No. _____

In The
Supreme Court of the United States

HUGH MCINNISH AND VIRGIL H. GOODE, JR.,

Petitioners,

v.

JAMES R. BENNETT,
ALABAMA SECRETARY OF STATE,

Respondent.

On Petition For Writ Of Certiorari To The Alabama Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the states have the right and the duty under the powers given to them by the U.S. Constitution to hold elections for the Office of President of the United States, to determine and investigate the eligibility of persons who may not qualify for that office.

2. Whether determining the eligibility of a candidate for the Office of President of the United States requires the reaching of the definition of a "natural born citizen" as used in Article II of the U.S. Constitution.

3. Whether the U.S. Constitution, which requires that a candidate for the Office of President of the United States be a "natural born citizen," requires that a presidential candidate be born in the United States to U.S. citizen parents.

PARTIES TO THE PROCEEDINGS

Petitioners Virgil Goode and Hugh McInnish, and Respondent Secretary of State of Alabama, James R. Bennett appeared before the Supreme Court of Alabama.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

PETITION FOR WRIT OF CERTIORARI

Through the powers vested to the states by the U.S. Constitution to hold presidential elections, and through the powers reserved by the Tenth Amendment, the state of Alabama, as well as any of the other states in this union, have the right and the duty not only to hold and administer the elections for the Office of President of the United States, but also to investigate and determine the eligibility of those running for that office. Indeed, this is a matter of necessity given our system of government. So it is that in Alabama, as it is in other states, it is the Secretary of State's responsibility to determine the eligibility of the candidates and investigate any potential fraud that has occurred in the election process. The investigation into the eligibility of presidential candidates must necessarily be done at the state level.

The state of Alabama has a constitutional right and duty to make certain that presidential candidates are eligible to run for office. For eligibility, the state must reach a determination of whether a candidate is a "natural born citizen." For states to make that determination, this Court must, under the present circumstances where courts have failed to enforce the definition of "natural born citizen," step in to make a final determination. In a presidential context, the phrase "natural born citizen" was unmistakably written by our Founding Fathers in Article II of the U.S. Constitution to mean any person born in the United States to U.S. citizen parents. The Court has not addressed the issue of "natural born citizen" since

Minor v. Happersett, 88 U.S. 162 (1875), where this Court defined "natural born citizen" as one born in the United States with U.S. citizen parents, a term used extensively and defined in the "Law of Nations" by Emmerich de Vattel. Since *Happersett* was decided around 139 years ago, recent courts are continually violating the U.S. Constitution by redefining "natural born citizen" and by not allowing states to investigate eligibility. This Court has appellate jurisdiction under Article III, section 2, of the U.S. Constitution to hear cases, such as the present case, that involve a point of constitutional law. As such, this Court has the authority and must decide this important issue.

The present case is now before this Court on writ of certiorari from a decision by the Alabama Supreme Court affirming the dismissal of Petitioners Virgil Goode and Hugh McInnish's Petition for a Writ of Mandamus or Other Appropriate Extraordinary Relief directed at former Alabama Secretary of State Beth Chapman. Petitioners requested that the Montgomery County Circuit Court issue a writ of mandamus compelling the Secretary of State to demand that all candidates for the Office of President of the United States to present a certified copy of their bona fide birth certificate to be delivered to the Secretary of State directly from the government official in charge of the record depository in which it is stored, and to make the receipt of such a prerequisite to the candidates' names placed on the Alabama ballot for the November 6, 2012 general election, as Chief Justice Ray Moore found in his dissenting opinion. Reaching

the definition of "natural born citizen" is related to the Secretary of State's duty to review a birth certificate because a birth certificate must be produced not only to establish the candidate's citizenship, but the citizenship of the parents as well.

This petition before the Montgomery County Circuit Court also requested that the court issue a preliminary and permanent injunction preventing the placement on the 2012 Alabama ballot until their eligibility had been conclusively determined. The court denied the request and the Alabama Supreme Court affirmed the decision. Chief Justice Roy Moore of the Alabama Supreme Court dissented to the majority opinion outlining his reasoning, and this Court should respectfully look closely at his dissent. The Alabama Supreme Court's decision was reached in error.

In order for the states and their officers to perform this constitutional duty, this Court must respectfully reaffirm the definition of "natural born citizen," which the Founding Fathers intended to mean any person born in the United States to U.S. citizen parents. Accordingly, this Court must now act to prevent further harm and injustice in any future elections.

OPINION BELOW

The ruling under review is the affirmation of the Alabama Supreme Court in the case of *McInnish, et al. v. Bennett*, No. 1120465, 2014 WL 1098246.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article II, section 1 of the U.S. Constitution:

> "No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen Years a resident within the United States."

Article II, section 1, cl. 2 of the U.S. Constitution:

> "Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding

> an office of trust or profit under the United States, shall be appointed an elector."

Tenth Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Fourteenth Amendment, section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case was filed in the Montgomery County Circuit Court on October 11, 2012 and was assigned to the Honorable Eugene W. Reese. On October 12, 2012, Petitioners Goode and McInnish filed a motion for summary judgment and a motion to shorten response time to 5 days. Thereafter, on October 18, 2012, The Secretary filed her motion to dismiss, which Goode and McInnish fully opposed. On October

31, 2012, Goode and McInnish filed a motion for status conference since time was of the essence, the election was on November 6, 2012 and this case was not resolved.

Despite repeated requests to the Montgomery County Circuit Court to expedite this case and issue a ruling before the November 6, 2012 presidential election, the court refused and failed to consider Petitioners' pleadings, and thus any portion of this lawsuit, before the November 6, 2012 election. Having received no rulings from the court, on November 10, 2012 Goode and McInnish filed a Praecipe, since this lawsuit is of great importance, as Obama had "won" the election and law and equity require that this case should be decided at least before the electors vote on December 17, 2012.

On November 20, 2012, the Secretary of State filed her renewed motion to dismiss, which Goode and McInnish also opposed. A hearing was held before the Court on the Secretary of State's Motion to Dismiss on December 6, 2012. On the same day, Judge Reese, in a one-sentence order, dismissed the case with prejudice.

On January 17, 2013, Petitioners filed a timely notice of appeal to the Alabama Supreme Court. On March 21, 2014, over a year after the appeal had been filed, the Alabama Supreme Court affirmed the decision of the Circuit Court of Montgomery County.

Petitioners sought and received an extension of thirty days from Justice Clarence Thomas to file this Petition.

STATEMENT OF FACTS

On February 2, 2012 Petitioner McInnish, together with his attorney and others, visited the Office of the Alabama Secretary of State, Beth Chapman,[1] wherein the Hon. Emily Thompson, Deputy Secretary of State, speaking in the absence of and for the Secretary of State, represented that her office would not investigate the legitimacy of any candidate, thus violating her duties under the U.S. and Alabama Constitutions.

On October 11, 2012, Petitioners filed suit in the Circuit Court of Montgomery County seeking to have a writ of mandamus issued to the Alabama Secretary of State compelling her to demand from all candidates whose names had been submitted to her for inclusion on the ballot in Alabama, for the office of President of the United States, a bona fide birth certificate. Such birth certificate should have been delivered to the Secretary of State directly from the government official who was in charge of the records depository in which it was stored.

[1] Ms. Chapman resigned from the Office of Alabama Secretary of State on July 31, 2013 and was replaced by the Honorable James R. Bennett.

Joining in with the lawsuit before the Montgomery County courthouse was Virgil Goode, candidate for the Office of President of the United States as the candidate for the Constitution Party. Petitioners' actions came about because no physical, paper copy of the actual birth certificate of candidate Barack Hussein Obama had been produced in order to definitively establish Obama's birth within the United States. Instead, there is credible evidence that the "birth certificate" released by Mr. Obama on the internet was altered or otherwise fraudulent.

There was strong forensic evidence of fraud in the birth certificate released by Mr. Obama. This allegation is substantiated by the affidavits of an official source Sheriff Arpaio of Maricopa County Arizona, and by the leader of his cold case posse Michael Zullo. Sheriff Arpaio was first asked to undertake an investigation into Obama's long-form birth certificate in August of 2011 upon petition by 250 residents of Maricopa County.

Michael Zullo was the lead investigator for the Cold Case Posse and was charged with the task of determining whether the electronic document released by the White House as Mr. Obama's birth certificate was, in fact, authentic. In February 2012, the Cold Case Posse informed Sheriff Arpaio that there was likely forgery involved with the documents. Zullo concluded that "the document published on the White House website, is, at minimum, misleading to the public as it has no legal import and cannot be relied

on as a legal document verifying the date, place and circumstance of Barack Obama's birth."

Given this information from an official source, Sheriff Joseph Arpaio of Maricopa County, Arizona, the Alabama Secretary of State was under a duty to investigate the eligibility of the candidate in question.

As stated in the Alabama Attorney General's Opinion:

> The Secretary of State does not have an obligation to evaluate all of the qualifications of the nominees of political parties and independent candidates for state offices prior to certifying such nominees and candidates to the probate judges pursuant to sections 17-7-1 and 17-16-40 of the Code of Alabama. **If the Secretary of State has knowledge gained from an official source arising from the performance of duties prescribed by law, that a candidate has not met a certifying qualification [such as a candidate's failure to file a public statement of Economic Interest], the Secretary of State should not certify the candidate.**

Attorney General's Opinion No. 1998-200. Because of the information presented by Petitioners through the investigation of Sheriff Arpaio, an official source, the Alabama Secretary of State must have then instigated an investigation and if, finding that Mr. Obama did not meet the requirements of being a "natural born citizen" by presenting his birth certificate, then

the Alabama Secretary of State should not have certified the candidate.

Nevertheless, the Alabama Secretary of State stated that she would not investigate the eligibility of any of the candidates. Because of this refusal by the Alabama Secretary of State to investigate the eligibility of any of the candidates, Petitioners Virgil Goode and Hugh McInnish were forced to file suit requesting a writ of mandamus be issued compelling the Alabama Secretary of State into performing her duties.

SUMMARY OF THE ARGUMENT

This is a case about the rights and the duties of the states to determine the eligibility of a candidate running for Office of President of the United States. The U.S. Constitution empowers the states with the power to hold elections for federal offices, and this power includes the power and the duty to ensure that those running for federal office meet the stringent requirements set forth by the U.S. Constitution. In this case, wherein another candidate for President of the United States challenges the eligibility of another candidate, the states must conduct an investigation into whether the other candidate is eligible.

The U.S. Constitution requires that the President be a "natural born citizen." U.S. Constitution, Article II, section 1, cl. 5. Although the U.S. Constitution does not define "natural born citizen" within its text, it is certainly distinct from a mere "citizen."

In fact, based on historical records, including U.S. Supreme Court precedent, a "natural born citizen" is defined as one being born in the United States to U.S. citizen parents.

This Court must definitively determine the definition of "natural born citizen" because certain candidates, who would otherwise be unqualified, will unlawfully run for office and potentially win the election for presidency, as our Constitution expressly prohibits.

ARGUMENT

I. THE STATES ARE EMPOWERED WITH THE RIGHTS AND DUTIES TO CONDUCT PRESIDENTIAL ELECTIONS

A presidential election is not an exclusively federal process. In fact, electors, those chosen to ultimately select the President, were to be designated exclusively by the *state* legislatures. Article II, section 1, cl. 2. As this Court has held in *Or v. Mitchell*, 400 U.S. 112, 123 (1970), "the Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them." *Id. See also McPherson v. Blacker*, 146 U.S. 1, 35 (1892) ("The appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States"). Presidential elections are thus a cooperative and complementary

effort of both the state and federal government. In fact, the federal government did not at the time of ratification have the power to conduct an election without the cooperation of the states.

Further, in 1791, the Tenth Amendment was ratified in order to reaffirm the limited and enumerated powers of the federal government. Specifically, the Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Indeed, as the Supreme Court indicated:

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

United States v. Darby, 312 U.S. 100, 124 (1941).

Powers granted to the federal government are the limited and enumerated powers specifically granted in the Constitution. The powers "prohibited by it to the states" are those the Constitution specifically prohibited in Article I, section 10. Since the Constitution

neither exclusively grants the federal government the right to conduct investigations, nor specifically prevents the states from doing so, the right of the state to protect its borders must be one reserved for the state, as confirmed by the Tenth Amendment.

Nor are there any federal statutes that preempt a state's ability to determine the eligibility of a presidential candidate or investigate any potential fraud that has taken place. There are two federal laws cited by the states that allegedly stand for the notion that states are preempted from determining eligibility, specifically the Twentieth Amendment and 3 U.S.C. § 15. This argument is non-meritorious. The Twentieth Amendment simply states the procedure "*if* the President elect shall have failed to qualify." There is no mention about the method of qualification, only that the electors shall meet and vote by ballot. States similarly claim federal statute 3 U.S.C § 15 also preempts the states from determining eligibility. Yet this statute simply states the procedure for counting the electoral votes, and objections if improper votes are cast. *See Fitzgerald v. Green*, 134 U.S. 377, 378 (1890) ("The sole function of the presidential electors is to cast, certify, and transmit the vote of the state for president and vice-president of the nation"). *Nothing* is stated about challenging the *qualification* of a candidate.

Nor would any action by the Alabama Secretary of State interfere with presidential electors. These actions occur *before* the electors cast their votes, and are simply in place to ensure that the presidential

elector votes for an eligible candidate. It would surely be possible for a disqualified candidate to be declared ineligible, leaving the electors with the duty to vote for the remaining candidates.

Agreeing with Petitioners, Chief Justice Roy Moore found in his dissenting opinion,

> "A state law that required birth certificates from presidential candidates as a precondition to placement on the ballot would likely pass muster under federal preemption law." Such a law would not conflict with the Constitution, but would rather harmonize with the natural-born-citizen clause. New Hampshire, for example, requires an affirmation that a person is a "natural born citizen" as a condition to placing that person's name on a presidential-election ballot. N.H. Rev. Stat. Ann. § 655:47. See also *Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1201 (D. Colo. 2012), aff'd, 495 F. App'x 947 (10th Cir. 2012) (upholding a Colorado law requiring all presidential candidates to affirm that they are natural-born citizens). Although states have no power "to add qualifications to those enumerated in the Constitution," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995), they certainly are not limited in enforcing those stated therein.

