No. 09-982

In the Supreme Court of the United States

BRIAN MOORE,

Petitioner,

v.

DELBERT HOSEMANN,
MISSISSIPPI SECRETARY OF STATE,

Respondent.

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

BRIEF IN OPPOSITION

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Questions Presented

Whether the court of appeals correctly held that the waiver of service provision in Federal Rule of Civil Procedure 4(d) does not apply to a state constitutional officer sued exclusively in his official capacity.

Whether the court of appeals correctly abstained pursuant to *Railroad Commission v. Pullman Co.* in light of the unique legal and factual context of this case.

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Constitutional, Statutory, and Other Provisions Involved

In addition to the items cited by the petitioner, the respondent restates the operative state statute to reflect a recent amendment that moots the legal issue giving rise to the suit. The respondent also sets forth additional state statutes and further provisions of Federal Rule of Civil Procedure 4(d)(1) that are relevant but were not cited by the petitioner.

Miss. Code § 23-15-785(2) (as amended by S. B. 3058, Reg. Sess. (Miss. 2010), approved by the Governor on March 17, 2010):[1]

> 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. The certificates and petitions must be filed with the State Board of Election Commissioners by filing them in the Office of the Secretary of State by 5:00 p.m. not less than sixty (60) days previous to the day of the election.

Miss. Code § 7-3-3:

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[1] Senate Bill 3058 is reprinted in the Brief in Opposition's Appendix A (Opp. App.) 1b-4b.

> The secretary of state shall keep his office at the seat of the government, shall keep the same open Monday through Friday of each week for eight hours each day, and shall carefully preserve the official books, library, papers, records, and furniture belonging to his office.

Miss. Code § 25-1-98:

> In addition to any other times required by statute, all state offices shall be open and staffed for the normal conduct of business from 8:00 a.m. until 5:00 p.m., Monday through Friday, except on legal holidays as set forth in Section 3-3-7.

Federal Rule of Civil Procedure 4(d)(1):

> (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. The notice and request must:
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> (A) be in writing and be addressed:
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> (i) to the individual defendant; or
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> (ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form;

(D) inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent--or at least 60 days if sent to the defendant outside any judicial district of the United States--to return the waiver; and

(G) be sent by first-class mail or other reliable means.

Statement of the Case

Mississippi Code Section 23-15-785(2) required petitioner's presidential candidate qualifying papers to be filed with the office of the Secretary of State not less than sixty days prior to the November 2008 general election. Miss. Code Ann. § 23-15-785(2) (Rev. 2007). The version of Section 23-15-785(2) in effect in 2008 did not address the hour at which the Secretary's office should close on the sixtieth day before the general election. The underlying dispute in this case involves the Secretary's closure of his office at the traditional hour of 5:00 p.m. on the last day that qualification petitions could be timely filed with his office. Despite

petitioner's prior knowledge of the business hours of the Secretary's office, petitioner admittedly arrived after 5:00 p.m. on that last day and was unable to file his petition because the office was closed.

In this litigation, petitioner asserts that because Section 23-15-785(2) did not specify that the Secretary's office must close at 5:00 p.m. the office was required to deviate from its normal business hours and remain open until midnight in order to receive petitioner's filing. The Secretary notes that other provisions of the Mississippi code provide that the Secretary's office is open eight hours per work day, from 8:00 a.m. until 5:00 p.m. In an attempt to transform a disagreement with the Secretary's interpretation of state law into a federal constitutional claim, petitioner asserts that the Secretary's decision to close his office at 5:00 p.m. when such a time was not explicitly set forth in Section 23-15-785(2) was a usurpation of the Mississippi legislature's authority to direct the manner of appointment of presidential electors under Art. II, § 1, cl. 2 of the United States Constitution. Pet. 6 (citing *Bush v. Gore*, 531 U.S. 98 (2000)).

Important to this Court, Section 23-15-782(2) was amended during the 2010 legislative session to remove any doubt that presidential qualifying petitions must be filed by 5:00 p.m. on the sixtieth day before the general election. Opp. App. 2b. Because the legislature has now expressly adopted a 5:00 p.m. deadline, petitioner's allegation that the Secretary is acting contrary to the legislature's direction is definitively answered. This legislative action moots the petitioner's only claim, a claim for prospective relief requiring the Secretary's office to remain open

until midnight on the last day to file future presidential candidate petitions.

(1) The 2008 Version of Section 23-15-785(2).

