refused to intervene on October 7, 2008. *See* 129 S. Ct. 359 (2008). The election was held on November 4, 2008 without the Petitioners' presidential candidates' names on the ballot.

Acting pursuant to Rule 4(d), Petitioners had (contemporaneously with filing their complaint)

[1] It did not order the Socialist Party's candidates on the ballot because it questioned whether they otherwise satisfied Louisiana's ballot access requirements.

requested that the Secretary waive service of process. The Secretary refused. Petitioners thereafter served the Secretary under Rule 4(e) and moved the District Court to award costs and attorney's fees as provided in Rule 4(d).

Following the election, the District Court granted the Secretary's Rule 12(b) motion to dismiss. It concluded that the case was moot notwithstanding the "capable of repetition yet evading review" doctrine. App., *infra,* at 18. It also denied Petitioners' Rule 4(d) motion for costs and fees, holding that Rule 4(e) (and hence Rule 4(d)) does not apply to state officials sued in their official capacities under 42 U.S.C. § 1983. *Id.* at 24.

The Fifth Circuit affirmed on both points. It concluded that the controversy was moot and did not qualify under the "capable of repetition yet evading review" exception. App., *infra,* at 8. It rejected Petitioners' "capable of repetition" argument because, it concluded, Petitioners did not prove "either a 'demonstrated probability' or a 'reasonable expectation,' that they will 'be subject to the same [unlawful governmental] action again.)'" *Id.* at 4-5 (citations omitted).

Petitioners' alleged that Louisiana had experienced at least ten named hurricanes over the course of the last twenty years – all in late August and September – had election dates and qualifying deadlines altered by the Secretary in the past, has two statutes specifically designed to address the problem

of deadlines and natural disasters (like hurricanes), *see* La. Rev. Stat. § 29:724.D(1); *id.* § 18:401.1, will likely have elections and candidates' qualifying deadlines disrupted by storms in the future, and will continually need dates and deadlines modified. Still, the Fifth Circuit concluded the case was moot: "At most, [Petitioners'] evidence shows that the Secretary will have an opportunity to act in the same allegedly unlawful manner in the future; however, it does not show a reasonable probability that the Secretary will act in that manner if given the opportunity." *See* App., *infra,* at 5.

The Fifth Circuit reasoned that something more than a mere "opportunity" was needed. Petitioners needed to present evidence

> showing that the Secretary had unlawfully changed filing deadlines in the past, that the Secretary's actions reflect a policy or a consistent pattern of behavior that he has determined to continue, or that the Secretary's action was prescribed by statute, which is the type of evidence presented in most election law cases that fall under the exception.

Id. at 7. Because Petitioners failed to present this "evidence," they did not satisfy their burden of proving the case was not mooted by the election.

The Fifth Circuit made much of the fact that the challenged wrongdoing constituted an executive decision. Hence, a more demanding "likelihood of recurrence" standard was appropriate:

> [u]nlike most election law cases, [Petitioners'] case does not involve a challenge to a governmental action done pursuant to an election statute. These challenges are often able to survive mootness under the exception because courts will assume that the government will enforce the same statute in the future. In cases such as this, where the challenged governmental action was not done pursuant to a statute, such an assumption cannot be made, so [Petitioners] cannot simply rely on general election law cases to support their assertion that the exception applies.

Id. at 6-7 n.6.

Relying on the Fifth Circuit's recent decision in *Moore v. Hosemann*, 591 F.3d 741, 746-47 (5th Cir. 2009), *cert. filed,* 78 U.S.L.W. 3501 (Feb. 17, 2010) (No. 09-982), the court also rejected Petitioners' Rule 4(d) claim to costs and fees. According to *Moore,* state officials sued in their official capacities for prospective relief under § 1983 are the state; they therefore must be served under Rule 4(j). Because Rule 4(e) does not apply, neither does the waiver provision in Rule 4(d). App., *infra,* at 8.