Decision at pp. 58.

Further, in concluding, Chief Justice Moore found that,

> Although the removal of a President-elect or a President who has taken the oath of office is within the breast of Congress, the determination of the eligibility of the 2012 presidential candidates before the casting of the electoral votes is a state function. This matter is of great constitutional significance in regard to the highest office in our land.

Decision at p. 80.

Nor is Chief Justice Moore's opinion a novel concept. The handling of election matters by state courts is common in other state courts as well. Florida courts, for example, have the power and the duty to decide any election contest. *See State ex rel. Cherry v. Stone*, 265 So. 2d 56, 58 (Fla. Dist. Ct. App. 1st Dist. 1972); *Shevin v. Stone*, 279 So. 2d 17, 22 (Fla. 1972).

The states therefore have the right and the duty to hold elections for federal office. Implicit within those rights and duties is the requirement that a state must conform with the other provisions of the U.S. Constitution, including the "natural born citizen" requirement to hold the Office of President of the United States. There is thus no reason that states such as Alabama should be prohibited from determining the eligibility of those on their election ballots. For this reason, any argument that states cannot investigate the eligibility of a candidate is non-meritorious.

II. SECRETARY OF STATE HAD A DUTY TO DETERMINE ELIGIBILITY OF CANDIDATES

The Alabama Secretary of State has a duty to verify the eligibility of those seeking office when there is a candidate who has not met a qualification for the office he or she seeks. As stated in the Alabama Attorney General's Opinion:

> The Secretary of State does not have an obligation to evaluate all of the qualifications of the nominees of political parties and independent candidates for state offices prior to certifying such nominees and candidates to the probate judges pursuant to sections 17-7-1 and 17-16-40 of the Code of Alabama. **If the Secretary of State has knowledge gained from an official source arising from the performance of duties prescribed by law, that a candidate has not met a certifying qualification [such as a candidate's failure to file a public statement of Economic Interest], the Secretary of State should not certify the candidate.**

Attorney General's Opinion No. 1998-200 (emphasis added). The attorney general's opinion is not case precedent in the Alabama courts. *Ala. Dep't of Pub. Safety v. Barbour*, 5 So. 3d 601, 609 (Ala. Civ. App. 2008) (*citing Anderson v. Fayette County Bd. of Educ.*, 738 So. 2d 854 (Ala. 1999)). **Nevertheless, it constitutes an admission by Alabama's chief law enforcement officer on behalf of the state that if the Secretary of State has knowledge gained**

from an official source about a candidate's eligibility then she "should not" certify the candidate. The example cited "such as a candidate's failure to file a public statement of Economic Interest" is simply demonstrative of a disqualifying factor and is not an exhaustive list.

In this case, Petitioner Goode, who was also a candidate for the Office of President of the United States, had a credible reason to believe that one of his fellow candidates was not eligible to run for that same office. In addition, the Alabama Secretary of State gained knowledge from an official source, Sheriff Joseph Arpaio of Maricopa County, Arizona, that Mr. Obama's birth certificate was altered and invalid.

Nevertheless, the Alabama Secretary of State refused to perform her duties as the chief election officer of the state of Alabama. In doing so, the Alabama Secretary of State failed to uphold her oath of office which requires him or her to support the U.S. Constitution and the Constitution of the State of Alabama.

III. THIS COURT MUST RESPECTFULLY DETERMINE THE DEFINITION OF "NATURAL BORN CITIZEN" AS USED IN THE U.S. CONSTITUTION

In order for the Alabama Secretary of State to perform her duties which are required of him or her, the Secretary of State must know, once and for all, what the term "national born citizen" requires for the

eligibility of one to hold the Office of President of the United States.

As set forth below, historical evidence shows that the Founding Fathers intended a "natural born citizen" to be one who was born in the United States to U.S. citizen parents.

IV. THE INTENT OF THE FRAMERS OF THE CONSTITUTION ESTABLISH THAT "NATURAL BORN CITIZENS" ARE THOSE BORN WITHIN THE TERRITORY OF THE UNITED STATES TO TWO CITIZEN PARENTS

A. Under The Principles Of Statutory Construction, The Term "Natural Born Citizen" Must Be Defined Differently Than The Term "Citizen."

Although the Framers of the U.S. Constitution did not define "natural born citizen" within the actual text of the U.S. Constitution, and, while intending for its meaning to require that a citizen have had both of his parents born in the United States, the Court must now step in to correct recent holdings that go against this Court's definition of a "natural born citizen" as held in *Happersett*.

It is a fundamental principle of statutory interpretation that where two different and distinct terms have been used, each is to be given its own meaning. "As always, '[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority

of enactment.' . . . *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974) . . . Any argument that a federal court is empowered to exceed the limitations [of a statute] . . . without plain evidence of congressional intent to supersede those sections ignores our longstanding practice of construing statutes in pari materia." *Crawford v. Gibbons*, 482 U.S. 437, 445 (1987) (*citing United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168-169 (1976); *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 24 (1976)).

The rationale behind this rule is based on the intent of the statute's drafters. When undertaking the important task of crafting law, the drafter of a statute certainly chooses their words carefully. A drafter's goal is to create a statement of the law that is as clear and concise as possible. Thus, when an idea has been memorialized in one word or phrase, the drafter uses that one word or phrase, and it alone, to communicate the idea, since the use of two or more words or phrases would risk creating an interpretive ambiguity that would threaten to defeat purposes of the law being drafted. It is the application of this principle that gives rise to the question presently before this court.

No statutory drafters undertook their task with greater care than the Framers of the Constitution of the United States. Seeking to establish a new form of government, the Framers engaged in over four months of rigorous debate. The fact that the result of their efforts spans a mere four pages is a testament to the Framers' commitment to concisely stating the law and proof of their intention that every word be given

meaning. Thus, the requirement that the President be a "natural born citizen," a phrase used nowhere else in the Constitution, must be given a meaning distinct from the term "citizen," a word employed on its own ten times within the Constitution.

The context in which the Framers use the unique phrase "natural born citizen" further establishes their intention that it be distinguished from the term "citizen." Under Article II of the Constitution, eligibility for the Office of the President is only open to those who are "a natural born citizen, or a citizen of the United States, at the time of the Adoption of this Constitution." This two-pronged approach to satisfying the citizenship requirement for presidential eligibility clearly establishes the fact that the Framers contemplated a future citizen class, distinct from "a Citizen of the United States." A "natural born citizen" must, therefore, possess qualifications that "a citizen of the United States" was unable to attain "at the time of the Adoption of this Constitution." Thus, it is necessary to identify these qualifications in order to define "natural born citizen."

Firstly, naturalization must be eliminated as a means of attaining "natural born citizen" status because it was through naturalization that all "Citizens of the United States, at the time of the Adoption of this Constitution" became citizens, having previously been citizens of England or their various countries of origin. Therefore, it would be unnecessary to specify the two modes of acquiring citizenship. By eliminating naturalization, only two qualifications for "natural

born citizen" status can remain: birth within the territory of the United States and two United States citizen parents.

The first qualification of a "natural born citizen," birth within the territory of the United States, could not have been attained by anyone prior to the founding of our country. Since the United States was hardly more than a decade old at the time the Constitution was drafted, the only persons that would meet this qualification would have been far too young to serve as president, thus necessitating the provision for "Citizens of the United States, at the time of the Adoption of this Constitution."

The second qualification of a "natural born citizen," being born to two United States citizen parents, was similarly unattainable by anyone prior to the founding of our country. This additional requirement was necessary, however, since many British citizens remained within the territory of the United States. As explained in greater detail below, the Framers were acutely concerned about the danger of foreign influence in the Office of the President. By requiring a person to be born to two United States citizen parents, the Framers insured that hostile foreign interests would not be able to infiltrate the highest office of our fledgling country through a child born to foreign citizens on United States soil.

B. The Framers' Goals In Restricting Eligibility For The Office Of The President Require That "Natural Born Citizens" Be Born Within The Territory Of The United States To Two Citizen Parents.

At the time of the drafting of the U.S. Constitution, the United States was hardly more than a decade old. With the Revolutionary War still fresh in their minds, the Framers of the Constitution were acutely aware of the country's susceptibility to foreign influence. In this regard, the Framers were centrally concerned with the Office of the President.

On July 25, 1787, in a letter to George Washington, who had been elected to preside over the Constitutional Convention, future Chief Justice of the Supreme Court John Jay states:

> Permit me to hint, whether it would not be wise & seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Commander in chief of the American army shall not be given to, nor devolve on, any but a natural *born* Citizen.[2]

Similarly, in 1788, Federalist 68, Alexander Hamilton, who himself was born outside of the United

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[2] Available at http://wwwapp.cc.columbia.edu/ldpd/jay/image?key=columbia.jay.10627&p=1&level=1 (last viewed on June 5, 2012) (emphasis in original).

States, recognized the need for the stringent requirements for the office of President of the United States:

> Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one querter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the Union? But the convention have guarded against all danger of this sort, with the most provident and judicious attention.

Federalist 68.

The Framers of the Constitution were very concerned about the danger of foreign influence undermining American society, so much so, that John Jay wrote five Federalist Papers on the dangers of foreign influence (#2-6), and George Washington warned direly about it in his "Farewell Speech" in 1796:

> Against the insidious wiles of foreign influence (I conjure you to believe me, fellow-citizens) the jealousy of a free people ought to be constantly awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government.

In order to protect and safeguard against this foreign influence, the Founding Fathers placed within the U.S. Constitution the unique requirement that the President of the United States, the highest office in the land, be a "natural born citizen." The Framers of the U.S. Constitution intended to include this requirement in order for there to be at least a single generation of those loyal to the United States before their children were to be leaders of this nation.

The term "natural born citizen" was well established at the time the Constitution was drafted and enacted, coming from the law of nations as compiled and set forth in the historic treatise the "Law of Nations," a treatise crafted by the renowned Emmerich de Vattel, and which the Framers consulted and relied upon in crafting and enacting the Constitution.[3]

In a section titled "Of the Citizens and Natives" the "Law of Nations" spoke of the difference between citizens and "natural born citizens" as follows. "The citizens are the members of the civil society; bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. The natives, or ***natural-born citizens, are those born in the country, of parents who are citizens***." "Law of Nations," Book 1, Chapter 19, § 212 (emphasis added). Vattel went on to clarify and confirm, the

[3] Recently, in this Court's decision of *Arizona v. United States*, 567 U.S. ___ (2012), Justice Scalia made use of Vattel's "Law of Nations" in the writing of his opinion.

"country of the father is the country of the son." *Id.*

Not coincidentally, the Supreme Court in *The Venus*, 12 U.S. 253 (1814), Justice John Marshall, in a case entirely decided by the legal concepts of the law of nations, directly quotes the above definition by Vattel almost verbatim. Justice Marshall wrote:

> Vattel, who, though not very full to this point, is more explicit and more satisfactory on it than any other whose work has fallen into my hands, says "The citizens are the members of the civil society; bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. The natives or indigenes are those born in the country of parents who are citizens. Society not being able to subsist and to perpetuate itself but by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights."

The Venus, 12 U.S. 253, 289 (1814). Justice Marshall went on to explain:

> The writers upon the law of nations distinguish between a temporary residence in a foreign country for a special purpose and a residence accompanied with an intention to make it a permanent place of abode. The latter is styled by Vattel "domicile," which he defines to be, "a habitation fixed in any place, with an intention of always staying there." Such a person, says this author, becomes a

> member of the new society, at least as a permanent inhabitant, and is a kind of citizen of an inferior order from the native citizens, but is nevertheless united and subject to the society without participating in all its advantages.

Id. at 278. Thus, *The Venus* stands for the proposition that allegiance to one's country cannot be established by domicile because it is easily disintegrated when a person moves back to his native country. The Framers wanted a solid bond to one's country. Citizenship through this temporary allegiance cannot be what the Framers were looking for when requiring the future president to be a "natural born citizen," for the purpose of the prevention of foreign influence. The Framers desired and mandated that a deep abiding allegiance to the United States for the future president must be had, as this person would be the Commander in Chief of the U.S. Armed Forces. They were looking for allegiance derived from at least naturalized U.S. citizen parents, on the standing of a "Native," who had legally thrown off native allegiances and pledged sole allegiance to their new nation, not the temporary allegiance of inhabitants, simply changed by moving domicile.

The definition that a "natural born citizen" was one born in the country with two citizen parents, was the prevalent view of the time. In his landmark treatise "A Treatise on Citizenship," following the law of nations codified in Vattel's "Law of Nations," Alexander Peter Morse definitively stated and reiterated

the accepted law on "natural born citizen," **"A citizen, in the largest sense, is any native or naturalized person who is entitled to full protection in the exercise and enjoyment of the so-called private rights. The natural born, or native is one who is born in the country, of citizen parents."** Morse, Alexander Peter, *A Treatise on Citizenship* p. xi (1881). **"Under the view of the law of nations, natives, or natural born citizens, are those born in the country, of parents who are citizens."** *Id.* at § 7.

This Court has similarly made clear that "citizen" and "natural born citizen" were two distinct and separate terms. Less than a decade after the passage of the Fourteenth Amendment, the Supreme Court clarified that only **"all children born in a country of parents who were its citizens" were in turn "natural born citizens."** *Minor v. Happersett*, 88 U.S. 162, 167 (1875).