The version of Mississippi code section 23-15-785(2) in effect in 2008 required presidential nominating petitions from political parties to be submitted to 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." *See* Miss. Code Ann. § 23-15-785(2) (Rev. 2007). Pursuant to the sixty-day deadline, petitioner was required to file his petition by Friday, September 5, 2008. Pet. 5. Section 23-15-785(2) did not direct the Secretary to keep his office open beyond its traditional hours of operation. Indeed, other statutory provisions expressed the legislature's intent that the Secretary's office should be open from 8:00 a.m. to 5:00 p.m. on regular business days. *See* Miss. Code Ann. § 7-3-3 (Rev. 2002) ("The secretary of state shall keep his office at the seat of the government, shall keep the same open Monday through Friday of each week for eight hours each day, ..."); Miss. Code Ann. § 25-1-98 (Rev. 2006) ("In addition to any other times required by statute, all state offices shall be open and staffed for the normal conduct of business from 8:00 a.m. until 5:00 p.m., Monday through Friday,. . . .") On September 5, the Secretary closed his office at the traditional hour of 5:00 p.m. as required by state law. Prior to September 5, petitioner was aware that the office would close at 5:00 p.m. and that his documents must be filed before that time. Opp. App. 6b.

(2) Petitioner's 2008 Attempt to File and Subsequent Litigation

After missing the known 5:00 p.m. deadline, petitioner filed this action pursuant to 42 U.S.C. § 1983 alleging that the Secretary's closure of his office at 5:00 p.m. when Section 23-15-785(2) made no mention of 5:00 p.m. was a "significant departure" from the Mississippi legislature's designated process for the selection of presidential electors so as to usurp the legislature's authority under Art. II, § 1, cl. 2 of the United States Constitution.[2] Pet 6. The complaint sought prospective relief placing petitioner on the November 2008 presidential ballot.

At the preliminary injunction hearing, petitioner testified that he was aware prior to September 5 that the Secretary's office would close at 5:00 p.m. and that his petition must be filed before 5:00 p.m. Opp. App. 6b. The district court denied the preliminary injunction motion, finding in part that the Secretary's "interpretation of state election law and his determination to close his office at the traditional time of 5:00 p.m. is reasonable and cannot be said to be inconsistent with the state's election statutes." *Id.* at 7b. The Fifth Circuit declined petitioner's request for an emergency stay, and petitioner subsequently dismissed his interlocutory appeal and request for emergency relief pending before the Fifth Circuit.

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[2] Petitioner conceded to the district court that a 5:00 p.m. deadline, if consistent with state law, is not itself unconstitutional. Opp. App. 8b.

On March 10, 2009, the district court granted the Secretary's motion to dismiss the complaint as moot in light of the concluded 2008 election. On April 9, 2009, petitioner filed a motion for expenses under Federal Rule of Civil Procedure 4(d)(2). The Secretary opposed the motion because Rule 4(d) does not apply to a suit brought against a state constitutional officer exclusively in his official capacity and because petitioner failed to comply with the mandatory procedural requirements of Rule 4(d). The district court denied the motion for expenses "for the reasons assigned in defendant's response." Pet. App. 24.

Petitioner appealed the dismissal and the order denying expenses. The Fifth Circuit affirmed the denial of petitioner's motion for expenses, finding that Rule 4(d) does not apply to state officers sued only in their official capacity. Pet. App. 10-13. The Fifth Circuit reversed the dismissal on the grounds of mootness, abstained from considering the merits under *Pullman*, and remanded the case for the district court to "consider whether to abstain" under *Pullman*. Pet. App. 1-10. On remand, the district court abstained under *Pullman*.

To the best of respondent's knowledge, petitioner has not filed a "new round of litigation in state court." *See* Pet. 10.

(3) The 2010 Amendment to Mississippi Code Section 23-15-785(2).

During the 2010 session, the Mississippi legislature amended Section 23-15-785(2) to resolve any misconception about the deadline by which presidential qualifying petitions must be filed. The

legislature added language specifying that the filings must be made "*by 5:00 p.m.* not less than sixty (60) days previous to the day of the election." *See* Opp. App. 2b (added language in italics). Mississippi is a covered jurisdiction under Section 5 of the Voting Rights Act, and the legislation requires the Attorney General to submit the clarification to the Department of Justice for preclearance. Opp. App. 3b. The amendment was transmitted to the Department on April 13, 2010. The preclearance process is generally completed within sixty days of the Department's receipt of the submission. *See* 28 C.F.R. § 51.9(a). The respondent fully expects the amendment to be precleared as it is uncontroversial; denies no one the right to vote; and has no discriminatory "purpose" nor "effect" with respect to race, color, or membership in a language minority group. *See Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 328 (2000); 42 U.S.C. § 1973c; 28 C.F.R. § 51.52.

