No. 09-982

APR 13 2010

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

PETITIONER'S SUPPLEMENTAL BRIEF

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

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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*.

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On March 17, 2010, Mississippi's Legislature approved an amendment to § 23-15-785(2) of the Mississippi Code, specifically providing that presidential candidates' qualifying papers must be delivered to the Secretary "by 5:00 p.m. not less than sixty (60) days previous to the day of the election." *See* Miss. 2010 Session Laws (S.B. No. 3058) (March 17, 2010) (WL No. 91). According to news reports, the Governor signed this bill on March 19, 2010. *See* New Mississippi law sets deadline for prez candidates, SUN HERALD, March 19, 2010.

REASONS FOR GRANTING THE WRIT

Petitioner's case has not been mooted by Mississippi's March 19, 2010 statutory change for the following reasons:

1. Mississippi's change to its filing deadline cannot moot Petitioner's claim to damages – in the form of costs and attorney's fees – under Rule 4(d). *See Los Angeles v. Lyons,* 461 U.S. 95, 109 (1983); *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 478 n.1 (1989); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 719 (2007). Consequently, Petitioner's claim that the Fifth Circuit erroneously ruled that Rules 4(e) and 4(d) do not apply to state officials sued in their official capacities under 42 U.S.C. § 1983 for prospective relief is not moot.

2. Mississippi's proposed change to § 23-15-785(2) of the Mississippi Code must be pre-cleared under § 5 of the federal Voting Rights Act, 42 U.S.C. § 1973c, before it can become effective. As of March 29, 2010, it has not been submitted for pre-clearance,[1] let alone cleared by the Department of Justice. (The Department of Justice ordinarily requires at least sixty days to clear changes to election laws.) Consequently, Mississippi's proposed change has not mooted Petitioner's challenge to the Secretary's interpretation of § 23-15-785(2) and the Fifth Circuit's abstention order under *Railroad Commission of Texas v. Pullman,* 312 U.S. 496 (1941).

3. Assuming that the change to § 23-15-785(2) becomes effective, it still will not moot Petitioner's challenge. This Court has stated on several occasions that voluntary changes to policies and statutes do not moot constitutional challenges. *See, e.g., City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."); *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 661-62 (1993) ("now, as then, the mootness question is controlled by . . . the 'well settled' rule that 'a defendant's voluntary cessation of a challenged practice does not deprive a

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[1] *See* http://www.justice.gov/crt/voting/notices/noticepg.php.

federal court of its power to determine the legality of the practice'"); *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 174 (2000) ("A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case."); *City News & Novelty v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) ("voluntary cessation of a challenged practice rarely moots a federal case"); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 719 (2007) ("Voluntary cessation does not moot a case or controversy unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,' a heavy burden that Seattle has clearly not met.").

Mississippi's voluntary change on March 19, 2010, which came one month after this Petition was filed (and coincidentally on the day this Court called for a response), was obviously designed to moot Petitioner's challenge. As the cited cases demonstrate, this Court has been hesitant to afford defendants this power – especially where the voluntary act is obviously designed to cause mootness.

4. Even if the statutory change were to moot Petitioner's challenge to the Secretary's 5:00 PM deadline, it does not moot Petitioner's procedural claim that the Secretary does not have authority under Article II of the Constitution to regulate presidential elections. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 266 (1978) (holding that procedural challenge was proper even though no substantive harm

occurred); *Memphis Community School District v. Stachura*, 477 U.S. 299, 304 (1986) (same); *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (same). Mississippi's statutory change does not address the Secretary's authority under Mississippi law and Article II, § 1 cl. 2, of the United States Constitution to change legislatively-enacted deadlines. Consequently, this aspect of Petitioner's challenge remains alive. *See, e.g., Horton v. City of St. Augustine*, 272 F.3d 1318, 1326 (11th Cir. 2001) (holding that "post-judgment alterations to legislative enactments" might "moot a case to the extent they remove certain challenged features, but do not moot a case if they leave other challenged features substantially undisturbed"). Even if Mississippi's statutory change moots Petitioner's challenge to the substance of the Secretary's decision (i.e., the 5:00 PM deadline), it does not affect the procedural feature of Petitioner's case – that is, whether the Secretary has authority to regulate presidential elections.

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

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