REASONS FOR GRANTING THE WRIT

I. The Circuits are Split Over Whether Rule 4(e) Applies to State Officials Sued in Their Official Capacities for Prospective Relief Under 42 U.S.C. § 1983.

Rule 4(d) requires that defendants either waive service or suffer the plaintiff's costs. *See* Fed. R. Civ. P. 4(d)(2). Not all defendants, however, are required to waive service. According to Rule 4(d), only those defendants subject to service under Rules 4(e), (f), and (h) are subject to this duty. In particular, the United States, which must be served under Rule 4(i), is not subject to Rule 4(d). Likewise, state and local governmental defendants "subject to suit" are served under Rule 4(j).

The First and Second Circuits have concluded that state officials sued in their official capacities for prospective relief under 42 U.S.C. § 1983 are subject to service as individuals under Rule 4(e). The First Circuit explained in *Echevarria-Gonzalez v. Gonzalez-Chapel,* 849 F.2d 24, 29 (1st Cir. 1988), that official-capacity claims against state officials are governed by the Rule applicable to individual service, at that time Rule 4(d)(1):[2]

> Although we imagine that in most or all cases where a state officer is sued in his

[2] Rule 4(d)(1)'s requirements for individual service are now included in Rule 4(e). *See Caisse v. DuBois,* 346 F.3d 213, 216 (1st Cir. 2003).

> official capacity, the state has a major interest in the outcome, the officer remains the actual party to the action. A state officer is often sued in his official capacity because the Eleventh Amendment forbids a direct action against the state. *See Ex Parte Young*, 209 U.S. 123 (1908).

The court explained that "[i]f the Eleventh Amendment bars an action against the state, then the latter is not 'subject to suit' pursuant to Rule 4(d)(6), and thus the rule is inapplicable." *Id.* (citing C. WRIGHT & A. MILLER, 4A FEDERAL PRACTICE & PROCEDURE § 1110 (1987)).[3] The court therefore concluded:

> The action is against an individual, albeit in his official capacity, and not against the state. Although the state . . . has a great interest in the outcome, it will be the individual . . . who in an official capacity is going to be bound by the judgment, and who can be held in contempt if a court order is disobeyed. . . . We therefore hold that service upon a state officer in his official capacity is sufficient if made pursuant to Rule 4(d)(1).

Id. 29-30.

The First Circuit reiterated this conclusion in *Caisse v. DuBois,* 346 F.3d 213 (1st Cir. 2003), a § 1983 prison conditions action filed against state

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[3] Rule 4(d)(6)'s provisions for serving government are now included in Rule 4(j).

corrections officers in both their individual and official capacities. The First Circuit expressly rejected the claim that Rule 4(j) applied: "service of process for public employees sued in their official capacities is governed by the rule applicable to serving individuals." *Id.* at 216. The Court accordingly ruled that "to serve the defendants in either an individual or official capacity, [the plaintiff] had to comply with Fed. R. Civ. P. 4(e) providing for service of process on individuals." *Id.*

The Second Circuit has endorsed this result. In *Stoianoff v. Commissioner of Motor Vehicles*, 208 F.3d 204 (2d Cir. 2000) (Table) (2000 WL 287720), where a *pro se* plaintiff failed to comply with Rule 4(j) when serving a state official sued in his official capacity, the Second Circuit observed: "service here may be effected pursuant to Rule 4(e), which provides for service upon individuals generally. *See, e.g.*, *Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24, 28-30 (1st Cir. 1988) (holding that service on state officer in his official capacity is sufficient if made pursuant to predecessor to Rule 4(e).").[4]

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[4] Several district courts have held that because Rule 4(e) applies to official-capacity actions under § 1983, Rule 4(d)(2)'s waiver requirement also applies. *See, e.g., Marcello v. Maine*, 238 F.R.D. 113, 115 (D. Me. 2006) (holding that § 1983 action against a state judge in his official capacity was governed by Rule 4(e) and hence Rule 4(d)); *Whatley v. District of Columbia*, 188 F.R.D. 1, 2 (D.D.C. 1999) (holding that "municipal government employees are subject to Rule 4(d)(2) of the Federal Rules of Civil Procedure when sued in both their individual and official