Justice Horace Gray's Supreme Court opinion in *United States v. Wong Kim Ark, merely* held that the children of domiciled resident aliens, would be" citizens" at birth, if born in America, since they would be "subject to the jurisdiction" of the United States through the jurisdiction had over their parents. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). This case merely determined that the child was a "citizen" and did not establish that he was a "natural born citizen" since that was not at issue. In fact, "natural born citizen," a requirement for president, had *nothing* to do with the case. Not surprisingly, Justice Horace

Gray reiterated the *Minor v. Happersett* definition, that "natural born citizens" are born of U.S. citizen parents, and noted that the parents at issue in the Wong Kim Ark case were not U.S. citizens. *Id.* (*citing Minor v. Happersett*, 88 U.S. 162). Justice Gray certainly was not ruling that children of domiciled resident aliens were "natural born citizens," eligible to be president.

Even more, there is clear evidence the Founding Fathers studied, utilized, and incorporated the law of nations codified in Vattel's "Law of Nations" in the crafting and enacting of the Constitution, and frequently consulted Vattel's "Law of Nations" thereoften for guidance.

In a letter from Benjamin Franklin to Charles Dumas, editor of the 1775 edition of the "Law of Nations," Franklin specifically thanks Dumas for providing him with copies of the "Law of Nations."

This Founding Father and Framer wrote:

> "I am much obliged by the kind present you have made us of your edition of Vattel. It came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the law of nations. Accordingly that copy, which I kept, (after depositing one in our own public library here, and sending the other to the College of Massachusetts Bay, as you directed,) **has been continually in the hands of the members of our Congress, now sitting, who are much pleased with your notes**

> **and preface, and have entertained a high and just esteem for their author.**"

Franklin, who was instrumental in the drafting and enacting of the Constitution, provides confirmation that those drafting the Constitution were "frequently consulting" the law of nations codified in "Law of Nations." The Framers then knew of and incorporated the definition of "natural born citizen" which was provided twice within the "Law of Nations."

Not surprisingly, a direct reference to legal incorporation of the law of nations as codified in Vattel's "Law of Nations" also appeared in the Constitution itself. In Article I, section 8, the Constitution granted enumerated powers for the legislative branch. One of these enumerated powers was "To define and punish Piracies and Felonies committed on the high seas, and **Offenses against the Law of Nations**;" U.S. Constitution, Article I, section 8, cl. 10 (emphasis added). The Framers took care in incorporating and recognizing the law of nations, and providing Congress with a means of legislating crimes committed against it.

Even after the Constitution was written, Vattel's "Law of Nations" continued to be consulted and utilized by the leaders of the United States. On October 5, 1789, President George Washington borrowed from the New York Society Library a copy of Vattel's "Law of Nations," as evidenced by his entry in the ledger. In short, the Supreme Court's decision in *Minor v. Happersett* recognized the law of nations' definition

of "natural born citizen" which was adopted by the Framers of the Constitution.

Throughout various lawsuits involving the issue of "natural born citizen," various state and federal courts have held that a "natural born citizen" is nothing more than an individual born within the United States or its territories. *See*, *e.g., Ankeny v. Governor of the State of Indiana*, 916 N.E.2d 678 (Ind. Ct. App. 2009) (holding a "natural born citizen is simply one born within the United States or its territories.); *Tisdale v. Obama*, No. 3:12-cv-00036 (E.D. Va. Jan. 20, 2012) (holding that "any child born in the U.S. is a "natural born citizen.").

Congress has also misinterpreted the "natural born citizen" requirement. A memorandum to Congress dated April 3, 2009, written by the Congressional Research Service (CRS), states:

> Considering the history of the constitutional qualifications provision, the common use and meaning of the phrase "natural-born subject" in England and in the Colonies in the 1700s, the clause's apparent intent, the subsequent action of the first Congress in enacting the Naturalization Act of 1790 (expressly defining the term "natural born citizen" to include a person born abroad to parents who are United States citizens), as well as subsequent Supreme Court dicta, it appears that the most logical inferences would indicate that the phrase "natural born Citizen" would mean a person who is entitled to U.S. citizenship "at birth" or "by birth."

> According to an April 2000 report by the CRS, most constitutional scholars interpret the natural born citizen clause as to include citizens born outside the United States to parents who are U.S. citizens. This same CRS report also asserts that citizens born in the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands, are legally defined as "natural born" citizens and are, therefore, also eligible to be elected President.[4]

With these varying definitions of the term "natural born citizen," is it clear that this Court must respectfully put to rest and set a more recent precedent that a "natural born citizen" is one born in the United States to U.S. citizens.

C. This Lawsuit Must Continue Forward Because This Harm Is Capable Of Repetition Yet Evading Review And Must Definitively Be Determined In Order To Prevent Harm

Pursuant to the holding in *Roe v. Wade*, 410 U.S. 113, 125 (1973), Petitioners' claim is not moot because the harm caused by not defining "natural born citizen" is "capable of repetition, yet evading review." In *Roe*, a case involving pregnancy rights, the respondent raised the issue of standing because the petitioner was no longer pregnant by the time her claims

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[4] Presidential Elections in the United States: A Primer. United States Congressional Research Service, April 17, 2000. Retrieved January 8, 2010.

were adjudicated. The Supreme Court held that the harms involved in cases involving pregnancy "truly could be 'capable of repetition, yet evading review'" as a result of the short amount of time pregnant respondents would in fact be pregnant. *Id*. (*citing Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)). By analogy in the present case, every contest of an election would arguably be mooted by the mere length of a trial and appeals process. Elections occur just about every year and, thus, the potential for harm exists for each and every election cycle. *See Allen v. Bennett*, 823 So. 2d 679, 682 (Alabama 2001) (finding that a case is not moot when "the outcome of [the] case could impact future elections").

Questions, that have otherwise been rendered moot, will be heard by the court when one or more of the following three exceptions apply: "(1) the case involves questions of great public importance; (2) the conduct complained of is capable of repetition yet avoiding review; or (3) a party to the controversy will suffer some detriment without the court's decision." *Coady v. Pennsylvania Board of Probation and Parole*, 804 A.2d 121, 124 (Pa. Commw. Ct. 2002).

This case falls under each of the three named exceptions and therefore is not moot because (1) the question of the protection against fraud and dishonesty regarding presidential and other elections undoubtedly involves a question of great public importance, (2) the legitimacy of candidates, where the legitimacy of at least one candidate has been determined to be in doubt, as explained, involves

complained of conduct that will undoubtedly recur, and (3) without this Court's interpretation of "natural born citizen," Petitioners will suffer a detriment in being deprived of knowing that their elections were conducted honestly, and that their candidates were legally qualified to run for office.

As such, this Court must respectfully affirm the definition of "natural born citizen" to prevent harms from occurring in future elections also. Because this situation will arise again, as it has numerous times in the past, a definition must be provided before a candidate's citizenship is questioned once again in an election. While all "natural born citizens" are citizens, not all citizens are "natural born citizens." Without express judicial guidelines, we will be unable to avoid future controversies, or worse, we may run the risk of allowing terrorists to become elected as U.S. President. Accordingly, this Court must respectfully act now.

CONCLUSION

Under the strictures of the U.S. Constitution, states were empowered and entrusted with the duty to hold elections for the Office of President of the United States. Inherent within this power to hold elections is the right and the duty to determine whether one choosing to run for the Office of President of the United States is eligible to run for that office as set forth in Article II's requirement that the President of the United States be a "natural born

citizen." Thus, this Court must definitively hold that a state has the power to investigate and determine whether a candidate for office is eligible for that office.

This Court has already defined the term "natural born citizen." It is only recently that courts throughout our country have began to sway from the intended meaning and shockingly began to determine that states do not have the power to even investigate a candidate's eligibility. Accordingly, this Court is in a position to put an end to this harm and restore the integrity of the original meaning consistent with its ruling in *Happersett*.

For the foregoing reasons, Petitioners respectfully request that this Court grant this Petition for Writ of Certiorari.

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2013-2014

1120465

Hugh McInnish and Virgil H. Goode, Jr.

v.

Jim Bennett, Alabama Secretary of State[1]

Appeal from Montgomery Circuit Court
(CV-12-1053)

(Filed Mar. 21, 2014)

PER CURIAM.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P.

Stuart, Murdock, Shaw, Main, and Wise, JJ., concur.

Bolin and Bryan, JJ., concur specially.

Moore, C.J., and Parker, J., dissent.

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[1] Beth Chapman, then Secretary of State, was the named appellee when this appeal was filed. While this appeal was pending, Ms. Chapman resigned, and Jim Bennett was appointed Secretary of State and was automatically substituted as a party. *See* Rule 43(b), Ala. R. App. P.

BOLIN, Justice (concurring specially).

I concur with this Court's no-opinion affirmance of this case. However, I write specially because I respectfully disagree with Chief Justice Moore's dissent to the extent that it concludes that the Secretary of State presently has an affirmative duty to investigate the qualifications of a candidate for President of the United States of America before printing that candidate's name on the general-election ballot in this State. I fully agree with the desired result; however, I do not agree that Alabama presently has a defined means to obtain it.[2]

Initially, Chief Justice Moore addresses certain threshold issues, including the timeliness of the plaintiffs' challenge to presidential-ballot access for the general election in 2012. Here, the Secretary of State asserted the affirmative defense of laches, arguing that the plaintiffs had impermissibly delayed in asserting their challenge to President Obama's ballot access. *See* Rule 8, Ala. R. Civ. P. "'"To establish the application of the doctrine of laches, [a defendant] ha[s] to show that [the plaintiff] delayed in asserting his right or claim, that his delay was inexcusable, and that his delay caused the [defendant] undue prejudice."'" *Ex parte Lightwave Techs., L.L.C.,* 971 So. 2d 712, 720 (Ala. 2007) (quoting *Ex parte Grubbs,* 542 So. 2d 927, 929 (Ala. 1989)).

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[2] *See* Chief Justice Moore's dissent for a statement of the facts and procedural history relevant to the issue presented.

Chief Justice Moore concludes in his special writing that the plaintiffs' challenge, brought 5 weeks after Barack Obama was selected as the Democratic Party nominee for President of the United States and *only 26 days before the general election,* did not constitute "inexcusable delay." As to the merits of this proceeding, I cannot agree that there was not inexcusable delay and undue prejudice amounting to laches. "'Objections relating to nominations must be timely made. It is too late to make them *after the nominee's name has been placed on the ballot* and he has been elected to office. . . . '" *State ex rel. Norrell v. Key,* 276 Ala. 524, 525-26, 165 So. 2d 76, 77 (1964) (quoting 29 C.J.S. *Elections* § 141 (emphasis added)). The evidence suggests that the Secretary of State had expressed to the plaintiffs and their representatives well prior to the primary and *as early as February 2, 2012,* that she[3] had no duty to investigate the eligibility qualifications of a presidential candidate. Barack Obama was nominated as his party's presidential candidate at the Democratic National Convention on September 5, 2012. For this election, ballots were required to be printed and delivered to the absentee-election manager of each county *by at least September 27, 2012. See* § 17-11-12, Ala. Code 1975. The plaintiffs did not file their petition challenging Barack Obama's ballot access until October 11, 2012,

[3] Although this case is now styled with Jim Bennett as the Secretary of State and the appellee, Beth Chapman was Secretary of State at all times relevant to this action.

approximately eight months after being apprised of the Secretary of State's position that she had no affirmative duty to investigate and *two weeks after* the ballots were to be printed and delivered to the various counties. The failure by the plaintiffs to at least file their petition challenging ballot access during the intervening time between Barack Obama's nomination as his party's presidential candidate and the time in which the ballots were due to be printed and delivered to the various counties constitutes, I believe, "inexcusable delay" on the part of the plaintiffs. The prejudice that would have ensued from such a late challenge, if successful, would have been twofold: first, assuming it could have been accomplished from a practical standpoint, the reprinting and distribution of general-election ballots would have come, at that late date, at great financial cost to the State; and second, and just as important, the reprinted ballots would differ from absentee ballots already sent to the members of our military and other citizens overseas. This would not be a proper way to conduct such an important election.

Moving beyond the merits of the matter before us, and with due regard to the vital importance to the citizenry of the State of Alabama that the names of only properly qualified candidates appear on a presidential-election ballot for election to the highest office in our country, I write specially to note the absence of *a statutory framework* that imposes an affirmative duty upon the Secretary of State to investigate claims such as the one asserted here, as well as a procedure

to adjudicate those claims. The right of a lawful and proper potential candidate for President to have ballot access must be tempered and balanced against a clear process for removal of an unqualified candidate. Nothing in this process should be left to guesswork, or, with all proper respect, to unwritten policies of the Secretary of State, and certainly not without a disqualified candidate having a clear avenue for judicial review consistent with the time constraints involved and due-process considerations.

As noted above, Chief Justice Moore concludes in his special writing that the Secretary of State has an affirmative duty to investigate the qualifications of a candidate for President of the United States of America before printing that candidate's name on the general-election ballot in this State. Although logically the Secretary of State, being the chief elections official of the state, should be vested with such a duty, under our present constitutional and statutory framework addressing elections, including presidential elections, not only is that not the case, but the Secretary of State would be bereft of written authority for such an action and ill equipped from a practical standpoint to carry out such an important duty.

The Office of Secretary of State is a constitutional office whose general duties are prescribed in Ala. Const. 1901, Art. I, § 134, as follows:

> "The secretary of state shall be the custodian of the great seal of the state, and shall authenticate therewith all official acts of the

> governor, except his approval of laws, resolutions, appointments to office, and administrative orders. He shall keep a register of the official acts of the governor, and when necessary, shall attest them, and lay copies of same together with copies of all papers relative thereto, before either house of the legislature, when required to do so, and shall perform other duties as may be prescribed by law."

The general duties and scope of the Secretary of State's office are codified in § 36-14-1 et seq., Ala. Code 1975. Section 17-1-3, Ala. Code 1975, provides that the Secretary of State is the chief elections official in the State and, as such, shall provide uniform "guidance" for election activities. It is, however, a *nonjudicial office without subpoena power or investigative authority or the personnel* necessary to undertake a duty to investigate a nonresident candidate's qualifications, even if such a duty could properly be implied.

