

No. 20-2309

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DAN WHITFIELD,
Plaintiff-Appellant,

and GARY FULTS,
Plaintiff,

v.

JOHN THURSTON,
in his official capacity as Arkansas Secretary of State,
Defendant-Appellee.

On Appeal from the United States District Court for the
Eastern District of Arkansas
No. 4:20-CV-00466-KGB (Hon. Kristine G. Baker)

Appellee's Supplemental Brief Regarding Mootness

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INTRODUCTION

Dan Whitfield was a would-be independent candidate for the United States Senate who failed to meet the requirements to obtain ballot access for the November, 2020 election. He claimed that the COVID-19 pandemic rendered Arkansas’s ballot-access laws severely burdensome and therefore unconstitutional. The district court disagreed, and after a bench trial, it entered a final judgment in Defendant-Appellee’s favor. After Whitfield belatedly and unsuccessfully sought expedition of his appeal, the election came and went. Months later, the Court is poised to hold oral argument.

But whatever Whitfield might wrongly believe about the merits of his arguments, this Court cannot change the outcome of an election that already occurred. The only remedy Whitfield sought—inclusion on the 2020 ballot—is no longer possible. Whitfield’s case is moot, and his appeal should be dismissed. Indeed, that result is so plainly obvious that this Court can, and should, resolve this case by submission without oral argument.

ARGUMENT

Before considering the merits of Whitfield’s case, this Court must determine whether he “presents a live Article III case or controversy.” *Miller v. Thurston*, 967 F.3d 727, 733-34 (8th Cir. 2020). “The mootness doctrine ‘has its origins in the article III case or controversy requirement’ and also serves ‘as a check against

the unnecessary use of judicial resources and against the creation of unnecessary precedent.” *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021) (quoting *Olin Water Servs. v. Midland Research Laboratories, Inc.*, 774 F.2d 303, 305 & n.2 (8th Cir. 1985)) (alterations omitted). “Mootness occurs when the parties lack a legally cognizable interest in the outcome.” *Id.* (quoting *Olin Water Servs.*, 774 F.2d at 305 & n.2) (internal quotation marks omitted).

Whitfield claims that the effects of the COVID-19 pandemic rendered Arkansas’s ballot-access laws unconstitutional as applied to the November, 2020 election. *See, e.g.*, Appellant’s Br. at 1-3 (statement of issues). Though Whitfield may have alluded in his pleadings to the challenged laws being generally unconstitutional, his only serious arguments on appeal center on the pandemic and its effects on ballot access. *See, e.g., id.* at 16 (“The COVID-19 pandemic and its effects on petitioning transformed the burden on Plaintiff to a severe burden”). The 2020 election is the only election (1) in which Whitfield has pleaded that he seeks to participate as an independent candidate; and (2) which will conceivably be impacted by the COVID-19 pandemic. It is thus the only relevant election for purposes of this appeal.

Unfortunately for Whitfield, the 2020 election is over. Because he failed to comply with Arkansas’s ballot-access laws, Whitfield was not listed on the ballot as a candidate for the United States Senate. That race was won by Tom Cotton,

who was re-elected and seated as a United States Senator for the State of Arkansas.¹ Nothing can change those facts. All that remains at this point in the case is Whitfield's argument that he *should have* been placed on the November, 2020 ballot. But even if he were correct (and he isn't), there is no relief which this Court can grant that could make it so. That Whitfield's claimed injury—his exclusion from the November, 2020 ballot—cannot be redressed by this Court renders the case moot.

In an opinion by Judge Easterbrook, the Seventh Circuit recently held in a remarkably similar case that the lack of an available post-election remedy mooted a putative candidate's appeal. *Krislov v. Yarbrough*, — F.3d —, 2021 WL 672106, at *2 (7th Cir. Feb. 22, 2021). Like Whitfield, the plaintiff in *Krislov* fell short of the number of signatures required to obtain ballot access for the 2020 election. *Id.* at *1. And “[b]y the time the case had been briefed and argued” on appeal, “the election was over.” *Id.* Like Whitfield, the plaintiff sought injunctive relief that could no longer be granted after the election, meaning no live controversy existed. *Id.* at *2.

¹ See <https://www.sos.arkansas.gov/elections/research/election-results>.

Recognizing that his case would become moot, Whitfield’s reply brief suggested, as an afterthought, that his claim regarding the COVID-19 pandemic’s effects on the November, 2020 election are “capable of repetition, yet evading review.” Reply Br. at 19. Yet he does not argue that he will ever run as an independent candidate for statewide office in Arkansas again,² nor does he seriously argue that the circumstances of the COVID-19 pandemic are likely to be repeated in the future. Indeed, he makes only a passing reference to “future pandemics and bad weather” as possible events which may impact signature petition drives in Arkansas in other elections. *Id.* at 20.

The remote possibility that another pandemic may affect signature petition drives in a future election—to say nothing of the chances that Whitfield would happen to be an independent candidate for statewide office in that election—does not save Whitfield’s claims from mootness. Indeed, the Seventh Circuit rejected the very same argument in *Krislov*, where the plaintiff claimed that a future election could give rise to the same circumstances he complained of (an untenable margin of error by signature-counting officials leading to his erroneous exclusion from

² Indeed, Whitfield claims on his social media profiles and campaign website that he intends to run as a *partisan* candidate for U.S. Senate in 2022, not as an independent. See <https://twitter.com/DanWhitCongress> (Twitter tagline reading “Democratic candidate for the United States Senate 2022”); <https://danwhitcongress.us/meet-dan> (“I am a Democratic candidate running for office in Arkansas.”).

the ballot). But the court held that chance was far too remote to present a live controversy. 2021 WL 672106, at *2. Similarly, Whitfield’s strained argument that a future pandemic or bad weather might reoccur in an election in which he is a candidate cannot save his claim from mootness.

Finally, even assuming that the issues Whitfield raises could repeat themselves in the future, he has no argument that they would evade judicial review. Indeed, Whitfield’s case was tried to a final judgment in the district court well in advance of the November 2020 election. *Cf. id.* (“Contests to the number of signatures raised to get on the ballot are routinely resolved before ballots are printed.”). And to the extent that Whitfield was unable to obtain appellate review of that judgment, it is only because of his own delay in pursuing his appeal. *See Appellee’s Resp. to Mot. for Expedited App.*, Doc. #4935302 at 9 (describing Whitfield’s nearly *two-week* delay in seeking expedition of his appeal). There is no reason that the claim Whitfield brought would evade review in the future if pursued by a plaintiff with appropriate zeal.

CONCLUSION

For these reasons, the Court should submit this case without argument and dismiss it as moot.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the Court's February 23, 2021, order limiting supplemental briefing to ten pages.

I also certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in 14-point Times New Roman font, using Microsoft Word.

I further certify that this PDF file was scanned for viruses, and no viruses were found on the file.

/s/ Dylan L. Jacobs

Dylan L. Jacobs

CERTIFICATE OF SERVICE

I certify that on March 1, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ Dylan L. Jacobs

Dylan L. Jacobs