In The

Supreme Court of the United States

BRIAN MOORE,

Petitioner,

v.

DELBERT HOSEMANN,
Mississippi 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

MARK R. BROWN
Counsel of Record
303 E. Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 236-6956 (fax)
mbrown@law.capital.edu

VICTOR I. FLEITAS
VICTOR I. FLEITAS, ATTORNEY
P.O. Box 7117
Tupelo, MS 38802

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

QUESTIONS PRESENTED

1. Whether Federal Rule of Civil Procedure 4(e)'s provision for service of process on individuals applies to official-capacity actions filed against state officers under the logic of *Ex parte Young*.

2. Whether state certification in the absence of unusual circumstances should be preferred to abstention under *Railroad Commission v. Pullman Company*.

LIST OF PARTIES

The names of all Petitioners are as follows:

Brian Moore.

The names of all Respondents are as follows:

Delbert Hosemann, in his official capacity as Mississippi Secretary of State.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Blank Page

PETITION FOR WRIT OF CERTIORARI

Petitioner, Brian Moore, petitions the Court for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit (entered December 18, 2009 with rehearing denied on January 18, 2010), reversing in part and affirming in part the District Court's dismissal of Petitioner's complaint under Federal Rule of Civil Procedure 12(c) and denying Petitioner's 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 (Jones, C.J., Smith and DeMoss, JJ.) is reported at 591 F.3d 741 (5th Cir. 2009), and is included in the Appendix (App., *infra*, at 1). The final judgment of the United States District Court for the Southern District of Mississippi is not reported and is reproduced in the Appendix (App., *infra*, at 14). The order of the District Court denying Petitioner's motion for costs and attorney's fees is not reported and is reproduced in the Appendix (App., *infra*, at 24).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 18, 2009. Rehearing was denied on January 18, 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, ...

Miss. Code § 23-15-785(2):

> The certificate of nomination by a political party convention must be signed by the presiding officer and secretary of the convention and by the chairman of the state executive committee of the political party making the nomination. Any nominating petition, to be valid, must contain the signatures as well as the addresses of the petitioners. Such certificates and petitions must be filed with the State Board of Election Commissioners by filing the same in the office of the Secretary of State not less than sixty (60) days previous to the day of the election.

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

Mississippi's legislature has provided that presidential candidates must qualify with its secretary of state "not less than sixty (60) days previous to the day of the election." Miss. Code § 23-15-785(2). For the November 2008 presidential election, this meant that candidates were required to file by September 5, 2008.

Unlike a number of election deadlines in Mississippi,[1] § 23-15-785(2) of the Mississippi Code does not include a specific time. It does not, for example, require that candidates file before 5:00 PM; nor does it require that they file by the "close of the business day."

Contrary to § 23-15-785(2)'s plain wording, Respondent, Mississippi's secretary of state, demanded that presidential candidates qualify by 5:00 PM on September 5, 2008. Because Moore, who was the 2008 presidential candidate for the Socialist Party USA,[2] attempted to file just minutes after the secretary's

---

[1] Section 23-15-853(2) of the Mississippi Code, for example, requires that *congressional* candidates "qualify with the Secretary of State by 5:00 p.m. not less than twenty (20) days previous to the date of the election."

[2] Because the Socialist Party USA was not recognized in Mississippi, Moore ran under the Natural Law Party's banner. The Natural Law Party and Moore's vice-presidential candidate were also plaintiffs. Only Moore appealed the District Court's dismissal.

5:00 PM deadline on September 5, 2008, he was excluded from Mississippi's presidential ballot.

Moore brought suit under 42 U.S.C. § 1983 on September 16, 2008. In addition to preliminary relief, Moore requested permanent and declaratory relief invalidating the secretary's 5:00 PM deadline. Respondent was sued in his official capacity; Moore did not name Mississippi as a defendant.

Moore argued that the secretary lacked authority under Article II of the United States Constitution to regulate presidential elections. Section 1 of Article II states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, ..." U.S. Const., art. II, § 1, cl. 2. *See Bush v. Gore,* 531 U.S. 98, 112 (2000) (C.J., concurring) ("A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."); *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 76 (2000) (per curiam) ("in the case of a law enacted by a state legislature applicable . . . to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution").[3] Because of Article II, Moore argued,

---

[3] *See also California Democratic Party v. Jones,* 530 U.S. 567, 602 (2000) (Stevens, J., dissenting) (questioning whether California initiative regulating congressional elections "in which popular choices regarding the manner of state elections are

(Continued on following page)

the secretary could not add to or alter the legislature's plain deadline. *See, e.g., Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1012-13 (S.D. Ohio 2008) (holding that Ohio's secretary of state violated Article II by creating presidential deadline).

The District Court denied preliminary relief on September 29, 2008, and the Fifth Circuit refused an emergency stay on October 6, 2008.[4] Moore's name therefore did not appear on Mississippi's ballot.