Section 17-9-3, Ala. Code 1975, provides:

> "(a) The following persons shall be entitled to have their names printed on the appropriate ballot for the general election, *provided they are otherwise qualified for the office they seek*:
>
> > "(1) All candidates who have been put in nomination by primary election and certified in writing by the chair and secretary of the canvassing board of the party holding the primary and filed with

the judge of probate of the county, in the case of a candidate for county office, and the Secretary of State in all other cases, on the day next following the last day for contesting the primary election for that office if no contest is filed. . . .

"(2) All candidates who have been put in nomination by any caucus, convention, mass meeting, or other assembly of any political party or faction and certified in writing by the chair and secretary of the nominating caucus, convention, mass meeting, or assembly and filed with the judge of probate, in the case of a candidate for county office, and the Secretary of State in all other cases. . . .

"(3) Each candidate who has been requested to be an independent candidate for a specified office by written petition signed by electors qualified to vote in the election to fill the office when the petition has been filed with the judge of probate, in the case of a county office and with the Secretary of State in all other cases. . . .

"(b) The Secretary of State, not later than 45 days after the second primary, shall certify to the judge of probate of each county in the state, in the case of an officer to be voted for by the electors of the whole state, and to the judges of probate of the counties

> composing the circuit or district in the case of an officer to be voted for by the electors of a circuit or district, upon suitable blanks to be prepared by him or her for that purpose, the fact of nomination or independent candidacy of each nominee or independent candidate or candidate of a party who did not receive more than 20 percent of the entire vote cast in the last general election preceding the primary who has qualified to appear on the general election ballot. . . ."

"The provisions of Section 17-9-3 . . . shall apply to presidential preference primaries held under the provisions of this article unless clearly inconsistent herewith or inappropriate for the conduct of a presidential preference primary." § 17-13-101, Ala. Code 1975. Section 17-14-31(a), Ala. Code 1975, provides:

> "(a) When presidential electors are to be chosen, the Secretary of State of Alabama *shall certify* to the judges of probate of the several counties the names of all candidates for President and Vice President who are nominated by any national convention or other like assembly of any political party or by written petition signed by at least 5,000 qualified voters of this state."

These sections, when read together, *require only* that the Secretary of State certify and include on the general-election ballot those presidential candidates who have been nominated by their respective parties following that party's national convention and who

are otherwise qualified to hold the office of President. However, nothing in the express wording of these statutory provisions imposes upon the Secretary of State *the duty to affirmatively investigate* the qualifications of a presidential candidate. Consistent with this conclusion is Op. Att'y Gen. No. 1998-00200 (August 12, 1998), which states:

> "The Secretary of State *does not have an obligation to evaluate all of the qualifications of the nominees of the political parties and independent candidates* for state offices prior to certifying such nominees and candidates to the probate judges pursuant to [§ 17-9-3, Ala. Code 1975]. If the Secretary of State has *knowledge gained from an official source arising from the performance of duties prescribed by law,* that a candidate has not met a certifying qualification, the Secretary of State should not certify the candidate."

(Emphasis added.)

Rather, the Secretary of State contends that the task of ensuring a candidate's qualifications is left to the leadership of that candidate's respective political party, a less than ideal procedure for all challengers because of its partisan nature. *See generally Knight v. Gray,* 420 So. 2d 247 (Ala. 1982) (holding that the Democratic Party had the authority to hear pre-primary challenges to the political or legal qualifications of its candidates).

Courts in other states have tended to agree that the investigation of eligibility requirements of a

particular candidate is best left to the candidate's political party. In *Keyes v. Bowen,* 189 Cal. App. 4th 647, 117 Cal. Rptr. 3d 207 (2010), the plaintiffs brought an action against California's Secretary of State and others, alleging that there was reasonable doubt that President Obama was a natural-born citizen, as is required to become President of the United States (U.S. Const., Art. II, § 1) and that the Secretary of State had a ministerial duty to verify that President Obama met the constitutional qualifications for office before certifying him for inclusion on the ballot. The trial court entered a judgment against the plaintiffs, concluding that the Secretary of State was required to see that state election laws were enforced, but that *the plaintiffs had failed to identify a state election law imposing a duty upon the Secretary of State* to demand documentary proof of birthplace from presidential candidates. *Id.* The plaintiffs appealed.

Like Alabama's Secretary of State, the California Secretary of State is the chief elections official of that state and is charged with ensuring "'that elections are efficiently conducted and that state election laws are enforced.'" 189 Cal. App. 4th at 658, 117 Cal. Rptr. 3d at 214 (quoting California Gov't Code, § 12172.5). Also similar to § 17-14-31(a) is California Election Code § 6901, which governs general elections and states:

> "'Whenever a political party, in accordance with Section 7100, 7300, 7578, or 7843 [none of which concern constitutional eligibility], submits to the Secretary of State its certified

> list of nominees for electors of President and Vice President of the United States, the Secretary of State shall notify each candidate for elector of his or her nomination by the party. The Secretary of State shall cause the names of the candidates for President and Vice President of the several political parties to be placed upon the ballot for the ensuing general election.' "

189 Cal. App. 4th at 659, 117 Cal. Rptr. 3d at 214 (emphasis omitted). In concluding that the California statutes did not impose a duty on the Secretary of State to determine whether a presidential candidate meets the eligibility criteria of the United States Constitution, the appellate court stated:

> "[T]he truly absurd result would be to require each state's election official to investigate and determine whether the proffered candidate met eligibility criteria of the United States Constitution, giving each the power to override a party's selection of a presidential candidate. The presidential nominating process is not subject to each of the 50 states' election officials independently deciding whether a presidential nominee is qualified, as this could lead to chaotic results. Were the courts of 50 states at liberty to issue injunctions restricting certification of duly-elected presidential electors, the result could be conflicting rulings and delayed transition of power in derogation of statutory and constitutional deadlines. Any investigation of eligibility is best left to each party, which presumably will

> conduct the appropriate background check or risk that its nominee's election will be derailed by an objection in Congress, which is authorized to entertain and resolve the validity of objections following the submission of the electoral votes. (3 U.S.C. § 15.)."

Keyes, 189 Cal. App. 4th at 660, 117 Cal. Rptr. 3d at 215-16.

Chief Justice Moore would impose upon the Secretary of State a duty to investigate the qualifications of all presidential candidates. However, Chief Justice Moore has failed to demonstrate how the Secretary of State, a nonjudicial officer with no subpoena power or investigative authority, could carry out this duty in those cases where an actual dispute arises regarding a candidate's qualifications, or, as in this case, could demand delivery to her of a certified copy of a candidate's birth certificate from the official-records depository in another state in which the birth certificate is kept. Chief Justice Moore has cited cases in which federal district courts have upheld decisions of state officials, including secretaries of state, who had refused to qualify proposed candidates who were less than 35 years old. *See Socialist Workers Party of Illinois v. Ogilvie,* 357 F. Supp. 109 (N.D. Ill. 1972), and *Peace & Freedom Party v. Bowen,* 912 F. Supp. 2d 905 (E.D. Cal. 2012). However, in each of those cases there was no real dispute as to the candidates' qualifications, because both candidates conceded they did not satisfy the age requirement of Art. II, § 1, U.S. Const. Therefore, there was no need for the secretary

of state to affirmatively investigate the matter of the candidates' qualifications.

The plaintiffs in this case did not necessarily challenge whether President Obama met the "natural-born citizen" requirement of Art. II, § 1, cl. 4 of the United States Constitution. Rather, the plaintiffs sought a writ of mandamus ordering the Secretary of State to authenticate the eligibility of each presidential candidate by requiring the candidates to produce a certified copy of his birth certificate. Although this requested relief, as stated above but worthy of repetition, may be highly desirable, I conclude that the Secretary of State had neither the duty nor the authority to compel a presidential candidate to produce a certified copy of a birth certificate or independently to obtain by other lawful means such a certified copy; therefore, the question remains as to what recourse a party with standing has to challenge the qualifications of a presidential candidate.

As a former probate judge[4] in this State, I am well aware of the void created in Alabama election law by the fact that the office of Secretary of State is without authorization, and concomitantly without the tools and enforcement power necessary thereto, to undertake the necessary and desirable burden of affirmatively investigating a presidential candidate's qualifications. The citizens of the State of Alabama

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[4] The probate judge is the chief elections official of a county. § 17-1-3, Ala. Code 1975.

are always entitled to have the names of only qualified candidates appear on their election ballot, most particularly when voting for the President of the United States. Looking forward, I would respectfully call upon the legislature to provide legislation that imposes this duty upon the Secretary of State and to give that office the authority and tools necessary to compel the compliance by a candidate, and that candidate's party, upon penalty of disqualification. The office of President is the only elective office that does not require a state residency to be a candidate, which makes the authority to obtain foreign records or documents a vital investigative tool. Under our current structure, however, the burden of investigating a presidential candidate's qualifications is best left – unfortunately or not – to that candidate's particular party, which as aptly stated in *Keyes, supra,* is "presumed" to conduct a thorough investigation of the candidate's qualifications or risk a challenge to that candidate's candidacy in Congress, the appropriate forum for a post-election challenge to a President's qualifications. *See* 3 U.S.C. § 15. However, it should not be necessary to rely on a post-election Congressional remedy if it can be proven before the election that the candidate is not qualified. The Secretary of State should have the written mandate to determine requisite qualifications, and a disqualified candidate should have a defined path of expedited judicial review.

Adding further to the need for a *state* statutory means of determining the qualifications of presidential candidates is the lack of a pre-election remedy in

the federal courts resulting from the potential of the political-question doctrine to divest a federal court of jurisdiction to hear a challenge to a presidential candidate's qualifications and the difficulty a party seeking to challenge a presidential candidate's qualifications in federal court would have in establishing standing under Article III of the United States Constitution. The Court in *Keyes, supra,* explained:

> "Indeed, in a case very similar to this one, the United States District Court for the Northern District of California dismissed a challenge to John McCain's citizenship, holding that presidential qualification issues are best resolved in Congress. (*Robinson v. Bowen* (N.D. Cal. 2008) 567 F. Supp. 2d 1144, 1147.)
>
> "The federal court noted that Title 3 United States Code section 15 sets forth a process for objecting to the President elect, and the Twentieth Amendment provides that, 'if the President-elect shall have failed to qualify, then the Vice President-elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President-elect nor a Vice President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be elected, and such person shall act accordingly until a President or Vice President shall have qualified.' Thus, 'mechanisms exist under the Twelfth Amendment and 3 U.S.C. § 15 for any challenge to

> any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if a president elect shall have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process. Arguments concerning qualifications or lack thereof can be laid before the voting public before the election and, once the election is over, can be raised as objections as the electoral votes are counted in Congress. The members of the Senate and the House of Representatives are well qualified to adjudicate any objections to ballots for allegedly unqualified candidates. Therefore, this order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance. Judicial review – if any – should occur only after the electoral and Congressional processes have run their course.' (*Robinson v. Bowen, supra,* 567 F. Supp. 2d at p. 1147.)"

Keyes, 189 Cal. App. 4th at 661, 117 Cal. Rptr. 3d at 216. Thus, I do agree with Chief Justice Moore that the political-question doctrine would likely divest a federal court of jurisdiction to hear a challenge to a presidential candidate's qualifications. It is also very unlikely that a party seeking to challenge a presidential candidate's qualifications in federal court would be able to establish standing under Article III. *See* Daniel P. Tokaji, Commentary, *The Justiciability of Eligibility: May Courts Decide Who Can Be President?,*

107 Mich. L. Rev. First Impressions 31 (2008), and the cases cited therein.

As called for above, the only real alternative to a judicial challenge to the eligibility, or the disqualification, of a presidential candidate in federal court is a pre-election challenge to the candidate's qualifications or disqualification brought in state court pursuant to state laws. Professor Tokaji has explained:

> "Although the possibility for state-court litigation of a presidential candidate's eligibility may seem counterintuitive, *there is a good reason for believing that this sort of dispute belongs in state court.* Article II, Section 1 of the Constitution provides: 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.' In litigation surrounding the 2000 election, Bush's legal team argued that the Florida Supreme Court violated this provision by failing to follow the Florida legislature's instructions on post-election proceedings. Chief Justice Rehnquist's concurring opinion in *Bush v. Gore*[, 531 U.S. 98 (2000),] accepted this argument, concluding that the state supreme court's construction of certain provisions of state election law went beyond the bounds of proper statutory interpretation. *Yet none of the Justices disputed that state courts may hear cases alleging violations of state election statutes or that*

state courts generally possess the power to interpret and enforce those laws.

"*State-court litigation might proceed as a lawsuit seeking to keep a presidential candidate off the primary or general election ballot, on the ground that he or she does not satisfy the requisite qualifications.* There exists some recent precedent for this type of case. In 2004, supporters of presidential candidate John Kerry brought a number of state-court actions seeking to deny Ralph Nader access to state ballots. In *In re Nomination Papers of Nader*[, 580 Pa. 134, 869 A.2d 1 (2004)], for example, registered voters in Pennsylvania filed suit in state court, seeking to have the names of independent candidate Nader and his running mate Peter Camejo excluded from the ballot. As in several other states, the objectors challenged the petition signatures submitted by the Nader-Camejo campaign. In addition, the Pennsylvania objectors argued that Nader and Camejo were not qualified to appear on the general election ballot by virtue of the state's 'sore loser' law, which prohibited candidates from running in a general election after running in state primaries. Although the Pennsylvania Supreme Court found that its statute did not in fact justify the exclusion of Nader and Camejo from the ballot, *there was no doubt as to the state court's ability to entertain a challenge to a presidential candidate's qualifications in the course of determining whether to deny that candidate access to the state ballot.*

"It is conceivable that a comparable state-court lawsuit could be filed, in Pennsylvania or another swing state, to challenge a presidential candidate's *constitutional* qualifications to serve. *There is no requirement that a plaintiff in a state-court lawsuit meet the Article III or prudential requirements for standing. Further, the federal political question doctrine does not bar state-court litigation seeking to exclude a presidential candidate from the ballot on the ground that he or she is ineligible.* It is also conceivable that a state-court case challenging a presidential candidate's eligibility could be brought after an election. State law might allow a post-election contest of primary or general election results on the ground that the candidate who gained the most votes does not meet the qualifications for office. A losing presidential candidate could bring a contest petition in state court, seeking an order invalidating the election results if state law allows such a remedy.