A full thirty days after the Governor signed into law the amendment to Section 23-15-785(2), and on the last business day before respondent's opposition was due, petitioner thought it wise to inform this Court of the amendment by filing a supplemental brief. Petitioner's supplement casts the actions of Mississippi's legislative and executive branches as a dastardly attempt to "cause mootness" by enacting the amendment "on the day this Court called for a response." Supp. Pet. 3. In fact, the legislation was introduced in January 2010, after the Fifth Circuit abstained and before petitioner filed with this Court.[3]

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[3] *See* http://billstatus.ls.state.ms.us/documents/2010/pdf/SB/3000-3099/SB3058IN.pdf.

The bill was approved by the Governor on March 17, 2010. This Court did not call for a response until March 19. Far from an unseemly act, the legislature addressed the exact infirmity alleged to exist by petitioner. Petitioner's complaint sought to prohibit the Secretary from closing at 5:00 p.m. on the sixtieth day before presidential general elections solely because petitioner believed a 5:00 p.m. deadline had not been authorized by the Mississippi legislature. Indeed, Petitioner conceded to the district court that a 5:00 p.m. deadline, if consistent with state law, is not itself unconstitutional. Opp. App. 8b. The legislature has now removed any doubt regarding its direction that qualifying petitions must be filed by 5:00 p.m. It is ironic that the legislature's act of addressing petitioner's alleged constitutional infirmity is considered by petitioner to be the legislature's wrongful spoiling his argument.

While the supplemental brief's legal arguments regarding mootness are addressed below, it is important to note that petitioner has offered no reason whatsoever why the Department would not preclear this uncontroversial amendment. *See* Supp. Pet. 2. Preclearance is fully expected.

Reasons to Deny the Petition

I. Review of the Fifth Circuit's Holding Regarding Waiver Under Rule 4(d) is Unwarranted.

A. There is no Circuit Split as the Fifth Circuit is the Only Circuit Court to Address the Application of Rule 4(d)'s Waiver Provision to State Officers Sued in Their Official Capacities.

Put simply, there is no direct conflict among the circuits regarding the precise question addressed by the Fifth Circuit. The Fifth Circuit is the only circuit court to address the application of Rule 4(d)'s waiver of service of process provision to state officers sued solely in their official capacity. Petitioner, recognizing that no other circuit has addressed this issue, attempts to manufacture a conflict with the First and Second Circuits by arguing that opinions of those circuits regarding other provisions of Rule 4, decided in wholly different contexts, conflict in principle with the Fifth Circuit's conclusion. The alleged conflict is overstated.

Although petitioner suggests otherwise, this case does not involve a challenge to the sufficiency of service of process under Rule 4(e) or 4(j) nor does it involve an application of *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Instead, the Fifth Circuit reviewed a narrow question regarding Rule 4(d)'s waiver provision. Noting the Advisory Committee's explanation of Rule 4(d)'s policy and limited application, the Fifth Circuit concluded that a state officer sued only in his official capacity is not subject to the waiver provision in Rule 4(d). Pet.

App.10-13. The 1993 Advisory Committee noted that the United States and other governmental entities are not expected to waive service for the reason that their "mail receiving facilities are inadequate to assure that notice is actually received by the correct person." Fed. R. Civ. P. 4 advisory committee note. Directly on point, the Advisory Committee further explained that as a matter of public policy "governmental entities should not be confronted with the potential for bearing costs of service in cases in which they ultimately prevail." *Id.* When, as in this case, the Secretary of State is named exclusively in his official capacity in a suit taking issue with his routine interpretation and execution of state law, it would be the "governmental entity," i.e., the State and its taxpayers, that would bear the costs of service. The Fifth Circuit concluded that "the most reasonable reading" of Rule 4(d) excludes its application to purely official capacity claims.[4] Pet. App. 12. While the Fifth Circuit is the only circuit court to address Rule 4(d)'s application to official capacity claims, the holding is consistent with all but one of the known district court opinions considering the precise question. *See Chapman v. N.Y.State Div. for Youth*, 227 F.R.D. 175, 179-180 (N.D.N.Y. 2005) (finding Rule 4(d) inapplicable to official capacity claims); *accord Randall v. Crist*, No. 5:03-cv-00220, 2005 WL 5979678, at *2 (N.D. Fla. Nov. 1, 2005); *Cupe v. Lantz*, 470 F. Supp. 2d 136, 138 (D. Conn. 2007); *Libertarian Party v. Dardenne*, No. 08-582, 2009 WL 790149, at * 5 (M.D.La. Mar. 24, 2009), *aff'd*, 595 F.3d 215 (5th Cir.2010); *but see Marcello v.*

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[4] The Fifth Circuit also noted that *Will*'s definition of a "person" for purposes of 42 U.S.C. § 1983 was unrelated to the definition of an "individual" for purposes of Rule 4(d). Pet. App. 13 n.5.

Maine, 238 F.R.D. 113, 115 (D. Me. 2006) (finding Rule 4(d) applicable to official capacity claims).