On March 10, 2009, the District Court concluded that Moore's suit was moot and dismissed his complaint. App., *infra*, at 23. It rejected Moore's argument that the controversy fell into the well-recognized "capable of repetition" exception, explaining that "there is no 'reasonable expectation' or 'demonstrated probability' that these plaintiffs . . . will again miss what they now know to be the 5:00 p.m. deadline for filing their qualifying papers." App., *infra,* at 20-21.

On April 9, 2009, Moore filed his notice of appeal. On that same day, Moore moved the District Court to award costs and attorney's fees under Federal Rule of Civil Procedure 4(d). Moore had requested that the

---

unreviewable by independent legislative action . . . [are] a valid method of exercising the power that [Article I] vests in state 'Legislature[s]'").

[4] Moore and his co-plaintiffs on December 4, 2008 voluntarily dismissed their interlocutory appeal and request for emergency relief pending in the Fifth Circuit.

secretary waive service of process. The secretary refused. Moore therefore duly served the secretary as an individual under Rule 4(e) and sought reimbursement under Rule 4(d).

The District Court on May 14, 2009, denied Moore's motion for costs as being "patently without merit." App., *infra*, at 24. Moore on June 1, 2009, amended his notice of appeal to include this May 14 order. The two appeals were consolidated in the Fifth Circuit.

The consolidated appeal was argued on November 4, 2009. The Fifth Circuit, in an opinion by Judge Smith, on December 18, 2008 reversed the lower court's dismissal but affirmed its denial of costs. App., *infra*, at 1. Judge Smith ruled that because Moore's action against the secretary was an action against Mississippi, Rule 4(j) applied. And because Rule 4(e) did not apply, Judge Smith concluded that Rule 4(d)'s waiver requirement did not apply either. *See* App., *infra*, at 13.

The court further announced *sua sponte* its intention to abstain from reaching the merits of Moore's controversy under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). App., *infra,* at 8. It also "urge[d] the district court to consider whether

to abstain on the basis of" *Pullman*, too. App., *infra*, at 8.[5]

Because *Pullman* abstention was not argued in the briefs nor addressed during oral argument, Moore petitioned for rehearing to suggest that the panel certify to the Mississippi Supreme Court the following question:

> Whether § 23-15-785(2) of the Mississippi Code requires that a recognized political party's presidential candidate's "qualifying papers" be delivered to the Mississippi Secretary of State by 5:00 PM on the day that is "sixty (60) days previous to the day of the [presidential] election."[6]

The panel denied rehearing without opinion on January 18, 2010. *See* App., *infra,* at 26-27. On

---

[5] *Pullman* abstention orders are final and appealable. *See Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 714 & n. 2 (1962) (holding that *Pullman* abstention order is final and appealable); *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 8 (1983) (observing that the lower court in *Idlewild* "stayed the federal suit under the *Pullman* abstention doctrine. We held that the District Court's action was final and therefore reviewable by the Court of Appeals.") (footnote omitted).

[6] Mississippi Rule of Appellate Procedure 20(a) authorizes certification of state-law issues by the Supreme Court and United States Courts of Appeals to the Mississippi Supreme Court. *See generally Government Employees Insurance Co. v. Brown,* 446 So.2d 1002 (Miss. 1984); *Boardman v. United Services Auto Ass'n,* 470 So.2d 1024 (Miss. 1985). District Courts cannot certify issues to the Mississippi Supreme Court.

February 8, 2010, the District Court *sua sponte* abstained under *Pullman*, thereby forcing Moore to file a new round of litigation in state court.

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) of the Federal Rules of Civil Procedure requires that defendants either waive service of process 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):[7]

> Although we imagine that in most or all cases where a state officer is sued in his 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)).[8] 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

---

[7] 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).

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

> upon a state officer in his official capacity is sufficient if made pursuant to Rule 4(d)(1).

Id. at 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 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*, 2000 WL 287720, 208 F.3d 204 (2d Cir. 2000) (Table), 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 that "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).").[9]

The Fifth Circuit expressly rejected the First Circuit's interpretation of Rules 4(e) and 4(j). *See* App. *infra*, at 12. It instead drew an equation between suits against federal agents, which are subject to the service requirements of Rule 4(i),[10] and suits against state officers.[11] *See* App., *infra*, at 12. "[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." App., *infra*, at 12.

As pointed out by the First Circuit in *Echevarria-Gonzalez,* 849 F.2d at 29, this logic ignores the plain

---

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

[10] 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).

[11] It also relied on decisions from several District Courts holding that Rule 4(j) applies to official-capacity actions. *See* App., *infra*, at 13 n. 6. These decisions conflict with those listed in note 9, *supra*.

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 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).[12]

Because the Fifth Circuit's conclusion contradicts that of the First and Second Circuits, and appears at odds with *Will,* certiorari is proper.

II. Preferring Abstention Over Certification Contradicts This Court's Instructions and Practices in Other Circuits.

This Court has urged the federal courts to utilize state certification procedures in constitutional cases rather than *Pullman* abstention.[13] In *Arizonans for*

---

[12] 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 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).

[13] *Pullman* abstention is designed to allow federal courts to avoid needlessly resolving constitutional questions. *See* Martha A. Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974). Thus, it has no application to non-constitutional cases, including diversity actions.