"There are obvious reasons why such post-election challenges would be undesirable. As Rick Hasen has argued in *Beyond the Margin of Litigation,* pre-election litigation is generally preferable to post-election litigation. It is generally better to resolve disputes before an election, allowing problems to be avoided in advance rather than putting courts in the difficult position of cleaning up the mess afterwards. This is particularly true in the context of a challenge to a presidential candidate's qualifications. In

> the event that a candidate is deemed ineligible, the party could still put up a substitute.
>
> "*Of course, it is up to states – and, in particular, to state legislatures – to define the rights and remedies available in cases where a presidential candidate is alleged to be ineligible.* There is certainly no constitutional *requirement* that the state provide either a pre-election remedy (such as denial of ballot access) or a post-election remedy (like an order invalidating election results) for such disputes. But there remains no constitutional bar to such state-law remedies. *In fact, such remedies would seem to fall squarely within what Article II contemplates in leaving it to state legislatures to define the manner by which presidential electors are appointed.*"

107 Mich. L. Rev. First Impressions at 37-38 (some emphasis added).

Even though I submit that a statutory procedure for addressing pre-election presidential-candidate-qualification resolution, while also imposing an affirmative duty upon the Secretary of State to investigate and pursue the necessary review, is the best vehicle to accomplish the desired result, an action brought in state court challenging a presidential candidate's qualifications is not without potential problems. In that regard, Professor Tokaji has further noted:

> "A downside of such lawsuits is that they could lead to mischief and inconsistency in the state courts. That is particularly true

where members of one party or another dominate a state's highest court. For example, a majority of Florida's judges were appointed by Democratic Governor Lawton Chiles, and Ohio's supreme court currently is dominated by elected Republican justices. Suppose that a group of Florida voters brought a state-court action seeking to exclude McCain's name from that state's ballot on the ground that he is ineligible to serve. Alternatively, suppose that Ohio voters brought a state lawsuit attempting to knock Obama off the Ohio ballot, alleging that he is ineligible. Suppose further that the state supreme court in either state actually grants the relief requested, excluding the challenged candidate from the ballot on the ground that he is not a natural born citizen. Notwithstanding Article II's language conferring authority on state legislatures to appoint electors, the prospect of a renegade state court excluding a presidential candidate who is, in fact, qualified is enough to give one pause. It is also possible that state courts in different states could reach conflicting decisions on whether a challenged presidential candidate satisfies the eligibility requirements in Article II.

"Fortunately, there would be an avenue for federal judicial review of such cases. Because the state court's decision would rest on *federal* law – in this case Article II's specification of the requirements to serve as president – the U.S. Supreme Court could hear the case on a petition for writ of certiorari. This is true even if the original state-court

> action would *not* have been justiciable in federal court. In *ASARCO v. Kadish,* [490 U.S. 605 (1989),] for example, the Court held that defendants who lost in state court could obtain U.S. Supreme Court review of federal issues decided against them, even though the original plaintiffs would *not* have had standing to bring the action in a federal court. The Court held that defendants had standing to seek Supreme Court review on the theory that they had suffered an 'injury' by virtue of the adverse state-court judgment against them. For similar reasons, if a candidate were removed from the Florida ballot as part of a state-court action, on the ground that he was constitutionally ineligible to serve as president, that candidate would presumably have standing to seek U.S. Supreme Court review – even if the original plaintiffs (the voters who sought to remove his name from the ballot) would not have had standing to sue in federal court as an initial matter. The prospect of U.S. Supreme Court review provides some assurance against a renegade state court rejecting a candidate who is eligible to be president, and against the possibility of two or more state courts reaching different conclusions on the same presidential candidate's eligibility."

107 Mich. L.Rev. First Impressions at 38-39.

The courts of this State are without jurisdiction to hear a post-election challenge to a presidential election. *See* § 17-16-44, Ala. Code 1975. Alabama law

currently provides no express means by which a party with standing may make, outside political-party machinery, a pre-election challenge to a presidential candidate's qualifications. The problem is further exacerbated by the compressed time period between a presidential nomination by a national-party-nominating convention and the date ballot preparation must be finished and absentee ballots delivered to counties in Alabama. As Professor Tokaji stated, a pre-election challenge to a presidential candidate's qualifications in state court pursuant to state election laws may be the best, or perhaps the only, relief available to an aggrieved party with standing. I agree, and, accordingly, I would respectfully invite the Alabama Legislature to enact a statutory process that defines a pre-election course of conduct, consistent with due process for the candidate, that vests an investigative duty upon the Secretary of State, while providing rights and remedies available to a party with standing who seeks to challenge the qualifications of a candidate for the office of President of the United States of America.

BRYAN, Justice (concurring specially).

I concur with this Court's no-opinion affirmance of the circuit court's judgment dismissing the plaintiffs' complaint.

I write specially to note that I understand the plaintiffs' desire to ensure that only the names of qualified presidential candidates are placed on this

State's general-election ballot. However, I agree with Justice Bolin's special writing insofar as he concludes that no "statutory framework" presently exists in this State that imposes an affirmative duty on the Secretary of State to investigate the qualifications of a candidate for President of the United States of America before printing that candidate's name on the general-election ballot in this State. Furthermore, I agree with Justice Bolin that no statutory procedure presently exists that permits Alabama courts to entertain a pre-election challenge to the qualifications of a presidential candidate appearing on a general-election ballot in this State. Because no law currently exists that could afford the plaintiffs the relief they sought below and because the creation of such law is strictly within the purview of the legislature, I concur to affirm the circuit court's judgment.

MOORE, Chief Justice (dissenting).

For the reasons stated below I dissent from this Court's decision to affirm without opinion the judgment of the Montgomery Circuit Court granting the motion of the Secretary of State to dismiss this action.

Hugh McInnish and Virgil H. Goode, Jr. (hereinafter "the plaintiffs"), appeal from an order of the Montgomery Circuit Court dismissing their complaint against the Alabama Secretary of State. The complaint alleged that the Secretary of State failed to perform a constitutional duty to verify the eligibility

of all presidential candidates appearing on the ballot in the 2012 general election. McInnish is a citizen of Alabama, a qualified elector, and a member of the Alabama Republican Executive Committee. Goode qualified as an independent candidate for President of the United States in the 2012 Alabama general election. Jim Bennett is currently the Alabama Secretary of State.[5]

I. Facts and Procedural History

On October 11, 2012, the plaintiffs filed a verified complaint in the Montgomery Circuit Court seeking a writ of mandamus ordering the Alabama Secretary of State to verify the eligibility of candidates for the office of President of the United States before placing their names on the 2012 general-election ballot.[6] The plaintiffs specifically petitioned the circuit court to order the Secretary of State to demand as a precondition to placing the names of presidential candidates on the ballot that "a certified copy of their *bona fide* birth certificate be delivered to her direct from the

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[5] While this case was pending on appeal, Secretary Bennett, who took office on August 1, 2013, was substituted as the appellee for his predecessor, Beth Chapman. *See* Rule 43(b), Ala. R. App. P. Because the trial below and the filings on appeal took place before Secretary Bennett's appointment, I will generally, in keeping with the record, refer to Beth Chapman as the Secretary of State in this writing.

[6] "The Secretary of State is the chief elections official in the state and shall provide uniform guidance for election activities." § 17-1-3(a), Ala. Code 1975.

government official who is in charge of the records depository in which it is stored." The plaintiffs also sought injunctive relief to prevent the placing of the names of candidates for President on the ballot "until their eligibility has been conclusively determined." Finally, the plaintiffs requested the circuit court to remove from the ballot the names of candidates whose eligibility could not be verified. The plaintiffs attached three affidavits, two articles, and a copy of an e-mail to their complaint.

On October 15, 2012, three weeks before the November 6 general election, the plaintiffs moved for a summary judgment, arguing that the Secretary of State had a duty to enforce the natural-born-citizen requirement of the United States Constitution in determining whether candidates for President of the United States were eligible for placement on the 2012 Alabama general-election ballot. *See* U.S. Const. Art. II, § 1, cl. 4 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President. . . .").[7] Although the plaintiffs attached no affidavits or other supporting evidentiary material to their motion for a summary judgment, the

[7] The presidential-qualifications clause, of which the natural-born-citizen requirement is a part, also denies eligibility for the office of President to any person "who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States." U.S. Const. Art. II, § 1, cl. 4.

motion did cite to the verified complaint, which states:

> "On February 2, 2012 Plaintiff McInnish, together with his attorney and others, visited the Office of the Secretary of State, at which the Hon. Emily Thompson, Deputy Secretary of State, speaking in the absence of and for the Secretary of State, stated that *her office would not investigate the legitimacy of any candidate,* thus violating her duties under the U.S. and Alabama Constitutions."

(Emphasis added.)[8]

On October 18, 2012, the Secretary of State answered the motion for a summary judgment and simultaneously moved to dismiss the case, arguing that the duty to investigate the qualifications of presidential candidates lies with Congress and not the office of the Secretary of State. She also argued that the plaintiffs had failed to join necessary parties, namely the presidential candidates and their electors,

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[8] Because the Secretary of State has not challenged the correctness of this statement, I do not consider whether it might be hearsay or, alternatively, an admission by a party opponent. *See* Rule 801(d), Ala. R. Evid. In her renewed motion to dismiss, ¶ 1, Secretary Chapman asserted that she "has no legal duty to investigate the qualifications of a candidate. . . ." *See Peace & Freedom Party v. Bowen,* 912 F. Supp. 2d 905, 907 (E.D. Cal. 2012) (finding that an attorney's statement admitting that the plaintiff, who sought placement on the presidential primary ballot, was only 27 years old was nonhearsay under Rule 801(d)(2), Fed. R. Evid.).

and that the complaint and motion were untimely because many ballots had already been printed and absentee voting had begun. On October 24, 2012, the plaintiffs filed an opposition to the motion to dismiss, reiterating their request that the circuit court "order the Secretary of State to verify the eligibility of all presidential candidates for the 2012 Alabama General Election Ballot."

In the remaining two weeks before the general election, the circuit court did not rule on the pending motions. On November 10, 2012, four days after the election, the plaintiffs filed a document entitled "Praecipe,"[9] noting that President Obama had been reelected and asking that the pending motions be decided "well before the Alabama electors vote on December 17, 2012." On November 20, 2012, the Secretary of State filed a "renewed" motion to dismiss, arguing that the occurrence of the election rendered the case moot and that under Alabama law the circuit court lacked subject-matter jurisdiction over a challenge to a presidential election. The plaintiffs opposed the motion, arguing the "capable of repetition, yet evading review" exception to mootness. *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911). The plaintiffs also requested that the circuit court order the Secretary of State to decertify the Alabama

[9] "Praecipe" is defined as "a writ ordering a defendant to do some act or to explain why inaction is appropriate" and "[a] written motion or request seeking some court action." *Black's Law Dictionary* 1292 (9th ed. 2009).

votes for any 2012 presidential candidate who did not provide an authenticated birth certificate. On December 6, 2012, the circuit court heard argument on the pending motions. The same day the court issued a "Final Order," which stated in its entirety: "This cause having come before the Court on Defendant's Motion To Dismiss, the same having been considered, it is hereby ORDERED, ADJUDGED AND DECREED said Motion is GRANTED."

The plaintiffs timely filed a notice of appeal to this Court on January 17, 2013.

II. Standard of Review

> "Where a [Rule] 12(b)(6)[, Ala. R. Civ. P.,] motion has been granted and this Court is called upon to review the dismissal of the complaint, we must examine the allegations contained therein and construe them so as to resolve all doubts concerning the sufficiency of the complaint in favor of the plaintiff. *First National Bank v. Gilbert Imported Hardwoods, Inc.,* 398 So. 2d 258 (Ala. 1981). In so doing, this Court does not consider whether the plaintiff will ultimately prevail, only whether he has stated a claim under which he may possibly prevail. *Karagan v. City of Mobile,* 420 So. 2d 57 (Ala. 1982)."

Fontenot v. Bramlett, 470 So. 2d 669, 671 (Ala. 1985). "[I]f under a provable set of facts, upon any cognizable theory of law, a complaint states a claim upon

which relief could be granted, the complaint should not be dismissed." *Id.*

In this case, the plaintiffs seek a writ of mandamus as well as other relief.

> "Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner [sic] to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court."

Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995).

III. Analysis

At the outset I note that the plaintiffs did not ask the circuit court to determine whether Barack Obama or any other presidential candidate on the 2012 ballot met the "natural-born-citizen" requirement of Art. II, § 1, cl. 4, of the United States Constitution. Instead, the plaintiffs petitioned the circuit court to issue a writ of mandamus ordering the Alabama Secretary of State to authenticate the eligibility of each candidate for President by requiring delivery to her of a certified copy of each candidate's birth certificate from "the records depository in which it is stored." The plaintiffs also requested injunctive relief preventing the placement of the name of any presidential candidate on the general-election ballot until such evidence

of eligibility had been supplied and the removal from the ballot of the names of presidential candidates "whose eligibility cannot be verified." In a post-election brief to the circuit court, the plaintiffs also requested that the circuit court order the Secretary of State to decertify the votes of any candidate who did not provide an authenticated birth certificate.

A. Threshold Issues

I first address four preliminary issues before turning to the merits of this case: subject-matter jurisdiction, standing, timeliness, and mootness.