Petitioner errs in suggesting that the Second Circuit's unpublished decision in *Stoianoff v. Comm. of Motor Vehicles* is in conflict with the Fifth Circuit's holding that Rule 4(d) does not apply to official capacity suits. *Stoianoff*, No. 99-7363, 2000 WL 287720 (2nd Cir. Mar. 16, 2000); Pet. 12. *Stoianoff* addressed sufficiency of service under Rule 4(j) and did not address the application of Rule 4(d). After finding that the *pro se* litigant had failed to properly serve an official capacity complaint pursuant to Rule 4(j), the *Stoianoff* decision noted in dicta that "it may be" that service of the official capacity complaint could be accomplished through Rule 4(e) but that the issue need not be decided because service through the means authorized by state law would satisfy both Rule 4(e) and Rule 4(j)(2). *Id.* at * 1, 2. Further, *Stoianoff* is an unpublished opinion not relied upon as authority within the Second Circuit. *See Sullivan v. Gagnier*, 225 F.3d 161, 165 n.4 (2nd Cir. 2000) (noting unpublished opinions are not precedent). Most importantly, that the Second Circuit did not decide the application of Rule 4(d)'s waiver provision to official capacity suits is evidenced by the fact that subsequent district court decisions within the Second Circuit do not cite *Stoianoff*. In fact, those subsequent district court opinions agree with the Fifth Circuit's conclusion that Rule 4(d) does not apply to suits against state officers in their official capacity. *See Chapman*, 227 F.R.D. at 179-180; *Cupe*, 470 F. Supp. 2d at 138. The

Second Circuit's holding in *Stoianoff* is not at odds with the Fifth Circuit's application of Rule 4(d).[5]

With respect to the First Circuit's decision in *Echevarria-Gonzalez v. Gonzalez-Chapel*, the Fifth Circuit's opinion accurately noted that *Echevarria* addressed only "whether plaintiffs had made adequate service on state official defendants" and not "whether a state official was subject to mandatory waiver obligations under rule 4(d)." Pet. App. 12 (citing *Echevarria*, 849 F.2d 24 (1st Cir. 1988)). While *Echevarria*'s holding is clearly limited to sufficiency of service,[6] the decision is further removed from the question of waiver because it predates the current, 1993 version of Rule 4(d) and the Advisory Committee's explanation that Rule 4(d) was not intended to require governmental entities to bear the

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[5] Petitioner's brief to the Fifth Circuit claimed that *Stoinanoff* evidenced that the Second Circuit "seems to be leaning" in the direction of applying Rule 4(e) to official capacity claims. Brief of Appellant before the Fifth Circuit at 49 n. 23. Before this Court, petitioner has escalated his rhetorical claim.

[6] Although removed from the question addressed by the Fifth Circuit, petitioner identifies no other circuit court that has adopted *Echevarria*'s holding that a state officer sued exclusively in his official capacity is treated as an "individual" under Rule 4(e) rather than as a governmental entity under Rule 4(j). Rule 17(d)'s direction that an officer sued in his official capacity may be "designed by official title rather than by name," as well as Rule 25(d)'s automatic substitution of successors of public officers sued in their official capacity, both undermine *Echevarria*'s conclusion that officers sued in their official capacities are nothing more than traditional "individual" defendants under Rule 4(e).

costs of service.[7] In this matter, it was the petitioner who argued that *Echevarria*'s reasoning should be extended beyond the First Circuit's holding and applied to a different section of Rule 4, a section the current version of which was not in existence at the time of *Echevarria*. The Fifth Circuit's opinion was explicitly limited to rejecting petitioner's expansive application of *Echevarria*. Any disagreement was only "insofar" as *Echevarria*'s reasoning was argued by petitioner to govern a different and revised section of Rule 4.[8] Pet. App. 12.

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[7] The 1993 amendments to Rule 4 expanded the waiver provision to about twice the length of its former version and provided "a clarity and level of precision that was missing from its predecessors." 4A Charles Alan Wright et al., Federal Practice & Procedure § 1092.1 (3d ed 2010). Importantly, it was not until the 1993 notes that the Advisory Committee explained that as a matter of public policy "governmental entities should not be confronted with the potential for bearing costs of service in cases in which they ultimately prevail." Fed. R. Civ. P. 4 advisory committee note. Also in the 1993, the Advisory Committee further explained that the United States and other governmental entities are not expected to waive service for the reason that their "mail receiving facilities are inadequate to assure that notice is actually received by the correct person." *Id.*

[8] The petition also cites the First Circuit's opinion in *Caisse v. Dubois*, 346 F.3d 213 (1st Cir. 2003), as evidence of the alleged conflict. *Caisse* involved a dispute over the sufficiency of service in which the First Circuit merely restated that, according to *Echevarria*, service of process for public employees is governed by Rule 4(e). *Id.* at 216. *Cassie* did not involve an application of Rule 4(d)'s waiver provision nor did the opinion examine *Echevarria* in light of the 1993 amendments and accompanying Advisory Committee notes.