Official English v. Arizona, 520 U.S. 43, 76 (1997), the Court explained that in constitutional litigation, "*Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court." (Citation omitted). "Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Id.* (citations omitted).

Following *Arizonans*, several Circuits have endorsed certification over forcing § 1983 plaintiffs to file additional actions in state court pursuant to *Pullman*.[14] The Ninth Circuit, for example, observed in *Doyle v. City of Medford*, 565 F.3d 536, 543 (9th Cir. 2009), that it prefers certification over abstention "in *Pullman*-type abstention cases 'because the alternative to certification is federal court abstention and the attendant delay until resolution of the

---

[14] When parallel proceedings are already pending in state court, federal courts have sometimes used *Pullman* abstention as a more efficient alternative. *See, e.g., Currie v. Group Insurance Commission,* 290 F.3d 1 (1st Cir. 2002) (refusing to certify because state-law issue was pending in state courts); *Nationwide Mutual Insurance Co. v. Unauthorized Practice of Law Committee of State Bar of Texas,* 283 F.3d 650, 656-57 (5th Cir. 2002) (refusing to certify because two cases were pending in state courts involving same issue). But this "unusual circumstance" is not present here.

derivative state court . . . action (including trial, the right to a direct appeal, and the right to seek discretionary review after the direct appeal).'" (Citation omitted).

The Second, Tenth and Eleventh Circuits have likewise expressed preferences for certification over abstention in the absence of unusual circumstances. The Second Circuit trumpeted the benefits of certification in *Tunick v. Safir*, 209 F.3d 67, 73 (2d Cir. 2000): "*Arizonans* made quite clear that . . . the device of certification provides all the benefits of *Pullman* abstention . . . [and] therefore . . . that we should consider certifying in more instances than had previously been thought appropriate." *See also Allstate Insurance Co. v. Serio*, 261 F.3d 143, 151 (2d Cir. 2001) (observing in constitutional case that "the Supreme Court indicated that certification is usually preferable to abstention."). The Tenth Circuit in *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1119 (10th Cir. 2008), rejected *Pullman* abstention because "the Supreme Court has expressed a preference for certifying questions to a state's supreme court." The Eleventh Circuit explained its preference for certification in *Pittman v. Cole*, 267 F.3d 1269, 1289 (11th Cir. 2001): "[c]ertification . . . offers substantial benefits over the traditional *Pullman* abstention method. . . . '[It] save[s] time, energy, and resources and helps build a cooperative judicial federalism.'" (Citation omitted).

While not stating clear preferences, several other Circuits have certified state-law questions in

Pullman-type cases. *See, e.g., Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 304 (1st Cir. 2000); *PSINet, Inc. v. Chapman*, 317 F.3d 413, 415 (4th Cir. 2003); *American Booksellers Foundation for Free Expression v. Strickland*, 560 F.3d 443, 447 (6th Cir. 2009); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 509-10 (7th Cir. 1998).

The Fifth Circuit alone "has tended to avoid certification in favor of abstention." Molly Thomas-Jensen, *Certification After* Arizonans for Official English v. Arizona: *A Survey of Federal Courts' Practices*, 87 DEN. U. L. REV. 139, 158 (2009). This is not necessarily because the Fifth Circuit objects to certification; after all, it routinely certifies state-law issues in diversity cases (where *Pullman* abstention is unavailable). *See, e.g., Huss v. Gayden,* 508 F.3d 240 (5th Cir. 2007); *National Union Fire Insurance Co. v. Mississippi Ins. Guar. Ass'n,* 507 F.3d 309 (5th Cir. 2007); *Bullock v. AIU Insurance Co.,* 503 F.3d 384 (5th Cir. 2007); *Paz v. Brush Engineered Materials, Inc.,* 445 F.3d 809 (5th Cir. 2006). Rather, it appears that the Fifth Circuit simply prefers *Pullman* abstention and the added obstacles it imposes on constitutional plaintiffs.[15]

---

[15] Remarkably, there is *no* reported instance of the Fifth Circuit certifying a state-law question in a *Pullman*-type setting. *See* Thomas-Jensen, *supra,* at 158. *Cf. Center for Individual Freedom v. Carmouche,* 449 F.3d 655 (5th Cir. 2006) (rejecting dissent's argument that state-law issue should be certified to Louisiana Supreme Court).

The Fifth Circuit offered no reason for its refusal to use Mississippi's certification procedure. Moreover, because Mississippi's procedure cannot be invoked by the District Court, *see* Miss. R. App. P. 20(a) (stating that only this Court and Courts of Appeals can certify), which has now followed the Fifth Circuit's advice and invoked abstention, Moore is forced to file a full round of needless and cumbersome litigation in Mississippi's courts. This inexplicable approach to constitutional litigation conflicts with the preference for certification expressed by this Court and several Circuits. Certiorari is proper.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

MARK R. BROWN
Counsel of Record
303 E. Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 236-6956 (fax)
mbrown@law.capital.edu

VICTOR I. FLEITAS
VICTOR I. FLEITAS, ATTORNEY
P.O. Box 7117
Tupelo, MS 38802

Blank Page