No. 17-156

In The

Supreme Court of the United States

HONORABLE MARK MARTIN,
IN HIS OFFICIAL CAPACITY AS SECRETARY OF
STATE FOR THE STATE OF ARKANSAS,

Petitioner,

v.

MARK MOORE,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

JAMES C. LINGER*
1710 South Boston Avenue
Tulsa, OK 74119-4810
(918) 585-2797
bostonbarristers@tulsacoxmail.com

Counsel for Respondent

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

The Respondent, Mark Moore, who was a party to the proceedings below, by and through his counsel, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at *Moore v. Martin*, 854 F.3d 1021 (8th Cir. 2017).

STATEMENT OF THE CASE

Because Petitioner offers no compelling reason for this Court to exercise its discretionary power to grant a writ of certiorari, as required by Supreme Court Rule 10, and because the Court of Appeals correctly applied existing law to the unique fact situation and election laws herein, Petitioner's request for a writ of certiorari should be denied.

Factual Background

This case involves a ballot access lawsuit challenging the requirements in Arkansas for an Independent candidate for partisan elective office which require a petition filing deadline of March 1 of the election year. Respondent Mark Moore, while he did not successfully comply with the petition signature deadline of March 3, 2014, for Independent candidates for Lieutenant

Governor of Arkansas in 2014, had successfully complied with the previously existing later deadline of May 1 for Independent candidates in 2012, when he was an Independent candidate for the Arkansas State Legislature. However, in 2014 in Arkansas, no Independent candidate at all successfully petitioned for ballot access for a statewide office, unlike in previous years when the deadline was May 1 or May 29. Further, and more significantly, it is Respondent Moore's intention to be an Independent candidate for Lieutenant Governor of Arkansas in the General Election to be held in November of 2018 (a fact noted by both the District Court and the Court of Appeals). The current deadline to file petitions for an Independent candidacy for Lieutenant Governor in Arkansas in 2018 is March 1, 2018. Therefore, because the Respondent Moore had also challenged the Independent petition deadline as to future elections in Arkansas, neither the District Court nor the Court of Appeals had a problem as to standing, mootness, or ripeness.

While there have been a number of federal court decisions in Arkansas which have declared early petition deadlines for Independent candidates unconstitutional, the Arkansas Legislature, after easing the petition deadline requirements, has a few years later, restored the old, invalid deadlines. After earlier deadlines were declared invalid by federal courts in Arkansas in 1975, 1976, and 1988, the Arkansas Legislature in 2013 moved the Independent deadline for the filing of petitions for Independent candidates to a date that had previously been struck down.

Since the election laws in Arkansas were changed in 2013 to move the petitioning deadline for Independent candidates in partisan elections from May 1 to March 1 of the election year, there were no statewide Independent candidates that qualified for a partisan election for 2014, and only one legislative Independent candidate and one county judge Independent candidate to successfully petition for the 2014 General Election – even though the certification of names to the General Election ballot was not done until August 21, 2014, and the delivery of electronic ballots to military voters did not begin until September 19, 2014.

While the 2014 election in Arkansas is now past, Respondent Moore – as both a voter in Arkansas and as a potential future Independent election candidate for Lieutenant Governor in 2018 – can still seek declaratory and injunctive relief as to the election laws complained of herein and their impact on future Arkansas General Elections as to Independent candidates and the right of Arkansas voters to cast their vote effectively. In fact, the District Court below held that Respondent Moore's case was not moot, had standing, and was ripe for decision (Order of District Court of August 25, 2015, Pet. App. 27-30).

Proceedings Below

Respondent Moore, along with two other Plaintiffs, filed suit against the Secretary of State on February 6, 2014, seeking a judgment enjoining and declaring provisions of the Arkansas Election Code,

Ark. Code Ann., §§ 7-7-101, 7-7-103 and 7-7-203(c)(1), unconstitutional because it sets a petition deadline for Independent candidates for partisan office for the 2014 General Election and future General Elections in Arkansas too far removed from the preferential primary, primary runoff, and general elections in Arkansas, and is not necessary to serve any compelling state interest in violation of Respondent's rights under the First and Fourteenth Amendments to the United States Constitution and Title 42, United States Code, § 1983, in that the aforesaid statutes are not framed in the least restrictive manner necessary to achieve legitimate state interests in regulating ballot access. However, Respondent Moore did not file for preliminary injunctive relief to have his name placed on the Arkansas ballot as an Independent candidate for Lieutenant Governor in 2014. Thereafter, Petitioner Secretary of State filed his Answer on August 14, 2014.