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The Fifth Circuit here relied on its previous decision in *Moore v. Hosemann*, 591 F.3d 741, 746-47 (5th Cir. 2009), *cert. filed,* 78 U.S.L.W. 3501 (Feb. 17, 2010) (No. 09-982), which expressly rejected the First Circuit's interpretation of Rules 4(e) and 4(j). *See* App., *infra*, at 8. In *Moore,* the Fifth Circuit drew an equation between suits against federal agents, which are subject to the service requirements of Rule 4(i),[5] and suits against state officers. "[T]he most reasonable reading of rule 4 affords state officers facing official capacity suits the same consideration given to federal officers in the same position." *Moore,* 591 F.3d at 747.

As pointed out by the First Circuit in *Echevarria-Gonzalez,* 849 F.2d at 29, this logic ignores the plain language of Rule 4(j), which requires that state governmental defendants must be "subject to suit" for its service requirements to apply. The law has been clear for one hundred years that states and their agencies are protected by the Eleventh Amendment; they are not subject to suit in federal court. *See Hans v. Louisiana*, 134 U.S. 1, 16 (1890) ("The suability of a State . . . was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally

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capacities"); *Mosley v. Douglas County Correctional Center*, 192 F.R.D. 282, 283-84 (D. Neb. 2000) (same).

[5] Rule 4(i)(2) provides that when a federal officer is sued in an official capacity, the United States must be served under Rule 4(i)(1).

asserted."). Only by suing a state official by name under the fiction of *Ex parte Young,* 209 U.S. 123, 159-60 (1908) (stating that when sued for injunctive relief for violating the Constitution the state official is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct"), can one avoid the Eleventh Amendment – and this is precisely because official-capacity suits are *not* suits against states.

This constitutional distinction between states and their officials was extended as a statutory matter to § 1983 litigation in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). There, this Court ruled that states are *never* proper defendants under § 1983. Rather, a § 1983 plaintiff must sue a state official by name in his official capacity. This is proper "because 'official-capacity actions for prospective relief *are not treated as actions against the State*.'" *Id.* at 71 n.10 (quoting *Kentucky v. Graham,* 473 U.S. 159, 167 n.14 (1985); citing *Ex parte Young,* 209 U.S. 123, 159-60 (1908)) (emphasis added).[6]

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[6] Official-capacity actions against states and/or state officers for money damages are not cognizable under § 1983. *See Will*, 491 U.S. at 71. Thus, the *only* recognized official-capacity action against a state officer under § 1983 is that authorized by *Ex parte Young*. *See Will*, 491 U.S. at 71 n.10. Of course, state officials can be sued for money damages as individuals. *See Hafer v. Melo,* 502 U.S. 21, 25 (1991). There is no question but that these "individual-capacity" actions are governed by Rule 4(e). If an individual-capacity action calls into doubt a state statute, Rule 5.1(a) requires that the state's attorney general be

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Because the Fifth Circuit's conclusions in *Moore v. Hosemann*, 591 F.3d 741 (5th Cir. 2009), *cert. filed,* 78 U.S.L.W. 3501 (Feb. 17, 2010) (No. 09-982), and below contradict that of the First and Second Circuits, certiorari is proper.

II. The Fifth Circuit Erred by Requiring Evidence to Rebut a Rule 12(b) Motion to Dismiss Based on Mootness.

The Fifth Circuit below repeatedly complained that Petitioners had not presented "evidence" to show that the Secretary was reasonably likely to fix election deadlines in the future. In doing so, it ignored the procedural posture of the case – dismissal under Rule 12(b).[7]

To use one example, the Fifth Circuit rejected Petitioners' claim that the Secretary assumed the power (albeit unconstitutionally) to alter deadlines,

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noticed. *See also* 28 U.S.C. § 2403(b) (providing that state must be allowed to intervene). *Compare* Federal Rule of Civil Procedure 4(i)(3) (federal officials sued in their individual capacities are subject to service as individuals under Rule 4(e) and United States must also be served).