1. Subject-Matter Jurisdiction

"[The circuit court] shall have authority to issue such writs as may be necessary or appropriate to effectuate its powers. . . ." Art. VI, § 142(b), Ala. Const. 1901. *See also* § 6-6-640, Ala. Code 1975 ("All applications for mandamus . . . shall be commenced by a petition, verified by affidavit. . . ."). This Court has jurisdiction to hear appeals from the circuit courts concerning extraordinary writs. Art. VI, § 140(b), Ala. Const. 1901. *See Rice v. Chapman,* 51 So. 3d 281 (Ala. 2010) (hearing an appeal from a denial by the Montgomery Circuit Court of a petition for a writ of mandamus that sought an order directing the Secretary of State to exclude a candidate from the primary-election ballot); *Alabama Republican Party v. McGinley,* 893 So. 2d 337 (Ala. 2004) (reversing the issuance of a writ of mandamus by the Montgomery

Circuit Court that ordered the Republican Party to place a candidate on the primary ballot and ordered the Secretary of State to certify the votes cast for that candidate).

2. Standing

Goode, as the Constitution Party candidate for President on the 2012 Alabama general-election ballot, had standing to challenge the presence on the ballot of other candidates for the same office. *See Hollander v. McCain,* 566 F. Supp. 2d 63, 68 (D.N.H. 2008) (noting that a candidate "has standing to challenge the inclusion of an allegedly ineligible rival on the ballot, on the theory that doing so hurts the candidate's . . . own chances of prevailing in the election"); *Drake v. Obama,* 664 F.3d 774, 782-83 (9th Cir. 2011) (recognizing the doctrine of "competitive standing" as a basis for challenging the eligibility of a ballot rival). The plaintiffs filed their complaint before the date of the 2012 general election. "[J]urisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events." *Mullan v. Torrance,* 22 U.S. (9 Wheat.) 537, 539 (1824). By contrast, the United States Court of Appeals for the Ninth Circuit denied competitive standing to candidates who did not file their complaint until after President Barack Obama was sworn in to office. *Drake,* 664 F.3d at 784 (holding that, once President Obama was sworn in, "[p]laintiffs' competitive

interest in running against a qualified candidate had lapsed").

Therefore, Goode, a presidential candidate on the 2012 general-election ballot who filed his complaint before the election, has standing to pursue this case. Because Goode has standing and his coplaintiff, McInnish, alleges the same claims as Goode, I need not address whether McInnish also has standing. *See Watt v. Energy Action Educ. Found.,* 454 U.S. 151, 160 (1981) ("Because we find [one plaintiff] has standing, we do not consider the standing of the other plaintiffs."); *Arlington Heights v. Metropolitan Hous. Dev. Corp.,* 429 U.S. 252, 264 & n.9 (1977) (noting that "[b]ecause of the presence of [one] plaintiff [who has demonstrated standing], we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit"); *Buckley v. Valeo,* 424 U.S. 1, 12 (1976) (holding that case was justiciable when at "least some of the appellants have a sufficient 'personal stake'" in its adjudication).

3. Timeliness

"'Objections relating to nominations must be timely made. It is too late to make them after the nominee's name has been placed on the ballot and he has been elected to office. . . .'" *State ex rel. Norrell v. Key,* 276 Ala. 524, 525-26, 165 So. 2d 76, 77 (1964) (quoting 29 C.J.S. *Elections* § 141). The plaintiffs filed their complaint on October 11, 2012, 26 days before the November 6 general election. The Republican and

Democratic Party candidates for President were nominated at their national conventions on August 29, 2012, and September 5, 2012, respectively. Allowing time for the parties to certify their candidates and electors to the Secretary of State pursuant to § 17-14-31, Ala. Code 1975, the plaintiffs filed suit approximately one month after the candidates were known.

Laches, an affirmative defense, Rule 8(c), Ala. R. Civ. P., which the Secretary of State raised in her pre-answer motion to dismiss, "'is inexcusable delay in asserting a right . . . causing prejudice to an adverse party. . . .'" *Dunn v. Ponceler,* 235 Ala. 269, 276, 178 So. 40, 45 (1937) (quoting 21 Corpus Juris, pp. 210-11). In his dissent in *Roper v. Rhodes,* 988 So. 2d 471, 485 (2008), Justice Murdock noted that the challenge to ballot certification at issue in that case was brought over two months after the candidate's nomination and only six days before the general election: "This delay, coupled with the apparent prejudice to the parties and to the orderly conduct of the general election itself that would result if the primary election were to be undone at such a late date, compels a ruling . . . on the ground of laches." Other courts have rejected ballot-eligibility challenges on timeliness grounds. *See, e.g., Fulani v. Hogsett,* 917 F.2d 1028 (7th Cir. 1990) (denying relief on laches ground when plaintiff filed complaint three weeks before November general election but irregularity had occurred in early August); *Liddy v. Lamone,* 398 Md. 233, 919 A.2d 1276 (2007) (denying on laches ground eligibility challenge brought 18 days before general election when

candidate had been certified for the ballot over 4 months before the general election).

In the cases cited above decided on the doctrine of laches, the ballot-access challenge had been brought 2 to 4 months after certification of the nomination and from 6 to 21 days before the election. In this case, the plaintiffs brought their challenge only 5 weeks after selection of the presidential nominees and 26 days before the election. Because of the brevity of the two-month interval between the national-convention nominations and the November general election, plaintiffs' filing of their action midway through that period did not constitute "inexcusable delay."

4. Mootness

The Secretary of State argues that the holding of the election renders this case moot. The plaintiffs argue an exception to mootness – that the certification of ineligible candidates is a matter "capable of repetition, yet evading review." They have preserved this argument, presenting it both in their opposition to the Secretary of State's renewed motion to dismiss[10] and also during the hearing before the circuit

[10] "[E]lections happen every year and the potential for harm is just as present in the next election cycle. This claim must therefore move forward and be heard so as to prevent this harm from occurring not only during this election but for future elections as well." Plaintiffs' Opp. to Def's Renewed Motion to Dismiss, at 2.

court on December 6, 2012.[11] In their appellate brief they ask this Court not only to reverse the judgment of the circuit court on the issue of requiring birth certificates from the presidential candidates whose names appeared on the 2012 general-election ballot, but also to direct the circuit court to order that the Secretary of State "do the same for all candidates in future presidential elections."

In a case similar to this one, the United States Court of Appeals for the Third Circuit held that the shortness of the election cycle qualifies presidential-candidate-eligibility challenges for the "capable of repetition, yet evading review" exception to mootness. The Third Circuit Court of Appeals reasoned:

> "Although the defendants argue that [plaintiff's challenge to President Obama's eligibility] is moot because the election is over, we consider the issue because '[t]his controversy, like most election cases, fits squarely within the "capable of repetition yet evading review" exception to the mootness doctrine.' *Merle v. United States,* 351 F.3d 92, 94 (3d Cir. 2003)."

Berg v. Obama, 586 F.3d 234, 239 n.5 (3d Cir. 2009). This Court has ruled similarly. *See Allen v. Bennett,*

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[11] "Since we have elections pretty much every year, the potential harm is here that we would have an issue that would have evaded review." Transcript of Proceedings on Motion to Dismiss, Dec. 6, 2012, at 6 (statement of plaintiffs' attorney Dean Johnson).

823 So. 2d 679, 682 (Ala. 2001) ("[B]ecause the outcome of this case could impact future elections, we hold that the interpretation of [the constitutional provision at issue in] this case – and hence this appeal – is not moot.");[12] (same).

The United States Supreme Court, rejecting a mootness challenge to a ballot-access law affecting presidential electors, has stated:

> "But while the 1968 election is over, the burden . . . allowed to be placed on the nomination of candidates for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935. The problem is therefore 'capable of repetition, yet evading review,' *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498, 515 [(1911)]."

Moore v. Ogilvie, 394 U.S. 814, 816 (1969). *See Rice v. Sinkfield,* 732 So. 2d 993, 994 n.1 (Ala. 1998) (citing *Ogilvie* as authority for the "capable of repetition, yet evading review" exception to mootness). *See also Morse v. Republican Party of Virginia,* 517 U.S. 186, 235 n.48 (1996) ("Like other cases challenging electoral practices, therefore, this controversy is not moot because it is 'capable of repetition, yet evading review.' "); *Swanson v. Worley,* 490 F.3d 894, 903 n.10

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[12] During the hearing on the motion to dismiss, the plaintiffs' attorney quoted this passage and stated: "So we have an Alabama case that points out this case is not moot."

(11th Cir. 2007) ("Although the 2002 election cycle has passed, it is well settled that ballot access challenges fall under the 'capable of repetition, yet evading review' exception to the mootness doctrine.").[13]

Ordinarily the "capable of repetition, yet evading review" exception to mootness requires the satisfaction of two conditions: "'[T]he challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and there was a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Albert P. Brewer Dev. Ctr. v. Brown,* 782 So. 2d 770, 772 n.1 (Ala. 2000) (quoting Charles Alan Wright, *Law of Federal Courts* § 12 (5th ed. 1994)). In this case, as in most election cases, the first prong is easily satisfied. The two-month period between the national-presidential-nominating conventions and the subsequent general election is too short to fully litigate the Secretary of State's duty to investigate presidential candidates under the qualifications clause. This Court has stated:

> "The capable-of-repetition-but-evading-review exception has been applied in contexts

[13] The Secretary of State argues that this case is not capable of repetition because President Obama may not constitutionally run for a third term. Secretary of State's brief, at 8-9 (citing U.S. Const. amend. XXII, § 1). President Obama, however, is not the defendant in this case; the Secretary of State is, and her refusal to investigate the eligibility of presidential candidates for the general-election ballot is capable of repetition.

> that generally involve a significant issue that cannot be addressed by a reviewing court because of some intervening factual circumstance, most often that the issue will be resolved by the passage of a relatively brief period of time. *See, e.g.,* . . . *Moore v. Ogilvie,* 394 U.S. 814, 89 S. Ct. 1493, 23 L. Ed. 2d 1 (1969) (involving challenges to election procedures after the completion of the election); and [*State ex rel.*] *Kernells* [*v. Ezell,* 291 Ala. 440, 444, 282 So. 2d 266, 270 (1973)], supra (same)."

McCoo v. State, 921 So. 2d 450, 458 (Ala. 2005). *See also Lawrence v. Blackwell,* 430 F.3d 368, 371 (6th Cir. 2005) ("Challenges to election laws are one of the quintessential categories of cases which usually fit this prong because litigation has only a few months before the remedy sought is rendered impossible by the occurrence of the relevant election."); *Van Bergen v. State of Minnesota,* 59 F.3d 1541, 1547 (8th Cir. 1995) ("Elections, including the preelection campaign period, are almost invariably of too short a duration in which to complete litigation and, of course, recur at regular intervals.").

In the context of election cases, the second-prong requirement that "the same complaining party would be subjected to the same action again" is relaxed. The case is customarily not moot if the challenged action could affect any candidate in the future, not just the one presently before the court.

> "The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since *the issues properly presented, and their effects on independent candidacies, will persist* as the California statutes are applied *in future elections.* This is, therefore, a case where the controversy is 'capable of repetition, yet evading review.'"

Storer v. Brown, 415 U.S. 724, 737 n.8 (1974) (emphasis added). Similarly, the United States Supreme Court, without inquiring as to future plans of the respondents to run for office, held that a challenge to ballot-access requirements was not rendered moot by the occurrence of the election. *Mandel v. Bradley,* 432 U.S. 173, 175 n.1 (1977). *See also Anderson v. Celebrezze,* 460 U.S. 780, 784 n.3 (1983) (same); *Brown v. Chote,* 411 U.S. 452, 457 n.4 (1973) (same); *North Carolina Right to Life Comm. Fund v. Leake,* 524 F.3d 427, 435 (4th Cir. 2008). ("[W]e reject, as other circuits have, the argument that an ex-candidate's claims may be 'capable of repetition, yet evading review' only if the ex-candidate specifically alleges an intent to run again in a future election.").

United States Supreme Court Justice Antonin Scalia summarized this jurisprudence in a case in which he disagreed with the majority's finding that the issue was not moot. Some of the Supreme Court's election-law decisions, he stated,

> "differ from the body of our mootness jurisprudence *not* in accepting less than a

> probability that the issue will recur, in a manner evading review, between the same parties; but in dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur *between the defendant and the other members of the public at large* without ever reaching us."

Honig v. Doe, 484 U.S. 305, 335-36 (1988) (Scalia, J., dissenting).

In *Moore v. Ogilvie,* 394 U.S. at 816 (quoted above), the Supreme Court rejected a mootness challenge to an election case because "candidates for statewide offices" not before the Court might encounter the same ballot obstacle in the future. Similarly, this Court, relying on *Ogilvie,* has stated:

> "[T]his exception for cases 'capable of repetition, yet evading review' has been specifically applied by the United States Supreme Court to the elections context in *Moore v. Ogilvie,* 394 U.S. 814, 89 S. Ct. 1493, 23 L. Ed. 2d 1 (1969), where a challenged nominating procedure was dealt with on the merits even after the election *because of the likelihood of its being used in future elections.*
>
> "This exception is properly applicable to the case at bar. The short 30-45 day time period between filing and election, coupled with the possibility of future elections in other counties, convinces us that if the rights of appellant, *and those similarly situated,* are to be afforded the protection they deserve,

> the occurrence of the election should not be permitted to effectively deny all review by this court. The cause, therefore, is not moot."

State ex rel. Kernells v. Ezell, 291 Ala. 440, 444, 282 So. 2d 266, 270 (1973) (emphasis added).[14]

Under both federal and state precedent, the plaintiffs' claim that the Secretary of State has a legal duty under the natural-born-citizen clause of the United States Constitution to verify the eligibility of candidates for the office of President of the United States before placing their names on the general-election ballot has not been mooted by the occurrence of the 2012 election. I now turn to the merits.

B. State-Law Issues

Before addressing the duty of the Secretary of State under the presidential-qualifications clause, I first identify the extent to which state law obligates her to determine whether presidential candidates are legally qualified for placement on the general-election ballot. I then examine the extent to which Alabama law provides state courts with jurisdiction to hear challenges to candidate qualifications.