After the November 2014 general election in Arkansas, the Petitioner Secretary of State and the Respondent Moore both filed motions for summary judgment with exhibits supported by statements of material facts which they contended there is no genuine dispute to be tried, along with briefs in support. After the parties also filed response briefs in support of their motions for summary judgment and in opposition to the other parties' motions for summary judgment, the parties subsequently filed on May 12, 2015, a Joint Stipulation of Partial Dismissal as to the Plaintiff William Chris Johnson only.

After hearing oral argument on July 27, 2015, and upon review of the record, the District Court filed an Order granting Petitioner's Motion for Summary Judgment, denying Respondent's Motion for Summary Judgment, and filed a Judgment in favor of the Petitioner on August 25, 2015. The District Court found that the petition deadline for Independent candidates of March 1 (several months before the political parties in Arkansas have their primary and runoff elections, and well before the general election ballots have to be printed) was necessary to meet a legitimate State interest because of the administrative costs and the time needed to verify Independent petition signatures as compared to the increasing number of petitions filed by judges for ballot access. (Pet. App. 36-37). After Respondent Moore and Plaintiff Michael Harrod filed a Motion to Reconsider and Alter or Amend Order and Judgment on September 22, 2015, along with a Brief in Support, and the Petitioner filed on October 2, 2015, a Response to the Motion to Reconsider and Alter or Amend Order and Judgment, the District Court filed an Order denying the Motion to Reconsider and Alter or Amend Judgment on October 7, 2015. The Respondent Mark Moore filed his Notice of Appeal on November 6, 2015.

On appeal, the United States Court of Appeals for the Eighth Circuit on April 26, 2017, in a two-to-one decision found that the District Court should not have granted Petitioner's Motion for Summary Judgment, there were disputed facts, and that the case should be remanded back to the District Court for further

proceedings and findings of fact. Additionally, the Eighth Circuit concluded in its two-to-one decision that the District Court had correctly denied Respondent's Motion for Summary Judgment and that Respondent's Motion for New Trial was moot. *Moore v. Martin*, 854 F.3d 1021 (8th Cir. 2017), Pet. App. 1-18. However, the Chief Judge of the Eighth Circuit in dissent, while he agreed that Petitioner's Motion for Summary Judgment should not have been granted, believed that the District Court should have granted Respondent's Motion for Summary Judgment and that there was no need to remand the case back to the District Court. *Moore v. Martin, Id.*, Pet. App. 15-18.

Petitioner timely filed a Petition for Writ of Certiorari in this Court.

REASONS FOR DENYING THE PETITION

I. The Court Should Not Grant Certiorari Based on a Party's Incorrect Assertion that the Court of Appeals Committed Error based on Petitioner's Incorrect Assertion that there is a conflict between the Eighth Circuit's decision and the decision of other Circuits and this Court. Ballot access cases, by their very nature, will tend to turn upon a balancing of unique facts and circumstances presented by the particular combination of restrictions embodied in the relevant state statutes. This makes such cases peculiarly inappropriate for review on Petition for Writ of Certiorari, especially when the Circuit Court of Appeals has conducted the requisite balancing and has decided that the case needs to be remanded to the District Court for further fact finding.