[7] The Secretary's motion to dismiss did not state whether it relied on Rule 12(b)(1) or Rule 12(b)(6). Nor did the District Court's opinion clarify this point; rather, it simply dismissed under Rule 12(b). *See* App., *infra,* at 10 & 18 n.21. Under either, plaintiffs are entitled to have their allegations taken as true and all reasonable inferences drawn in their favor. Evidence is not required. *See Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 104 (1998).

this authority constituted "policy" under Louisiana law, and was likely to be exercised again in the future:

> Appellants state that the "Secretary's policy is that he has the authority to fix emergency election deadlines," but *they do not present any evidence* to support their assertion that the Secretary has such a policy. Appellants also state in their reply brief that "the Secretary's action clearly represents policy; at least the Secretary has never claimed it does not." The burden, however, is not on the Secretary to show whether his actions constitute policy; instead, the burden is on Appellants to show that the Secretary's actions were policy, and *Appellants have not presented any evidence* that would allow them to meet that burden in this case.

App., *infra,* at 7 n.5 (emphasis added).[8]

Given the posture of the present case, Petitioners are not required to present evidence. At the Rule 12(b) dismissal stage, all factual allegations are to be

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[8] It is clear that the Louisiana Secretary of State is a "final authority," *see McMillian v. Monroe County*, 520 U.S. 781, 787 (1997) (holding that sheriff was a final authority whose single decision made policy for Alabama), responsible for making policy in Louisiana in the context of elections. La. Const., art. 4, § 7 ("The secretary of state shall head the department and *shall be the chief election officer of the state. He shall prepare and certify the ballots for all elections, promulgate all election returns, and administer the election laws*. . . .") (emphasis added).

taken as true and all plausible inferences must be drawn in the plaintiff's favor. *See generally Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007); *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009).

This Court in *Bennett v. Spear*, 520 U.S. 154, 168 (1997), made clear that this same standard applies to Article III's jurisdictional issues:

> while a plaintiff must "set forth" by affidavit or other evidence 'specific facts' to survive a motion for summary judgment, . . . , [a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for *on a motion to dismiss we* "*presum[e] that general allegations embrace those specific facts that are necessary to support the claim*."

(Emphasis added). *See also Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 104 (1998) ("This case is on appeal from a Rule 12(b) motion to dismiss on the pleadings, so we must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations.").

Here, Petitioners alleged that Louisiana had experienced at least ten named hurricanes over the course of the last twenty years (all in late August and September), had election dates and qualifying deadlines unilaterally altered by the Secretary in the past, has two statutes specifically designed to deal with the problem (hence showing that the Legislature realizes it will recur), will likely have elections and candidates' qualifying deadlines disrupted by storms in the

future, and will continually need dates and deadlines modified. Further, Petitioners assert for all these reasons that the Secretary will likely take it upon himself – contrary to Louisiana law and Article II – to move deadlines in the future.

These allegations and reasonable inferences present a plausible claim that the Secretary remains "capable" of altering election deadlines in the future. The Fifth Circuit's rejection of Petitioners' allegations for lack of evidence, as well as its requirement that evidence be presented at the dismissal stage to establish patterns of past wrongs and a likelihood of future wrongdoing, contradicts this Court's holdings in *Bennett*, *Steel Co., Twombly,* and *Iqbal.* Certiorari is proper.

III. The Fifth Circuit Erred by Holding Non-Legislative Action to a More Demanding Standard Under the Capable of Repetition Doctrine.