[14] Although this Court used the phrase "and those similarly situated" to describe future potential plaintiffs, *Ezell* was not a class action.

1. Duty of the Secretary of State to Investigate the Eligibility of Presidential Candidates

Alabama law mandates that the Secretary of State certify presidential candidates for inclusion on the ballot in two circumstances: (1) nomination by a national convention or (2) nomination by a petition signed by 5,000 qualified voters.

> "When presidential electors are to be chosen, the Secretary of State of Alabama *shall certify* to the judges of probate of the several counties the names of all candidates for President and Vice President who are nominated by any national convention or other like assembly of any political party or by written petition signed by at least 5,000 qualified voters of this state."

§ 17-14-31(a), Ala. Code 1975 (emphasis added). This statute by itself does not require the Secretary of State to question the eligibility of candidates who fulfill either method of qualifying for certification.

However, § 17-9-3(a), Ala. Code 1975, which also provides for placing candidates on the general-election ballot, contains a proviso that such candidates be "otherwise qualified for the office they seek." This statute in isolation applies only to candidates for state office. *See* § 17-9-3(a)(1)-(3).[15] Another statute,

[15] For a list of the qualifications for state office in Alabama, *see* § 36-2-1, Ala. Code 1975. "A candidate for public office must show that he meets the eligibility requirements of all categories

(Continued on following page)

however, extends the reach of § 17-9-3 to presidential primaries. Section 17-13-101, Ala. Code 1975, states: "The provisions of Section 17-9-3 . . . shall apply to presidential preference primaries . . . unless clearly inconsistent herewith or inappropriate for the conduct of a presidential preference primary." Thus, § 17-13-101 renders § 17-9-3, including its "otherwise qualified" language, applicable to presidential-preference primaries. Accordingly, candidates who qualify for placement on the ballot in a presidential-preference primary, *see* § 17-13-302, Ala. Code 1975, are "entitled to have their names printed on the appropriate ballot for the general election, provided they are otherwise qualified for the office they seek." § 17-9-3(a).

To qualify for placement on the general-election ballot as a candidate for President after participating in the presidential-preference primary, a candidate must be nominated by the national convention of his or her party. *See* § 17-14-31, Ala. Code 1975. Thus, by the combined effect of §§ 17-9-3(a) and 17-13-101, the "otherwise qualified" proviso of § 17-9-3(a) applies to presidential nominees who have appeared on the ballot in the presidential-preference primary. Under Alabama law, therefore, the Secretary of State, as the chief elections official, has a legal duty to determine that presidential-convention nominees who have run in the presidential primary are duly "qualified for the

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of § 36-2-1(a). . . . " *Osborne v. Banks,* 439 So. 2d 695, 698 (Ala. 1983).

office they seek" before placing their names on the general-election ballot.

2. Jurisdiction of Alabama Courts over Plaintiffs' Request for Relief

"The circuit court shall exercise general jurisdiction in all cases except as may otherwise be provided by law." Art. VI, § 142(b), Ala. Const. 1901. One such exception is found in § 17-16-44, Ala. Code 1975: "No jurisdiction exists in or shall be exercised by any judge or court to entertain any proceeding for ascertaining the legality, conduct, or results of any election, except so far as authority to do so shall be *specially and specifically enumerated* and set down by statute. . . ." (Emphasis added.) This statute appears in Chapter 16, Article 3, of the Election Code. Chapter 16 is entitled "Post Election Procedures." Article 3 is entitled "Election Contests." Its location in the Code indicates that the jurisdictional restrictions of § 17-16-44 apply only in post-election contests.

Section 17-16-44 refers to "any proceeding for ascertaining the legality, conduct, or results of any election." Certainly the "results" of an election may not be ascertained prior to election day. But ascertaining the "legality" or "conduct" of an election could potentially apply before the election as well as after. Construing § 17-16-44, this Court has stated: "'Construing this statute as a whole, it appears, broadly speaking, to cover cases inquiring into the validity of elections *theretofore* held – *a proceeding in the nature*

of a contest of an election, whether the legality, conduct or results of the election be the point of attack.'" *King v. Campbell,* 988 So. 2d 969, 977 (Ala. 2007) (quoting *Dennis v. Prather,* 212 Ala. 449, 452, 103 So. 59, 62 (1925), which construes a predecessor statute to § 17-16-44).

An election contest can occur only after an election has taken place. *See Sears v. McCrory,* 43 So. 3d 1211, 1215 n.4 (Ala. 2009) (stating that "an election contest cannot be filed until after a candidate is 'declared elected'" (citing *Smith v. Burkhalter,* 28 So. 3d 730, 735 (Ala. 2009))). The plaintiffs' pre-election request for an injunction preventing the placement of constitutionally unqualified presidential candidates on the ballot (or ordering their removal) thus does not implicate the jurisdiction-stripping statute, which applies only to post-election actions. However, § 17-16-44 does interdict the plaintiffs' post-election request for relief. No Alabama statute "specially and specifically" provides any state court with jurisdiction to entertain a contest of a *federal* election. *See* § 17-16-40, Ala. Code 1975 (providing for an eligibility challenge as part of a post-election contest of enumerated *state* offices).[16] In their post-election "praecipe" the

[16] By contrast, the Florida Supreme Court reviewed a contest of the vote in the 2000 presidential election under Fla. Stat. § 102.168, which provides that "'the certification of election . . . of *any* person to office [except for state legislators] . . . may be contested in the circuit court.'" *Gore v. Harris,* 772 So. 2d 1243, 1251 n.9 (Fla. 2000) (emphasis added), rev'd on other grounds, *Bush v. Gore,* 531 U.S. 98 (2000).

plaintiffs requested that the circuit court order the Secretary of State to decertify the Alabama votes for any 2012 presidential candidate who did not provide an authenticated birth certificate. Under § 17-16-44 no jurisdiction exists in any Alabama court to decertify the votes of a federal election.

C. Federal-Law Questions

The Secretary of State has a duty under state law to examine the qualifications of national-convention nominees who ran in the presidential primary before placing their names on the general-election ballot. The jurisdiction-stripping statute forbids inquiry into the eligibility of presidential candidates once an election has occurred, but it does not preclude such an inquiry before the election.

I now address whether the Secretary of State as part of her limited state-law duty to qualify certain presidential candidates for the ballot must take cognizance of the presidential-qualifications clause of the United States Constitution and, in particular, the natural-born-citizen requirement. I also address whether, regardless of the requirements or limitations of state law, the Secretary of State has a duty arising directly under the United States Constitution to qualify all presidential candidates under the presidential-qualifications clause before printing their names on the general-election ballot. "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for

the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland,* 369 U.S. 663, 666 (1962). Because the duty of state executive officers to enforce the qualifications clause may differ depending on whether a challenge is brought before the identity of the President-elect is determined or afterwards, I treat these two scenarios separately.[17]

1. Challenges to the Qualifications of the President-Elect

When federal courts discern a "textually demonstrable constitutional commitment of [an] issue to a coordinate political department," *Baker v. Carr,* 369 U.S. 186, 217 (1962), they ordinarily consider the

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[17] The President-elect becomes President at the inauguration held on January 20. U.S. Const. amend XX. When a presidential candidate becomes the President-elect, however, is a matter of definition. The three possible dates are the general election in early November, the date the electors cast their ballots in mid-December, 3 U.S.C. § 7, and the counting of the electoral votes by Congress on January 6. 3 U.S.C. § 15. The most relevant date for this analysis is the date the electors cast their votes. Between the November general election and the casting of electoral votes in mid-December, a state, if it chooses, is at liberty to resolve any "controversy or contest" in regard to the selection of its electors, if done at least six days before the electors "meet and give their votes." 3 U.S.C. §§ 5 and 7. Thus, under federal law, the states are empowered to resolve challenges to the validity of electors, and by implication the candidates to whom they are pledged, for about a month beyond election day. Alabama has not enacted legislation to avail itself of this option. Section 17-16-44 removes from Alabama courts the jurisdiction to hear such challenges.

matter a nonjusticiable political question and defer to the designated branch under the separation-of-powers doctrine. The Constitution assigns Congress the responsibility to resolve challenges to the qualifications of a President-elect or a sitting President. Article 2, § 1, of the United States Constitution establishes the electoral college. The Twelfth Amendment designates how electors certify their votes for President and Vice President to the president of the Senate, how those electoral votes are counted, and how a President is chosen if no candidate has a majority. The Twentieth Amendment in turn details how the President is chosen if the President-elect dies or "shall have failed to qualify." The Twenty-Fifth Amendment provides for a transfer of power in the event the President "is unable to discharge the powers and duties of his office." Finally, §§ 2 and 3 of Article I provide for impeachment and removal of the President.

These provisions, taken together, lodge with Congress the power to confirm the election of a President and to remove a President from office. Additionally, 3 U.S.C. § 15 provides detailed instructions for the counting of electoral votes, including a mechanism to hear and resolve objections. A federal district court has stated:

> "It is clear that mechanisms exist under the Twelfth Amendment and 3 U.S.C. § 15 for any challenge to any candidate to be ventilated when electoral votes are counted, and that the Twentieth Amendment provides guidance regarding how to proceed if

> a president elect shall have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process. . . . The members of the Senate and the House of Representatives are well qualified to adjudicate any objections to ballots for allegedly unqualified candidates."

Robinson v. Bowen, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008).[18] Once the states have cast their electoral votes, "the issue of the President's qualifications and his removal from office are textually committed to the legislative branch and not the judicial branch." *Grinols v. Electoral Coll.,* (No. 2:12-cv-02997-MCE-DAD, May 23, 2013) (E.D. Cal. 2013) (not reported in F. Supp. 2d). *See also Rhodes v. MacDonald,* 670 F. Supp. 2d 1363, 1377 (M.D. Ga. 2009) (noting that "if the President were elected to the office by knowingly and fraudulently concealing evidence of his constitutional disqualification, then [the] mechanism [of impeachment] exists for removing him from office").

In *State v. Albritton,* 251 Ala. 422, 37 So. 2d 640 (1948), the State of Alabama brought suit seeking to restrain Democratic Party electors from refusing to vote for Harry Truman were he to be the party's presidential nominee. This Court refused to intervene in what it considered a "political matter," citing among

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[18] After the 1872 election, Congress rejected three electoral votes cast for Horace Greeley, who was ineligible for office, having died three weeks after the election. *Cong. Globe,* 42d Cong., 3d Sess. 1285-87, 1289 (1873).

other authority the predecessor to § 17-16-44 and pointing the litigants to a federal remedy: "Section 17, Title 3, U.S.C.A. [currently 3 U.S.C. § 15], provides a complete remedy for contesting irregularity of casting votes by presidential electors." 251 Ala. at 425, 37 So. 2d at 643. Compare *Hutchinson v. Miller,* 797 F.2d 1279, 1284 (4th Cir. 1986) ("Had the framers wished the federal judiciary to umpire election contests, they could have so provided. Instead, they reposed primary trust in popular representatives and in political correctives.").

Because Congress completely occupies the field of determining the qualifications of a President-elect or a sitting President to hold office, the political-question doctrine ousts federal courts from having jurisdiction over those particular questions.[19] State courts should not rush in where federal courts decline to tread. *See Strunk v. New York State Bd. of Elections,* 35 Misc. 3d 1208(A), 950 N.Y.S.2d 722 (table) (Sup. Ct. 2012) (unreported disposition) ("Federal courts have no role in this process. Plainly, state courts have no role."). The doctrine of field preemption requires that states not regulate in an area

[19] *Bush v. Gore,* 531 U.S. 98 (2000), appears to be an exception to this principle. *See* Erwin Chemerinsky, Bush v. Gore *was not Justiciable,* 76 Notre Dame L. Rev. 1093 (2001); *See also* Erwin Chemerinsky, *How Should We Think about Bush v. Gore?,* 34 Loy. U. Chi. L.J. 1, 2 (2002) (describing George W. Bush as "the first President chosen by the Supreme Court"). In *Bush v. Gore,* neither party raised the justiciability question and the Court did not address it.

exclusively occupied by Congress. Preemption occurs "where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law. . . ." *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 368 (1986) (quoted in *General Motors Corp. v. Kilgore,* 853 So. 2d 171, 174 (Ala. 2002)). Field preemption has been found when the need exists for uniform federal treatment of a subject. *See Davis v. Redstone Fed. Credit Union,* 401 So. 2d 49, 51 (Ala. Civ. App. 1979).

Under the political-question and preemption doctrines, Alabama state courts are without power to regulate the conduct of a presidential election after the President-elect has been selected. Likewise, the Secretary of State also lacks authority to decertify Alabama's electoral votes for the President-elect.

2. Challenges to the Qualifications of Presidential Candidates

A state law that required birth certificates from presidential candidates as a precondition to placement on the ballot would likely pass muster under federal preemption law. Such a law would not conflict with the Constitution, but would rather harmonize with the natural-born-citizen clause. New Hampshire, for example, requires an affirmation that a person is a "natural born citizen" as a condition to placing that person's name on a presidential-election ballot. N.H. Rev. Stat. Ann. § 655:47. *See also Hassan v. Colorado,* 870 F. Supp. 2d 1192, 1201 (D. Colo.

2012), aff'd, 495 F. App'x 947 (10th Cir. 2012) (upholding a Colorado law requiring all presidential candidates to affirm that they are natural-born citizens). Although states have no power "to add qualifications to those enumerated in the Constitution," *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 805 (1995), they certainly are not limited in enforcing those stated therein.[20]

a. The Grant of Power to the States to Appoint Presidential Electors

The selection of presidential electors is an exclusive state function subject only to congressional determination of when the electors shall be selected and when they shall cast their votes.

> "Each State shall appoint, *in such Manner as the Legislature thereof may direct,* a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . . .
>
> "The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day

[20] Congress is also free to pass legislation in aid of the presidential-qualifications clause. *See, e.g.,* H.R. 1503, 111th Cong. (1st Sess. 2009) (seeking to amend federal campaign law to require the principal campaign committee of a presidential candidate to include a copy of the candidate's birth certificate with its statement of organization).