It has been the consistent policy of this Court to decline to grant petitions for writs of certiorari in cases which tend to be resolvable more upon their own peculiar facts than upon an application of principles of law. See, e.g., *Southern Power Co. v. North Caroline Public Service Co*., 263 U.S. 508, 509 (1924); *United States v. Johnston*, 268 U.S. 220, 227 (1925). Yet it may be that there is no field of constitutional doctrine where cases are more likely to turn upon their own peculiar facts and circumstances than the field of ballot access law. This was expressly recognized by Justice White's

opinion in the case of *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The Justices of this Court have repeatedly stressed that this Court's certiorari jurisdiction is not merely a mechanism for the correction of perceived errors by the lower federal courts. "[A]s Rule 17.1 of the rules of this Court makes plain, our certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring). "[C]ertiorari does not provide . . . 'a normal appellate channel in any sense comparable to the writ of error,' for the Court must limit its jurisdiction to questions that have significance beyond the immediate case." *Adams v. Illinois*, 405 U.S. 278, 287 n.4 (1972) (Douglas, J., dissenting), quoting *Fay v. Noria*, 372 U.S. 391 (1963). "This Court's certiorari jurisdiction should not be exercised simply 'for the benefit of the particular litigants,' . . . but instead for the 'settlement of [issues] of importance to the public as distinguished from . . . the parties.'" *Sullivan v. Little Hunting Park*, 396 U.S. 229, 250 (1969) (Harlan, J., dissenting) (citations omitted). "[C]ertiorari jurisdiction 'is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.'" *Rogers v. Missouri P. R. Co.*, 352 U.S. 500, 531 (1957) (Frankfurter, J., dissenting), quoting *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916).

While Petitioner contends in his Petition for Writ of Certiorari that there are conflicts between the Eighth Circuit's decision below and other Circuit Courts of Appeal and this Court, the fact is that the cases cited by Petitioner are not similar as to either facts or laws with the case at bar. *Arizona Green Party v. Reagan*, 838 F.3d 983 (9th Cir. 2016); *Libertarian Party of Wash. v. Munro*, 31 F.3d 759 (9th Cir. 1994); and *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007). Petitioner obviously could not find any conflicting Court of Appeals cases wherein election laws were upheld as to Independent candidate petition deadlines which were many months before political party primary elections and runoffs and where there was no evidence in the record justifying a legitimate state interest. The majority opinion of the Eighth Circuit below remanded the case for further fact finding as to what they considered an unclear record as to what periods of time between the former May 1 deadline for Independent candidate petitions and the early July deadline for initiative petitions were available for Arkansas to process Independent candidate petitions. Also, the Eighth Circuit found that the record did not establish when Independent candidate petitions were, in fact, processed in the past, nor did the record reveal during the 2014 election cycle, after the move of the deadline from May 1 to March 1, whether Independent candidate petitions were processed between those two dates. Additionally, the Eighth Circuit found the record unclear as to the amount of time required to process Independent candidate petitions and the feasibility of

temporarily hiring additional election workers. (Pet. App. 13-14).

The majority opinion below of the Eighth Circuit was simply taking the more cautious and conservative course of giving the Petitioner a chance to prove why the March 1 deadline was necessary by remanding the case to the District Court for further proceedings as to additional fact finding and clearing up the record. Of further interest, the dissent of Chief Judge Smith of the Eighth Circuit held that the record below did not show a genuine conflict existing in the months of May and July for the processing of Independent candidate petition filings and petitions for ballot initiatives and, therefore, the Respondent was entitled to judgment because there was no evidence that the early March 1 deadline was necessary to process the Independent petitions. (Pet. App. 15-18). The foregoing majority opinion of the Eighth Circuit presents issues for additional findings of fact for the District Court to make upon remand. Because Petitioner has identified nothing about this case that warrants the exercise of this Court's certiorari jurisdiction, the Petition for Writ of Certiorari herein should be denied.

II. Petitioner has not articulated a compelling reason to justify the granting of certiorari because there is no conflict between the Eighth Circuit decision and the decisions of this Court as to Article III standing because of the Respondent's position as a former Independent candidate in Arkansas, a present Arkansas voter, and a future intended Independent candidate in Arkansas.