Election controversies are routinely preserved by the "capable of repetition" exception. There is generally too little time to resolve ballot disputes or campaign finance controversies before the close of the election cycle – they "evade review" – and they frequently will recur if not resolved – making them "capable of repetition." *See, e.g., Norman v. Reed*, 502 U.S. 279 (1992); *Meyer v. Grant*, 486 U.S. 414 (1988); *Brown v. Chote*, 411 U.S. 452 (1973); *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Moore v. Ogilvie*, 394 U.S. 814 (1969). Without the "capable of repetition"

doctrine, many election disputes – like the present one – would escape constitutional scrutiny.

This Court recently reiterated that the "capable of repetition yet evading review" doctrine, in the context of election cases, governs "as applied" challenges as well as facial attacks. *See Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 463 (2007). Moreover, this Court has never suggested that a more demanding analysis applies to as-applied challenges, let alone challenges directed at policies put in place by non-legislative actors.

For example, in *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976), where a state judge issued a gag order preventing the press from reporting a criminal trial, the Court concluded that expiration of the order did not moot the case: "the District Court may enter another restrictive order to prevent a resurgence of prejudicial publicity. . . ." *Id.* at 546. "The dispute between the State and the petitioners who cover events throughout the State is thus 'capable of repetition.'" *Id.* at 547. *See also Gerstein v. Pugh*, 420 U.S. 103 (1975) (finding state judge's denial of probable cause hearing capable of repetition); *Gannette Co., Inc. v. DePasquale*, 443 U.S. 368 (1979) (holding judge's order closing proceedings capable of repetition).[9]

[9] Nor has the Court even limited the "capable of repetition" doctrine to governmental action. In *Morse v. Republican Party of Virginia,* 517 U.S. 186, 235 n.48 (1996), for example, the Court

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In *Honig v. Doe*, 484 U.S. 305 (1988), to use another example, the plaintiffs prospectively challenged disciplinary action taken by school officials under the federal Education of the Handicapped Act. Even though the plaintiffs' child left the school district and was no longer threatened with expulsion, the Court concluded that his challenge to the school officials' disciplinary conduct was "capable of repetition yet evading review." *Id.* at 318-19. No state statute was challenged; rather, the challenge was directed at the school officials' executive action. *See also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999) (holding that transfer of disabled plaintiff by state officials did not moot controversy under Americans With Disabilities Act and § 1983).

And in *Bradley v. Lunding,* 424 U.S. 1309 (1976), Justice Stevens (sitting in his capacity as Circuit Justice), stayed an Illinois election officials' executive decision to resolve ballot access priorities by lottery. Justice Stevens did not inquire whether the agency's decision was authorized by state statute, or somehow an application of statutory law; rather, he simply stated that the decision was "presumably" capable of repetition so that the intervening election would not moot the case. *Id.* at 1311-12.

The Fifth Circuit's application of a different, more demanding analysis to executive wrongdoing

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applied the doctrine to an ad hoc decision by the Republican Party to impose a $45 filing fee on convention delegates.

contradicts these precedents, as well as holdings in several circuits (including the Fifth). In *Moore v. Hosemann*, 551 F.3d 449 (5th Cir. 2009), *cert. filed,* 78 U.S.L.W. 3501 (Feb. 17, 2010) (No. 09-982), after all, the Fifth Circuit ruled that Mississippi's Secretary of State's decision to shorten Mississippi's filing deadline for presidential candidates was "capable of repetition." It did not apply a different, more demanding analysis.[10]

Nor did the Sixth Circuit apply a more demanding analysis in *American Civil Liberties Union of Ohio v. Taft*, 385 F.3d 641, 647 (6th Cir. 2004), which held that Ohio's governor's refusal to call a special congressional (House) election was "capable of repetition" even though another regular election had been held and the 108th Congress had convened. The governor's ad hoc executive decision was not authorized by statute, nor was the governor applying an Ohio law. His refusal to call an election is identical in form to the Secretary's refusal here to accept Petitioners' qualifying papers in the present case.

