No. 20-2309

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DAN WHITFIELD,
Plaintiff – Appellant

GARY FULTS
Plaintiff

v.

JOHN THURSTON, in his official capacity as
Secretary of State for the State of Arkansas,
Defendant – Appellee

On Appeal from the United States District Court
For the Eastern District of Arkansas, Central Division

Honorable Kristine G. Baker, District Judge
D.C. No. 4:20-cv-00466-KGB

APPELLANT'S SUPPLEMENTAL BRIEF

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STATEMENT OF THE CASE

The Plaintiff-Appellant Dan Whitfield (hereinafter sometimes referred to as "Plaintiff Whitfield"), after filing a timely notice of appeal on June 26, 2020, filed with this Court on July 8, 2020, a motion for expedited appeal and for order granting injunction which was denied by this Court on July 23, 2020. Plaintiff Whitfield's Opening Brief had been filed with this Court on July 22, 2020, with a renewed motion for expedited appeal being filed with this Court on July 28, 2020, which was denied by this Court on July 30, 2020. The Brief of Defendant-Appellee John Thurston, in his official capacity as Secretary of State for the State of Arkansas (hereinafter sometimes referred to as "Defendant Secretary Thurston"), was filed with this Court on August 24, 2020. Thereafter, on August 25, 2020, Defendant Secretary Thurston filed a letter pursuant to Fed. R. App. P. 28(j) with the Court, to which Plaintiff Whitfield filed a responsive 28(j) letter on August 28, 2020. Plaintiff Whitfield filed his Reply Brief on September 10, 2020, and now submits his Supplemental Brief pursuant to this Court's Order of February 23, 2021, requiring supplemental briefing on the question of whether the appeal is now moot, considering that the 2020 election is over and that the appellant Whitfield does not appear to be running as an Independent candidate in the 2022 election.

ARGUMENT

A. Plaintiff Whitfield is entitled to injunctive and declaratory relief as to future enforcement of the challenged ballot access laws because the issues in this case are capable of repetition yet evading review.

The Eighth Circuit has made it clear that a voter has a right to challenge ballot access laws, even if the voter is ineligible and cannot be a candidate, because the voter has a right to cast his vote effectively and have the ability to challenge laws which restrict his ability to vote for the candidate of his choice or dilute the effect of his vote if his chosen candidate were not fairly presented to the voting public. *McLain v. Meier*, 851 F.2d 1045, 1047-1048 (8th Cir. 1988); see also, *Williams v. Rhodes*, 393 U.S. 23, 45-46, 66 (1968); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); and *Moore v. Martin*, 854 F.3d 1021, 1024-1025 (8th Cir. 2017).

While denial of the preliminary injunction below and this Court's denial of two motions for expedited appeal is problematic for Plaintiff Whitfield as far as appearing on the Arkansas ballot as an independent candidate for U.S. Senator in the now past 2020 general election, declaratory relief as to the constitutionality of the laws in question as well as permanent injunctive relief as to the enforcement of the ballot access laws at issue as to future elections is certainly something that can be addressed by this Court. After all, placement of Plaintiff Whitfield's name on the 2020 General election ballot was not the only relief requested below. The laws in question and the constitutional challenges thereto are "capable of repetition, yet

evading review." *Anderson v. Celebrezze*, 460 U.S. at 784 n.3; *Mandel v. Bradley*, 432 U.S. 173, 175 n.1 (1977); *Storer v. Brown*, 415 U.S. at 737 n.8; *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973); and *Dunn v. Blumstein*, 405 U.S. 330, 332 n.2 (1972). As the U.S. Supreme Court has noted:

> The "capable of repetition, yet evading review" doctrine, in the context of election cases, is appropriate when there are "as applied" challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held. *Storer v. Brown*, 415 U.S. at 737 n.8.

As the District Court noted below: "The standard for granting a permanent injunction is essentially the same as for a preliminary injunction, except that to obtain a permanent injunction the movant must obtain success on the merits." *Bank One, Utah v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999) (citing *Amoco Production Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 546, n.12 (1987)). (JA, vol. I, 128). The significant issue in this appeal is as to the limitation as to nonpresidential independent candidates and their supporters caused by a fixed, non-rolling 90-day petitioning period from February 1 through April 30 which results in making nonpresidential independent candidates and their supporters who are petitioning to being particularly susceptible and vulnerable to the effects of Covid-19 or a future pandemic and/or bad weather because of the fixed, non-rolling time limitation of 90 days in contrast to the effects that they would have to

deal with if they had a longer petitioning period such as the unlimited time period allowed for presidential candidates and their supporters in Arkansas to gather a mere 1,000 petition signatures that are not even due until August 1 of the election year.