Before discussing further Petitioner's reasonable diligent candidate standing argument and what is wrong with it for the facts in this case, Respondent would draw this Court's attention to the fact that Petitioner in his Petition for Writ of Certiorari fails to mention that the issue of too early a deadline and/or the petition signature requirement for Independent candidates in Arkansas has been addressed to one extent or another in numerous previous cases decided by the District Court for the Eastern District of Arkansas, the Eighth Circuit on appeal, and in one case a summary affirmation by this Court. *Lendall v. Bryant*, 387 F.Supp. 397 (E.D. Ark., 1975) (hereinafter *Lendall* I); *Lendall v. Jernigan*, No. LR-76-C-184, aff'd mem., 433 U.S. 901 (1977) (hereinafter *Lendall* II); *Lendall v. Jernigan*, 424 F.Supp. 951 (E.D. Ark., 1977) (hereinafter *Lendall* III); *Rock v. Bryant*, 459 F. Supp. 64 (E.D. Ark., W.D. 1978), aff'd, 590 F.2d 340 (8th Cir. 1978)[1]; and

[1] In 1978, John Black successfully gathered 10,097 valid petition signatures of the minimum of 10,000 required in order to place his name on the Arkansas ballot in the 1978 General Election as an Independent candidate for the United States Senate.

Lendall v. McCuen, No. LR-C-88311 (E.D. Ark., W.D., Aug. 16, 1988) (hereinafter *Lendall* IV). Arkansas has previously had deadlines for Independent candidates and political party candidates declared unconstitutional which were both much more liberal and closer to the primary and general elections, as well as more restrictive, than currently exists in the election laws at issue herein. *Lendall* II; *Lendall* III; *Lendall* IV; and *Green Party of Arkansas v. Priest*, 159 F.Supp.2d 1140 (E.D. Ark. 2001). The three judge panel in *Lendall* II, as commented on in *Lendall* IV, that the "binding precedent which this Court must follow is the case of . . . *Lendall* II in which the sole issue was the deadline for filing petitions by independent candidates. In *Lendall* II, which was affirmed by the United States Supreme Court without opinion, the three-judge panel held that the first Tuesday in April was an unconstitutionally early deadline." *Lendall* IV at 5. Then, in *Lendall* III, the Chief Judge for the Eastern District of Arkansas, "who was one of the members of the three-judge panel

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After noting this, we come to the interesting information that Mr. Black began his candidacy on April 12, 1978 by purchasing a newspaper advertisement in the Arkansas Gazette. Therefore, from April 12, 1978 to the petition deadline of May 29, 1978, was a period of 48 days in which Mr. Black was able to collect approximately 16,000 signatures of which 10,097 were valid. However, in comparing the *Rock* case to the case at bar, it can be noted that Mr. Black's campaign for elective office and petitioning began approximately 42 days after March 1st. If Mr. Black had had to deal with the law in question herein he would have been out of luck because the petitioning deadline would have passed before he had even gotten started.

in *Lendall* II, again made the ruling of the Court in that case abundantly clear."

> At the time of three-judge court decision in the second proceeding (*Lendall* II), we concluded that in no event could the April deadline be justified for independent candidates. *Lendall* III, 424 F.Supp. at 954; *Lendall* IV, at 5-6.

Thus, the District Court found that a filing deadline in *Lendall* IV was also unconstitutional. Further, the District Court in *Lendall* IV, while finding that "Mr. Lendall made no attempt to comply with the January filing deadline", was convinced " . . . that this factor alone would not factually distinguish this case from the clear ruling of *Lendall* II that any filing deadline set for independent candidates before the first Tuesday in April is unconstitutional." *Lendall* IV, at 6. The unique history of this repeated litigation issue and the facts that were the basis for the prior rulings is another reason this Court should deny Petitioner's Petition for Writ of Certiorari. As this Court observed in an election controversy, the historical record of political parties' participation in elections is relevant as "[p]ast experience will be a helpful, if not always an unerring, guide." *Storer v. Brown*, 415 U.S. 724, at 742 (1974). Also to be considered is " . . . that voters be permitted to express their support for independent and new party candidates during the time of the major parties' campaigning and for some time after the selection of candidates by party primary." *McLain v. Meier*, 637 F.2d 1159, at 1164 (8th Cir. 1980).