Then-Judge Sotomayor in *United States v. Quattone*, 402 F.3d 304, 309 (2d Cir. 2005), likewise concluded that a judge's gag order – prohibiting the press from reporting jurors' names – was not mooted by the close of trial and expiration of the order: "We

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[10] Petitioners sought rehearing en banc because of this obvious conflict, but the Fifth Circuit declined further review. *See* App., *infra*, at 26.

agree with appellants that the order at issue in this case was too short in duration to be fully litigated prior to its expiration, and that there is a reasonable expectation that these same appellants will face a similar restrictive order in the future." It obviously did not matter to then-Judge Sotomayor that the gag order was put in place on an ad hoc basis by a non-legislative actor.

The Fifth Circuit's application of a more demanding standard contradicts this Court's, as well as Second and Sixth Circuit, precedents. Certiorari is proper.

IV. The Fifth Circuit Erroneously Confused Mootness With Standing.

This Court in *Honig v. Doe*, 484 U.S. 305, 319 n.6 (1988), observed that it has routinely "found controversies capable of repetition based on expectations that, while reasonable, *were hardly demonstrably probable*." (Emphasis added and citations omitted). The Court went on to state that its "concern in these cases, as in all others involving potentially moot claims, was whether the controversy was *capable* of repetition and not . . . whether the claimant had demonstrated that a recurrence of the dispute was more probable than not." *Id.* (emphasis in original).

Even though the Court in *Honig* did not precisely define "capable," it later in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000), gave the term meaning. *Laidlaw*

established that the "capable of repetition" doctrine requires less certainty than Article III standing: "The plain lesson . . . is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Id.*

The Court in *Laidlaw* used the "capable of repetition" doctrine as an example. "When . . . a mentally disabled patient files a lawsuit challenging her confinement in a segregated institution, her postcomplaint transfer . . . will not moot the action, despite the fact that she would have lacked initial standing had she filed the complaint after the transfer." *Id.* at 190-91 (citing *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999)). "*To abandon the case at an advanced stage may prove more wasteful than frugal*. This argument from sunk costs . . . surely highlights an important difference between the two doctrines." 528 U.S. at 191-92 (emphasis added).

The Fifth Circuit's approach erroneously conflates standing and mootness. As demonstrated by the Fifth Circuit's requirement that Petitioners "introduce[ ] evidence showing that the Secretary had unlawfully changed filing deadlines in the past, that the Secretary's actions reflect a policy or a consistent pattern of behavior that he has determined to continue, or that the Secretary's action was prescribed by statute," App., *infra,* at 7, it forced Petitioners to establish standing all over again after the election.

Several Circuits have rejected this approach. The Sixth Circuit in *American Civil Liberties Union v. Taft,* 385 F.3d 641, 646 (6th Cir. 2004), where the court concluded that the governor's refusal to call a special election was "capable of repetition," stated that "standing and mootness serve different purposes: . . . These different purposes are reflected in well-established exceptions to the mootness doctrine, including the doctrine that a case will not become moot if the injury is capable of repetition, while evading review." (Citing *Laidlaw*).

Becker v. Federal Elections Commission, 230 F.3d 381 (1st Cir. 2000), to use another example, made much of the *Laidlaw* distinction. Even though it concluded that Ralph Nader's standing to challenge the presidential debates presented a "close" question, *id.* at 386, it found his challenge was clearly not mooted by the 2000 election. Like most election challenges, it was "capable of repetition yet evading review." *Id.* at 389. The court warned against "conflating" the two inquiries, *id.* at 386 n.3, and stated that "questions of standing and questions of mootness are distinct, and it is important to treat them separately." *Id.*[11]

Conflating standing and mootness contradicts this Court's decision in *Laidlaw* as well as decisions

[11] Chief Judge Torruella disagreed with the standing and mootness determinations. *See id.* at 397 (Torruella, C.J., concurring).

from the First and Sixth Circuits. Certiorari is proper.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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