To be sure, the opinion below suggests a limited disagreement with *Echevarria*, a reference on which the petition relies heavily. But petitioner overstates this alleged conflict. At best, petitioner can maintain that given the conclusion reached by *Echevarria* regarding sufficiency of service, the First Circuit *may* disagree with the Fifth Circuit if and when it considers Rule 4(d)'s application to official capacity claims. But this is speculation, not a pronounced and existing intolerable conflict between circuit courts. Indeed, it may well be that since *Echevarria* was decided over twenty years ago, and given the changes to Rule 4(d), the 1993 committee notes, and the intervening opinions of the Fifth Circuit and many district courts, the First Circuit may, when it considers the precise question, agree that *Echevarria*'s statements regarding sufficiency of service were not intended to subject state officers, and thereby the state, to the waiver provisions of Rule 4(d). Petitioner's premonition as to how the First Circuit would address the question does not present an actual "direct conflict" suitable for review. *See Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (denying certiorari and finding speculation regarding how a circuit court would resolve a question is an insufficient basis on which to claim a conflict).[9]

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[9] The remaining cases cited by petitioner in support of the alleged conflict among circuits are not persuasive. Pet. 13, n.9. None of the cases were decided by a court of appeals. *Cf.* Sup. Ct. R. 10(a). Further, *Whatley* and *Mosby* did not address whether Rule 4(d) applies in official capacity only claims because those defendants were either named in both their official and individual capacities or only in their individual capacity. *Whatley v. District of Columbia*, 188 F.R.D. 1, 2 (D.D.C. 1999); *Mosby v. Douglas County Corr. Ctr.*, 192 F.R.D. 282 (D. Neb. 2000). The Fifth Circuit's decision did not address, and there appears to be no circuit split

In sum, the opinion below and *Echevarria* addressed different questions governed by different sections of Rule 4. *Echevarria*'s relevance is further undermined by the intervening Advisory Committee notes explaining the public policy against applying Rule 4(d) in instances in which governmental entities and their taxpayers will bear the costs. Because the Fifth Circuit is the only circuit to address the matter, there is not a genuine conflict among the circuit courts regarding the application of Rule 4(d) to official capacity claims. This Court should permit circuit courts other than the Fifth Circuit to address the precise question before considering review.

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regarding, whether a government employee sued at least in part in their individual capacity is subject to the waiver requirements of Rule 4(d). The petition has identified a single court, a district court, that has found Rule 4(d)'s waiver provision to be applicable to official capacity suits. *Marcello v. Maine*, 238 F.R.D. 113 (D. Me. 2006). Even if this district court opinion was a sufficient basis for review under Supreme Court Rule 10(a), it is an outlier opinion that appears not to have been relied upon by other courts and is contrary to the opinion below as well as district court opinions in the Second, Fifth, and Eleventh Circuits finding that Rule 4(d) does not apply to official capacity suits. *See Chapman*, 227 F.R.D. at 179-180 (N.D.N.Y. 2005); *Randall*, 2005 WL 5979678 *2 (N.D. Fla. Nov. 1, 2005); *Cupe*, 470 F. Supp. 2d at 138 (D. Conn. 2007); *Libertarian Party*, 2009 WL 790149 * 5 (M.D. La. Mar. 24, 2009). A lone district court opinion does not merit the time and attention of this Court.

B. This is a Poor Vehicle to Review the Application of Rule 4(d) Because Petitioner Failed to Comply with Rule 4(d)'s Requirements.

Separately, this case is a poor vehicle for exploring whether Rule 4(d)'s waiver provision applies to official capacity claims against state officers: The outcome of this case would be unchanged because petitioner's recovery of expenses under Rule 4(d)(2) is barred by his failure to comply with the mandatory procedural requirements of Rule 4(d)(1). The procedures imposed by Rule 4(d)(1) on plaintiffs are no less mandatory than, and are a predicate to, the requirement that a defendant pay the costs of service under Rule 4(d)(2).