In this Court's decision in *Anderson v. Celebrezze*, it was recognized that while only 5,000 petition signatures were required in the State of Ohio to achieve ballot access for independent candidates in statewide Ohio elections, *Anderson v. Celebrezze*, 460 U.S. 780, at 783 n.1 (1983); see also, *Anderson v. Celebrezze*, 499 F.Supp. 121 (S.D. Ohio 1980), (Ohio having a considerably larger population than Arkansas – which requires at least 10,000 petition signatures for independent candidates in statewide elections in Arkansas), this did not make a March 20 deadline in the election year in Ohio constitutional simply because of the low number of petition signatures required. *Anderson v. Celebrezze*, 460 U.S., at 786-794.

> Neither the administrative justification nor the benefit of an early filing deadline is applicable to an independent candidate. Ohio does not suggest that the March deadline is necessary to allow petition signatures to be counted and verified or to permit November general election ballots to be printed. In addition, the early deadline does not correspond to a potential benefit for the independent, as it does for the party candidate. After filing his statement of candidacy, the independent does not participate in a structured intraparty contest to determine who will receive organizational support; he must develop support by other means. In short, "equal treatment" of partisan and independent candidates simply is not achieved by imposing the March filing deadline on both. As we have written, "[s]ometimes the grossest discrimination can lie in treating

> things that are different as though they were exactly alike. *Anderson v. Celebrezze*, 460 U.S., at 800-801, quoting *Jenness v. Fortsen*, 403 U.S. 431, 442 (1971).

However, the Petitioner Secretary of State did suggest that the March 1 deadline for Independent candidate petitions was necessary to allow petition signatures to be counted and verified. The trouble was two Judges of the Eighth Circuit were highly skeptical of this assertion, noted that the record was unclear and did not support Petitioner's assertion, and remanded the case to the District Court for further findings on that issue (Pet. App. 6-15), while the Chief Judge of the Eighth Circuit in dissent thought that the Petitioner Secretary of State on the record did not show necessity for the March 1 deadline for Independent candidates because the validating of initiative petitions would not begin until after a couple of months were left to verify Independent candidate petitions if the deadline had been at the old date of May 1, and, therefore, summary judgment should actually have been entered in favor of Respondent Moore. (Pet. App. 15-18).

While Petitioner incorrectly asserts that the Eighth Circuit's opinion below is in conflict with other Circuits, in fact, the Eighth Circuit's opinion is in line with other Circuit Courts of Appeal and District Courts. Courts have recognized that ballot access requirements impose a tremendous burden on individuals that seek to field candidates for election, but may have fewer resources than the two major parties. *Wood v. Meadows*, 207 F.3d 708, 711 (4th Cir. 2000) (which

noted that "courts have subjected to searching scrutiny state laws requiring both party primary candidates and independent candidates to announce their candidacies by the same March deadline, well prior to the primary elections"); and *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 881 (3rd Cir. 1997) (which found that an early spring filing deadline of April 10, even with an extremely low signature requirement, unconstitutionally burdened First Amendment rights of minor political parties and their supporters); also see *Stoddard v. Quinn*, 593 F.Supp. 300, 302, 304, 306 (D. Maine 1984) (which found that administrative necessity did not require an early deadline of April 1 for independent candidates for statewide office, with 4,000 petition signatures required to be collected in the months of January, February, and March – "at a time of year when election issues are undefined and the voters are apathetic.").

As to Petitioner's argument on standing and the reasonable diligent candidate argument, it should be noted that in Arkansas between 1978 (when the Independent petition deadline was May 29), 2012 (when the Independent petition deadline was May 1), or 2014 and 2018 (when the Independent petition deadline was Monday, March 3, 2014, or March 1 for 2018), there is some evidence of the effect of different deadlines for Independent candidates' petitions. While, as noted in footnote 1 hereinabove, a Mr. Black was able to comply with a May 29th deadline in 1978, and a couple of Independent candidates were able to comply with a May

1 deadline in 2012, there were no Independent candidates for statewide office in Arkansas who were successful in 2014 in meeting the March 3, 2014 deadline. "Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." *Rock v. Bryant*, *Id*., quoting *Storer v. Brown*, 415 U.S. 724, 742 (1974). "Sufficient time must be set aside after filing to verify the signatures that appear on the petitions as well as to resolve any disputes that may have arisen and to review contested petitions." *Rock v. Bryant*, 459 F.Supp at 73. Nothing in the record below would indicate that a deadline in May for Independent candidates would have interfered with the foregoing State interest, particularly considering that Independent candidates do not appear on a preferential primary or primary runoff ballot, but only on the general election ballot in November.