In order for a court to dismiss a claim as moot, the ". . . defendant must demonstrate that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *United States v. Phosphate Export Ass'n., Inc.*, 393 U.S. 199, 203 (1968). The party claiming mootness bears the "formidable burden" of establishing that as the result of changed circumstances, the challenged law, policy, or practice cannot reasonably be expected to recur. See *Friends of the Earth, Inc. v. Laidlaw Environmental Servs., (TOC), Inc.*, 528 U.S. 167, at 190 (2000). Plaintiff Whitfield's case is not now moot based on the election being over and him not yet having made a decision about the particulars of a future candidacy at this early date. On this point, see the highly pertinent Eighth Circuit's decision in *MacBride v. Exon,* 558 F.2d 443 (8th Cir. 1977), as well as paragraphs 4 and 7 of the Complaint filed in the District Court below (JA 6-9, ¶¶ 4 and 7). The pertinent portion of paragraph 4 of Plaintiff's Complaint makes clear that the Plaintiff Whitfield supports:

> "petition drives to have independent candidates recognized for ballot access in the State of Arkansas and the right to cast [his] votes effectively for Independent candidates in Arkansas in the 2020 Arkansas General election **and future Arkansas elections**." [Emphasis added] (JA 7, ¶ 4).

Paragraph 7 of Plaintiff's Complaint states in several places that the ballot access laws challenged are as applied to the Plaintiffs for the 2020 Arkansas general election and for all subsequent general elections in the State of Arkansas, as well as seeking an injunction prohibiting the enforcement of the ballot access laws question, both temporary and permanent, "for all subsequent Arkansas general elections,"

> . . . to the extent that said statutes set an unconstitutional early, unnecessary, and vague deadline of May 1, 2020, coupled with an unnecessarily limited 90-day petitioning period, during election years for Independent candidates, along with the loss and curtailment of the overwhelming majority of petitioning time for the aforesaid 90-day petitioning period in 2020 because of the advent of the Coronavirus . . . . **particularly, the aforesaid 90-day petitioning period is specifically impacted this year, and will be susceptible to being impacted in future election years, by dangerous and deadly diseases such as Covid-19 and/or severe weather conditions**. [Emphases added] (JA 8-9, ¶ 7).

This Court's consideration of the mootness issue should take into account that it is well established that election law cases involving ballot access are different in that the controversy and issues raised therein are "capable of repetition, yet evading review" and, therefore, an exception to the usual mootness rule. Even though the 2020 election is over in Arkansas, the case is not moot because it presents an issue which is "capable of repetition yet evading review." *Van Bergen v. State of Minn.*, 59 F.3d 1541, 1547 (8th Cir. 1995). "Election issues are among those most frequently saved from mootness by [the capable of repetition yet

evading review] exception [to the mootness doctrine]." *Id.* As this Court said in the Van Bergen case:

> Van Bergen originally brought his claim to the district court prior to the gubernatorial primary in which he intended to run, but, despite expedited review in the district court, this appeal could not be brought until after the election. The issue of whether Minnesota's limitations of the use of ADADs in an election campaign context passes constitutional muster **will never be fully litigated if, at each election, the case becomes moot before appeals can be completed**. [Emphases added]. *Id.*

Since the issues involved in the case at bar are likely to occur again, the aforesaid exception to the mootness doctrine should apply to this ballot access case. Numerous ballot access cases have allowed cases to continue even after the elections are over which the candidates and their supporters were contesting. *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.3 (1983); *Mandel v. Bradley*, 432 U.S. 173, 175 n.1 (1977); *Storer v. Brown*, 415 U.S. 724, 737 n. 8 (1974); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 332 n.2 (1972); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *McLain v. Meier*, 851 F.2d 1045, 1047-1048 (8th Cir. 1988); *Pilcher v. Rains*, 853 F.2d 334, 335 n.1 (5th Cir. 1988), *aff'g.* 683 F.Supp. 1130 (W.D. Tex. 1988); *Blomquist v. Thomson*, 739 F.2d 525, 527 n.3 (10th Cir. 1984); *McLain v. Meier*, 637 F.2d 1159, 1162 n.5 (8th Cir. 1980); *McLain v. Meier*, 612 F.2d 349, 355 (8th Cir. 1979); and *MacBride v. Exon*, *Id.*