First, Rule 4(d)(1)(C) and (D) require that the notice and request sent by a plaintiff contain both the waiver of service form and a separate document containing the "text prescribed in Form 5" informing the defendant of the consequences of waiver and non-waiver. While petitioner provided the waiver form, he did not provide any document containing the text prescribed in Form 5. Record Pages 181, 182, Opp. App. 10b-13b. When this failure was noted, petitioner argued to the lower courts that providing the Request for Waiver form required by Rule 4(d)(1)(C) (Form 6) alleviated his need to provide a separate notice "using the text prescribed in Form 5" as required by Rule 4(d)(1)(D). However, Rule 4(d)(1) directs that the "notice and request *must*" be in conformity with each subsection (A) through (G), which includes separate requirements to provide a notice using the text of Form 5 and the Form 6 waiver. Fed. R. Civ. P. 4(d)(1) (emphasis supplied). The rule does not make the two forms interchangeable. More, the 1993 Advisory

Committee notes indicate that the waiver form and notice form are separate and each must be provided: the "text of the rule also sets forth the requirements for a Notice and Request for Waiver sufficient to put the cost-shifting provision in place. These requirements are illustrated in Forms 1A and 1B . . . ." Fed. R. Civ. P. 4 advisory committee note. The "Notice" and "Request for Waiver" forms referenced as 1A and 1B are now Forms 5 and 6, and the text of the rule along with the advisory committee notes indicate that *both* must be provided by plaintiffs seeking to invoke the cost-shifting provision of Rule 4(d)(2). Petitioner's admitted failure to abide by Rule 4(d)(1)'s mandatory procedures prohibits any recovery of costs under Rule 4(d)(2).

Rule 4(d) also requires that the notice and requested waiver must be provided to the defendant after the litigation has been commenced by the filing of the complaint. A defendant is not obligated to waive service when provided copies of an unfiled complaint and informed that plaintiff intends to file suit in the future. Specifically, the notice must "name the court where the complaint was filed." Fed. R. Civ. P. 4(d)(1)(B); *see also* Fed. R. Civ. P. 4(d)(1) ("plaintiff may notify such a defendant that an action has been commenced"); Form 5 ("Why are you getting this? A lawsuit has been filed against you, or the entity you represent in this court under the number shown above.") In this instance, petitioner mailed the requested waiver on September 15 but did not file the complaint until September 16. Opp. App. 10b; Pet 6. Petitioner's Waiver Request Form was incomplete, leaving blank the area requiring the disclosure of the cause number because no suit had yet been filed. Record Page 181, Opp. App. 11b. While in this matter

the suit was filed on September 16, Rule 4(d) does not task the defendant to check the district court docket to verify whether plaintiff has indeed filed his suit. Further, Rule 4(d) does not authorize a plaintiff to seek an anticipatory waiver for a suit that he intends to file in the future, whether it be one day, three months, or a year in the future.

Next, Rule 4(d)(1)(A)(i) and (d)(1)(G) require that the notice and request for waiver be in writing, addressed "to the individual defendant," and sent by first-class mail or other reliable means. Petitioner did not send the waiver request to the Secretary, but, instead, mailed the waiver to the Attorney General's Office and asked that it be delivered to the Secretary. Record Page 182, Opp. App. 10b. Petitioner did not accomplish the first task required under Rule 4(d) – provide the waiver request directly to the defendant.

Finally, even if petitioner's failures to follow the mandatory requirements of Rule 4(d)(1) do not directly prohibit his motion for costs, these failures provided the Secretary with "good cause" under Rule 4(d)(2) to refuse waiver without being subject to cost-shifting. *See* Fed. R. Civ. P. 4(d)(2) (providing cost-shifting only when the waiver is refused "without good cause").

Petitioner cannot benefit from the cost-shifting provisions of Rule 4(d)(2) when he admittedly failed to comply with the mandatory procedural requirements of Rule 4(d)(1). Petitioner cannot prevail in his claim for expenses without overcoming multiple procedural defects, yet there is no circuit split or other basis for this Court to review these defects. Because petitioner's motion for expenses fails on alternative grounds, this case is a singularly poor vehicle to

address the issues raised in the petition, even if they otherwise were grounds for this Court's review.

C. This is a Poor Vehicle for Review Because the Record is Undeveloped Regarding the Method of Service.

The petition asserts that after the Secretary declined to waive service, petitioner "served the secretary as an individual under Rule 4(e)." Pet. 8. In fact, the record does not reflect the manner in which the Secretary was served as no return of service was filed by the petitioner. According to the respondent's records, the complaint and summons were served upon the Office of the Attorney General, which would be consistent with Rule 4(j)(2)(b)'s authorization of "service in the manner prescribed by that state's law" and Miss. R. Civ. P. 4(d)(5)'s authorization of service upon an officer of the State of Mississippi "by delivering a copy of the summons and complaint to the Attorney General." It is without question that Rule 4(d)'s waiver provision is inapplicable to governmental entities served by means of Rule 4(j). Fed. R. Civ. P. 4(d)(1). There is no evidence in the record to support petitioner's claim that service was effected by personal service on the Secretary under Rule 4(e) and this Court lacks the necessary factual record to resolve that question. *Cf. Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (dismissing writ when record was revealed as inadequate to review the question presented).