Petitioner's reasonable diligent candidate standing argument is a red herring because no statewide Independent candidate succeeded in getting on the Arkansas ballot in 2014 and because Respondent did not seek to have his name placed on the Arkansas ballot in 2014. There was an Independent candidate in Arkansas in 2014 who successfully petitioned to get on the ballot for a legislative office (viz., George Pritchett). However, not only was Mr. Pritchett a candidate for the State Senate in a small district rather than a statewide office, but the number of signatures which were required of him was only 852 rather than the

10,000 minimum for a statewide office. Such a limited success rate in 2014 – including a county judge independent candidate for a small county whose petition signatures Petitioner doesn't verify – hardly speaks well of the regularity of Independent candidates obtaining ballot access in Arkansas with a March 1 or March 3 deadline when compared to statewide success for petitioning by Independent candidates with much later deadlines of May 1 in 2012 and May 29 in 1978. As held below, Respondent Moore's standing – as well as the ripeness and non-mootness of the case – is based on him being an Arkansas voter, a former Independent candidate, and a potential future Independent candidate for a statewide elective office (Pet. App. 27-30).

Because Arkansas cannot finalize its ballots until after the political party preferential primary and run-off primary elections in May and June, there is no meaningful justification for requiring independents to qualify by the petition deadline in early March. The foregoing arguments and cases would indicate that the laws in question herein are unconstitutional under the *Anderson v. Celebrezze* test. "It is clear that the Supreme Court has consistently required a showing of necessity for significant burdens on ballot access." *Anderson v. Celebrezze*, 460 U.S. at 789; and *Storer v Brown*, 415 U.S. at 743. The final part of the *Anderson* test is that the Court must consider the extent to which legitimate state interests make it necessary to burden the rights of the Respondent. *Anderson v. Celebrezze, Id*.

While the District Court noted that Arkansas had to check initiative petitions with a deadline in July, along with judicial petitions which are certified in February and any independent petitions for partisan office (which were two non-statewide candidates in 2014 with a March 3 deadline and seven in the previous general election with a May 1 deadline), said justification for an earlier deadline – as skeptically commented on by the Eighth Circuit majority opinion (Pet. App. 6-15), and more fully refuted in the dissent by Eighth Circuit Chief Judge Smith (Pet. App. 15-18) – is not likely to be shown to be valid on remand to the District Court because it amounts to the State checking a number of petitions at other times which are not in conflict and during the same time period as for Independent candidate petitions. Despite this, the Eighth Circuit majority took the more conservative course of remanding the case to the District Court for more fact finding. Also, as this Court has said, " . . . the possibility of future increases in the cost of administering the election system is not a sufficient basis for infringing [Respondent's] First Amendment rights." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 at 218 (1986). It was for this reason that the Eighth Circuit also remanded the case to the District Court to clear up and determine the amount of time required to process independent candidate petitions and the feasibility of temporarily hiring additional election workers if necessary (Pet. App. 14).

CONCLUSION

The decision below does not conflict with a decision of this Court or any Court of Appeals, particularly since the Eighth Circuit remanded the case back to the District Court for further determination of disputed and unclear facts. Disputed findings of fact rather than determinations of law do not call for this Court to grant certiorari. Further, both the District Court and the Court of Appeals found that the Respondent's case was not moot, Respondent had standing, and that the case was ripe for review because the Respondent was both an Arkansas voter and intended to be a future Independent candidate.

Because Petitioner offers no compelling reason for this Court to exercise its discretionary power to grant a Writ of Certiorari, as required by Supreme Court Rule 10, because under the facts in this case there is no conflict between Circuit Courts of Appeals and their decisions, and because the Court of Appeals correctly applied existing law to the unique facts of the case, Petitioners' request for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES C. LINGER*
1710 South Boston Avenue
Tulsa, OK 74119-4810
(918) 585-2797
bostonbarristers@tulsacoxmail.com
Counsel for Respondent

**Counsel of Record*