Because the election laws in question will affect candidates and voters in similar situations in future elections, this case presents a controversy "capable of repetition, yet evading review." As the Eighth Circuit has commented, regardless of the Plaintiff's ". . . candidacy in any future election, election law controversies tend not to become moot." *McLain v. Meier*, 637 F.2d at 1162 n.5. Thus, Plaintiff Whitfield has standing under Article III of the U.S. Constitution and the case has not become moot. In the context of election cases, application of the doctrine is appropriate in both "as applied" challenges as well as facial challenges. *Storer v. Brown*, 415 U.S. at 737 n.8. Further, the doctrine should be applied to election statutes when "(t)he construction of the statute, and understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." *Id.* Commonsense and past experience tell us that future fixed, non-rolling 90-day petitioning periods in Arkansas will be subject to impact and curtailment by both pandemics and bad weather. As this Court has said in a case relevant to the issues herein, while the injunctive relief granted the Plaintiff has lost its coercive effect, the declaratory judgment is still effective, and the case is not moot. *MacBride v. Exon*, 558 F.2d at 447. This is because of the usual mootness exception for election cases of an issue that is "capable of repetition, yet evading review." This is particularly true in

Arkansas where the ballot access requirements for independent candidates have on a number of occasions been declared unconstitutional, then corrected by the General Assembly, and several years later new unconstitutional ballot access requirements are put into effect, and then challenged successfully again as being unconstitutional.[1]

More importantly, the Eighth Circuit's decision in *MacBride v. Exon*, *Id.*, gives particular guidance to the specific issue which this Court has asked the parties to address in supplemental briefing. In deciding certain Nebraska election laws were unconstitutional as applied to third party and Independent Presidential candidates and their supporters, the District Court had granted specific relief in the case to the Libertarian candidate for President, Roger MacBride, and an Independent candidate for President in a companion case, Eugene McCarthy, which resulted in their names being put on the ballot. *MacBride v. Exon*, 558 F.2d at 445. After the election was over and neither candidate had won any state,

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[1] For a detailed discussion of the repeated challenges to Arkansas's ballot access requirements for independent candidates, see the discussion in the majority opinion in *Moore v. Martin*, 854 F.3d at 1026. Also note the subsequent appellate decision wherein the repeated challenges to Arkansas ballot access requirements for independent candidates was an important consideration for the majority opinion of the Eighth Circuit in declining to vacate the District Court judgment in *Moore v. Martin*, Case No. 4:14-cv-00065—JM, 2018 WL 10320761, at *2 (E.D. Ark. Jan. 31, 2018), even though the ballot access law declared unconstitutional had been repealed and amended by the Arkansas General Assembly and the case had been held to be moot on appeal. *Moore v. Thurston*, 928 F.3d 753, at 757-758 (8th Cir. 2019).

including Nebraska, as noted by the Court of Appeals, the Eighth Circuit went on to state that: "The coercive feature of the judgment has gone out of the case, but the fact that the election has taken place does not render the controversy about the constitutionality of the Nebraska statutes moot." *MacBride v. Exon*, 558 F.2d at 447 (citing *Storer v. Brown*, 415 U.S. 724, 737 n.8 and *Lendall v. Bryant*, 387 F.Supp. 397, 399 (E.D. Ark. 1975)). In conclusion, the Eighth Circuit used wording commenting on the District Court's decision which could be specifically applied at this time in the instant case.

> As we view it, the judgment of the district court now stands as a declaratory judgment only. The problem presented by this case may or may not arise in 1980, but it is certain to arise in some future presidential year. It is, of course, open to the Nebraska Legislature to address itself to the problem. *MacBride v. Exon*, 558 F.2d at 449-450.

The instant case is not now moot because Plaintiff Whitfield did not only request relief of the placing of his name on the Arkansas ballot for the 2020 general election, but also requested declaratory and injunctive relief as to future and subsequent Arkansas general elections.

CONCLUSION

WHEREFORE, premises considered, the Plaintiff Whitfield requests that, upon full consideration of this appeal, the Court of Appeals reverse the decision of the United States District Court for the Eastern District of Arkansas, Central Division, in the case below, declare the relief prayed for herein, declare the laws in

question herein unconstitutional, both facially and as applied for all subsequent election cycles in Arkansas, grant injunctive relief by enjoining enforcement of the laws in question as to all subsequent Arkansas election cycles, and grant such other and further relief as to which Plaintiff Whitfield may be entitled, and which this Court may deem equitable and just.

Respectfully submitted this 2nd day of March, 2021.

DAN WHITFIELD, Appellant

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 28 (a)(10), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7)(B).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN Fed. R. App. P. 32(a)(7)(B)(i) and (f), THE BRIEF CONTAINS:

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/s/ James C. Linger
James C. Linger