II. Review of the Fifth Circuit's Reliance on *Pullman* Abstention is Not Warranted.

A. The Issue of *Pullman* Abstention verses Question Certification is Moot and the Relief Articulated in Petitioner's Supplemental Brief is Barred by the Eleventh Amendment.

Because the legislature has now amended Section 23-15-782(2) to cure the exact constitutional defect alleged to exist by petitioner, both the underlying cause of action and the more specific question regarding *Pullman* abstention is moot. Further, in light of the amendment, there exists no alleged on-going violation of federal law so that the newly fabricated relief set forth in petitioner's supplemental brief is barred by the Eleventh Amendment.

Although the complaint sought relief with respect to the 2008 presidential election, petitioner persuaded the Fifth Circuit that the complaint was not moot because the 5:00 p.m. deadline will be enforced again in September 2012. Petitioner's argument became that the Secretary will close his office at 5:00 p.m. on the sixtieth day before the November 2012 election, and because such a 5:00 p.m. deadline is not explicitly set forth in Section 23-15-785(2), the Secretary would again be usurping the Mississippi legislature's authority under Art. II, § 1, cl. 2 to direct the manner of appointment of presidential electors. *See* Pet. 6. Petitioner's constitutional challenge rests solely on the alleged lack of legislative authorization. As the district court memorialized, "Plaintiffs conceded at oral argument that closing at 5:00 p.m., 6:00 p.m., or midnight would all be constitutional under the

Fourteenth Amendment. Thus, Plaintiffs' argument is that the Secretary's alleged violation of Section 23-15-785(2) is the sole basis for the constitutional claim." Opp. App. 8b.

The legislature's 2010 amendment to Section 23-15-785(2) explicitly requiring presidential petitions to be filed by 5:00 p.m. on the sixtieth day before the general election renders petitioner's complaint for prospective relief moot. In light of the amendment, there can be no dispute that the Secretary's closure of his office at 5:00 p.m. in September 2012 will be consistent with the legislature's direction for the manner of appointment of presidential electors. There is no effectual relief available to petitioner regarding the 5:00 p.m. deadline. Without a live controversy to review, certiorari on the question of *Pullman* abstention should be denied. *See, e.g.*, *Church of Scientology of California v. U.S.*, 506 U.S. 9, 12 (1992) ("if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed" as moot (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

Thirty days after the amendment to Section 23-15-785(2) was signed into law, and on the last business day before the respondent's opposition was due, petitioner filed a supplemental brief belatedly addressing this clearly fatal development. Petitioner contends that this matter is not moot based on the "voluntary cessation" line of cases. Supp. Pet. 2 (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982)). In *City of Mesquite*, plaintiffs filed a federal court constitutional challenge to an ordinance governing amusement establishments. *Id.* at 288.

During the litigation, the city repealed the challenged ordinance and sought to dismiss the case as moot. *Id.* This Court found the matter was not moot because the city could simply reenact "precisely the same provision" once the federal challenge was dismissed. *Id.* at 289. The possibility that the defendant would await the dismissal of the complaint and then resume the same allegedly unconstitutional conduct was a sufficient reason to find the action not to be moot. *Id.* at 289 n.10. But, this Court did recognize that a voluntary cessation will moot a claim if "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* The Mississippi legislature's amendment mandating a 5:00 p.m. deadline makes it absolutely clear that the allegedly wrongful behavior of an "unauthorized" 5:00 p.m. deadline could not reasonably be expected to recur.

Nonetheless, petitioner purposefully confuses a voluntary cessation of challenged conduct with a change in the statute to remedy the alleged constitutional defect. The former may not moot a case, the latter undoubtably will. The Secretary has not voluntarily ceased closing his office at 5:00 p.m. in order to moot the challenge. Instead, the legislature has now amended state law to unquestionably authorize the Secretary to enforce a 5:00 p.m. deadline. In each of the four voluntary cessation cases cited by petitioner, the defendant abandoned or altered the challenged behavior. None of those cases addressed mootness when the alleged constitutional defect is remedied by legislative changes to the governing statute. In this matter, the amendment, without question, remedied the specific and only alleged constitutional defect challenged by the

petitioner: That the Secretary lacked legislative authorization under Section 23-15-785(2) to close at 5:00 p.m. Opp. App. 8b. Although petitioner appeals to the rationale of *City of Mesquite*, he offers no explanation of how an "unauthorized" 5:00 p.m. deadline may reoccur in 2012 in light of the legislature's explicit authorization of such a deadline.

The controlling precedents here are the numerous cases holding that when the challenged law is revised so as to cure the alleged defect, there remains no live controversy to adjudicate under Article III. *See Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) ("substantia[l] amend[ment]" of challenged regulation mooted controversy over its validity); *Kremens v. Bartley*, 431 U.S. 119, 128-130 (1977) (challenge to law permitting parents to commit juveniles under 18 to mental hospital mooted, with respect to those over 13, by new legislation permitting such commitment only of juveniles 13 and under); *Board of Pub. Util. Comm'rs v. Compañia General De Tabacos De Filipinas*, 249 U.S. 425, 426 (1919) (challenge to statute alleged to constitute unlawful delegation of legislative power to regulatory board dismissed after statutory amendment detailed board's responsibilities); *see also Department of Treasury v. Galioto*, 477 U.S. 556, 559-560 (1986) (equal protection challenge to federal firearms statute treating certain felons more favorably than former mental patients moot after Congress amended statute to eliminate discrimination). With respect to mootness and statutory amendments, this Court has instructed that it will review the "statute as it now stands, not as it once did." *Hall v. Beals*, 396 U.S. 45, 48 (1969). Because the statute, as amended, clearly authorizes the Secretary's 5:00 p.m. deadline, "the case has

therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *See id.*

Petitioner's final supplemental argument asserts that "even if the statutory change were to moot Petitioner's challenge to the Secretary's 5:00 p.m. deadline," petitioner is entitled to a generalized declaratory judgment that "the Secretary does not have authority under Article II . . . to regulate presidential elections." Supp. Pet. 3. Although petitioner asserts that this "procedural feature" of his case is unrelated to the 5:00 p.m. deadline, petitioner did not identify *any* act of the Secretary other than closing at the 5:00 p.m. as the basis for his federal constitutional claim. *See* Opp. App. 8b. Petitioner asserts that the amendment to Section 23-15-785(2) "does not address the Secretary's authority" to adopt future, yet unknown, deadlines that might run afoul of Article II of the constitution so that petitioner is entitled to a general judgment declaring that the Secretary does not have authority to "regulate presidential elections." Supp. Pet. 4. The most obvious flaw in this argument, of which there are many, is that the Eleventh Amendment prohibits all relief against state officials based solely on past acts and prohibits all prospective relief unless there exists an on-going violation of federal law. *See Edelman v. Jordan*, 415 U.S. 651, 668 (1974); *Green v. Mansour*, 474 U.S. 64, 68-69 (1985). It is critical that, in light of the amendment, petitioner cannot alleged an on-going violation of federal law. The Eleventh Amendment prohibits relief premised on a past violation of federal law and petitioner cannot perform an "end run" around this clear prohibition by seeking "notice relief" or other

forms of relief seeking to "deter[]" possible future misconduct or to instruct state officials on federal law. *See Green*, 474 U.S. at 68-69, 73.

Finally, even if the entire suit is not moot, the question of whether *Pullman* abstention or certification was appropriate is unquestionably moot. The clarification to Section 23-15-785(2) makes state law unmistakably clear so that neither *Pullman* abstention nor certification is now appropriate. Both certification and *Pullman* abstention require the existence of an "uncertain question of state law," such as an ambiguous statute. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984) (noting *Pullman* abstention is limited to uncertain questions of state law); *City of Houston, Tex. v. Hill*, 482 U.S. 451, 470 (1987) (declining to certify question when statute was not ambiguous). The amendment to Section 23-15-785(2) removes any doubt as to the deadline by which presidential qualifying petitions must be filed so that neither *Pullman* abstention nor certification is appropriate. At this point, review of the Fifth Circuit's decision regarding *Pullman* abstention would be an advisory opinion.

B. If Not Moot, the Fifth Circuit's Abstention Under *Pullman* was a Factually Dependent Decision Unsuitable for Review.

The traditional concerns regarding *Pullman* abstention are absent from this unique litigation. This Court has noted a concern that *Pullman* may "entail[] a full round of litigation in the state court system before any resumption of proceedings in federal court." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997). In this matter, such would not be the case.

Petitioner's federal claim is premised on the Secretary's alleged violation of state statutory law by closing at 5:00 p.m. Pet. 6. Thus, if the petitioner prevailed in state court on his allegation that the Secretary acted in violation of state law, the state court would grant him complete relief by directing the Secretary to act in conformity with state law. Indeed, an order requiring compliance with state law is not available in federal court. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.") As a practical matter, there would be no reason to return to federal court as the federal court could grant no additional relief. Moreover, because any future alleged injury to petitioner would not occur until the next presidential qualifying deadline in September 2012, there was ample time for the state court to resolve this matter of state law. The federal litigation itself was in a nascent stage, having not progressed beyond the filing of an answer and a denial of the preliminary injunction motion. *Pullman* abstention fit the unique context of this litigation and the Fifth Circuit's invocation of Pullman abstention was a fact-bound application of a legal standard generally considered inappropriate for review by this Court. *See, e.g., Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320-21 (1994); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 34 (1993).

Conclusion

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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