> shall be the same throughout the United States."

U.S. Const. Art. II, § 1, cls. 2 & 3 (emphasis added). "In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States." *McPherson v. Blacker,* 146 U.S. 1, 35 (1892). *See also Opinion of the Justices No. 87,* 250 Ala. 399, 401, 34 So. 2d 598, 600 (1948) (same). "Congress has never undertaken to interfere with the manner of appointing electors . . . but has left these matters to the control of the states." *Fitzgerald v. Green,* 134 U.S. 377, 380 (1890). The electors, called into existence by the United States Constitution, act by authority of the state in choosing a President and Vice President:

> "The presidential electors exercise a federal function in balloting for President and Vice-President but they are not federal officers or agents any more than the state elector who votes for congressmen. They act by authority of the state that in turn receives its authority from the federal constitution."

Ray v. Blair, 343 U.S. 214, 224-25 (1952). *See also Burroughs v. United States,* 290 U.S. 534, 545 (1934) (same); *Opinion of the Justices No. 194,* 283 Ala. 341, 343, 217 So. 2d 53, 55 (1968) (quoting *Green,* 134 U.S. at 379) (same); *U.S. Term Limits,* 514 U.S. at 805 (noting that the Constitution provides "express delegations of power to the States to act with respect to federal elections").

In contrast to the detailed provisions in the Twelfth Amendment that allocate to Congress the authority to count the electoral votes and, in the absence of a majority, to choose the President and Vice President, the Constitution grants "plenary power to the state legislatures in the matter of the *appointment* of electors." *McPherson,* 146 U.S. at 35 (emphasis added). No constitutional division of power between the states and the federal government or between the different branches of government hinders any state from selecting its allocated portion of the members of the electoral college. State power, far from being preempted in this area, is expressly bestowed. For implementation in Alabama *see* §§ 17-14-30 through -37, Ala. Code 1975 ("Elections for Presidential and Vice Presidential Electors").

The authority of the states to select electors, however, does not extend to abrogating the qualifications clause.

> "Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States; but otherwise the power and jurisdiction of the state is exclusive, *with the exception of* the provisions as to the number of electors and *the ineligibility of certain persons*. . . ."

McPherson, 146 U.S. at 35 (emphasis added). "[T]he First Section of the Second Article of the Constitution" "does grant extensive power to the States to

pass laws regulating the selection of electors. . . . *[T]hese granted powers* are always subject to the limitation that they *may not be exercised in a way that violates other specific provisions of the Constitution.*" *Williams v. Rhodes,* 393 U.S. 23, 29 (1968) (emphasis added). *See also Ray v. Blair,* 343 U.S. at 227 (noting "the state's right to appoint electors in such manner, *subject to possible constitutional limitations,* as it may choose" (emphasis added)); *Williams v. Virginia State Bd. of Elections,* 288 F. Supp. 622, 626 (E.D. Va. 1968), aff'd mem., 393 U.S. 320 (1969) ("In short, the manner of appointment must itself be free of Constitutional infirmity.").

Although the electoral college was originally established to be an independent body of judicious individuals who would exercise their discretion in the same manner as other chosen representatives, in practice the electors have been chosen by popular vote in tandem with the presidential candidates they are pledged to support.[21] law makes this practice mandatory. *See* § 17-14-31(c), Ala. Code 1975. Although the names of the electors are not printed on the presidential ballot, § 17-14-32, Ala. Code 1975, "[a] vote for a particular presidential candidate is counted as a vote for the slate of electors pledged to

[21] In the first presidential election five state legislatures directly appointed the electors without any participation by the voters. *McPherson,* 146 U.S. at 29-30. Today "in each of the several States the citizens themselves vote for Presidential electors." *Bush v. Gore,* 531 U.S. at 104.

support him." *Hitson v. Baggett,* 446 F. Supp. 674, 675 (M.D. Ala. 1978), aff'd mem., 580 F.2d 1051 (5th Cir. 1978). Accordingly, when the Secretary of State, pursuant to state law, authorizes the printing of names of presidential candidates on the general-election ballot, he or she is also participating in executing the state's power under Article II of the United States Constitution to select presidential electors. This power, however, expressly granted to the States by the Constitution, must be exercised in conformity with other provisions of the Constitution, including the qualifications clause.

b. The Duty of the Secretary of State to Support the United States Constitution

The United States Constitution is the supreme law of the land. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ." U.S. Const. Art. VI, cl. 2. In the immediately following clause the Constitution binds state officials to obey this mandate: "[A]ll executive and judicial Officers . . . of the several states, shall be bound by Oath or Affirmation, to support this Constitution. . . ." U.S. Const. Art. VI, cl. 3. The Alabama Constitution requires state officials to take a similar oath or affirmation to support the federal and state constitutions:

> "All members of the legislature, and all officers, executive and judicial, before they

> enter upon the execution of the duties of their respective offices, shall take the following oath or affirmation:
>
> > "'I, ... , solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Alabama, so long as I continue a citizen thereof; and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter, to the best of my ability. So help me God.'"

Art. XVI, § 279, Ala. Const. 1901. *See also Speiser v. Randall,* 357 U.S. 513, 536 (1958) (Douglas, J., concurring) ("All public officials – state and federal – must take an oath to support the Constitution by the express command of Article VI of the Constitution."); The Federalist No. 27, at 175 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting that "all officers, legislative, executive, and judicial, in each State, will be bound by the sanctity of an oath" to support the constitution as the supreme law of the land); *Shuttlesworth v. Birmingham Bd. of Educ.,* 162 F. Supp. 372, 381 (N.D. Ala. 1958) ("As executive officers of the State, the members of the defendant [Birmingham] Board [of Education] are likewise required to 'be bound by Oath or Affirmation to support this Constitution.'").

The oath to support the constitution, wrote Justice Story,

> "results from the plain right of society to require some guaranty from every officer, that

> he will be conscientious in the discharge of his duty. Oaths have a solemn obligation upon the minds of all reflecting men, and especially upon those, who feel a deep sense of accountability to a Supreme being."

III Joseph Story, *Commentaries on the Constitution of the United States* § 1838 (1833). Story explained the purpose for state officers to execute the oath: "The members and officers of the state governments have an essential agency in giving effect to the national constitution. . . . [F]unctions, devolving on the state authorities, render it highly important, that they should be under a solemn obligation to obey the constitution." *Id.,* § 1839. George Washington admonished his countrymen that "'"the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is *sacredly obligatory upon all.*"'" *State v. Manley,* 441 So. 2d 864, 867 (Ala. 1983) (quoting *In re Opinion to the Governor,* 55 R.I. 56, 61, 178 A. 433, 436 (1935), quoting in turn R.I. Const. Art. I, § 1).

Under the Constitutions of the United States and of the State of Alabama, the Secretary of State, as an executive officer of the State of Alabama, has an affirmative legal duty to recognize and support the United States Constitution as the supreme law of the land.[22] The United States Constitution does not

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[22] The Secretary of State argues that she does investigate the qualifications of candidates in "a very specific set of circumstances," namely, "when she has knowledge gained from an

(Continued on following page)

supply a detailed catalog of the specific duties encompassed by the Article VI oath of allegiance. "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind." *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 407 (1819). Nonetheless, as Chief Justice John Marshall stated for the Court in regard to the oath for judicial office:

> "Why otherwise does [the Constitution] direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

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official source while performing her duties as prescribed by law, that a candidate has not met a certifying qualification." Secretary of State's brief, at 11. The Attorney General's opinion on which she relies states: "The Code does not require the Secretary of State to determine whether each nominee meets all the qualifications for his or her particular office." Op. Att'y Gen. No. 1998-00200 (August 12, 1998), at 3. Further, "the Secretary of State has no duty to investigate facts not within his official knowledge. . . ." *Id.,* at 5. The Attorney General's opinion, however, cites only state-law requirements for ballot access that may give rise to "official knowledge," such as an ethics-commission notice or a duty to verify petition signatures. *Id.,* at 3. The opinion does not mention the federal qualifications clause implicated in this case.

> ". . . .
>
> "Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government?"

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803). *See also Collier v. Frierson,* 24 Ala. 100, 109 (1854) (discussing the constitutional provisions for amending the state constitution and asking: "But to what purpose are these acts required, or these requisitions enjoined, if the Legislature or any other department of the government, can dispense with them").

The "last and closing clause of the Constitution" binds all executive and judicial officers of the several states "to preserve it in full force, in all its powers, *and to guard against resistance to or evasion of its authority, on the part of a State.*" *Ableman v. Booth,* 62 U.S. (21 How.) 506, 524 (1858) (emphasis added).

> "[E]very State has plighted to the other States to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes. In the emphatic language of the pledge required, it is *to support this Constitution.*"

62 U.S. (21 How.) at 525.

c. Enforcing the Qualifications Clause

The qualifications clause is justiciable. In two cases federal district courts have upheld decisions of state officials, including secretaries of state, who refused to qualify proposed candidates for the presidential ballot who were less than 35 years old. In *Socialist Workers Party of Illinois v. Ogilvie,* 357 F. Supp. 109 (N.D. Ill. 1972), the court declined to enjoin the decision of the State Electoral Board, which included as a member the Illinois Secretary of State, refusing to place on the presidential ballot the Socialist Workers Party candidate for President, who was admittedly 31 years old. The candidate, the court found, "does not fulfill the eligibility requirements specified in Article II, Section 1 of the United States Constitution." 357 F. Supp. at 113. Recently, in *Peace & Freedom Party v. Bowen,* 912 F. Supp. 2d 905 (E.D. Cal. 2012), the court upheld a decision of the California Secretary of State refusing to list Peta Lindsay on the 2012 primary ballot as the Peace and Freedom Party candidate for President. The Court noted that Lindsay, whose attorney admitted in a letter that she was 27 years old, "is ineligible to serve as president due to her age." 912 F. Supp. 2d at 908.

These cases address situations in which allegedly ineligible presidential candidates have sought judicial relief from the decisions of state election officials excluding them from the ballot because they were underage. *See also Hassan v. Colorado,* 870 F.Supp.2d 1192, 1195 (D. Colo. 2012), aff'd, 495 F. App'x 947 (10th Cir. 2012) (denying a motion to enjoin the

Colorado Secretary of State from refusing to certify for the presidential ballot a naturalized citizen who could not affirm that he was "'a natural-born citizen of the United States'"). The case before us seeks inverse relief: to require the Secretary of State to investigate for ineligibility candidates she has already certified for the presidential-election ballot and to screen all such candidates for eligibility in the future. In *Jones v. Bush,* 122 F. Supp. 2d 713 (N.D. Tex. 2000), aff'd, 234 F.3d 134 (5th Cir. 2000) (table), registered voters in Texas sought an injunction to restrain the 32 Texas electors from casting their votes for both George W. Bush as President and Richard B. Cheney as Vice President on the ground that both were inhabitants of Texas in violation of the first clause of the Twelfth Amendment.[23] The court found that the voters lacked standing for failure to show particularized injury, *id.* at 716-18, but nevertheless addressed the merits of the case to "assist the parties in obtaining full appellate review in the short period that remains before the Electoral College votes." *Id.* at 718. Equating the term "inhabitant" as used in the Twelfth Amendment with the term "domicile" as used in personal-jurisdiction law, the court found that Mr. Cheney was domiciled in, and thus an inhabitant of, Wyoming. Accordingly, the plaintiffs failed to satisfy

[23] "The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves. . . . " U.S. Const. Amend. XII.

their burden to show a likelihood of success on the merits of their claim that the Vice President-elect was an inhabitant of Texas. *Id.* at 718-21.

In *Jones v. Bush,* the court directly adjudicated, although as dicta, an alleged violation of an eligibility provision of the United States Constitution without any auxiliary grounding in state law. In this case the plaintiffs seek to require the Alabama Secretary of State to respect her duty and oath of allegiance to the United States Constitution either as an adjunct requirement to the "otherwise qualified" phrase in § 17-9-3 or as a freestanding duty under the United States Constitution. The presidential-eligibility provisions of the United States Constitution, where unambiguous and directly applicable to the actions of a particular state official, do not require the existence of a parallel state statute to be enforceable. Otherwise a state could nullify within its borders the eligibility provisions of the federal constitution simply by not passing enabling legislation.

"Constitutional provisions are presumed to be self-executing." 16 C.J.S. *Constitutional Law* § 89 (2005). "A constitutional provision is considered to be self-executing when additional legislation is not required for it to be effective." *Cole v. Riley,* 989 So. 2d 1001, 1005 n.2 (Ala. 2007). The qualifications clause prohibits anyone from being eligible for the office of President who does not meet the three qualifications stated therein. "[U]sually no legislation is required to effectuate a constitutional provision that is prohibitory

in its language. . . ." 16 Am. Jur. 2d *Constitutional Law* § 101 (2009).

As the gatekeeper for presidential-ballot access in Alabama, the Secretary of State is the official upon whom rests the duty to enforce the qualifications clause. "A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way." *Ex parte Virginia,* 100 U.S. 339, 347 (1879). If the responsible state official could defy or deliberately ignore the Constitution, "the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases." *Sterling v. Constantin,* 287 U.S. 378, 397-98 (1932). "'[A]n official, whose duty it was to enforce the law, [may not] disregard the very law which it was his duty to enforce. . . .'" *Faubus v. United States,* 254 F.2d 797, 807 (8th Cir. 1958) (quoting *Strutwear Knitting Co. v. Olson,* 13 F. Supp. 384, 391 (D. Minn. 1936)). Compare *Seay v. Patterson,* 207 F. Supp. 755, 756 (M.D. Ala. 1962) (noting that "the governor of a state when he acts or fails to act in his official capacity must be and is always subject to the constitutional limitations imposed upon him by the Constitution of the United States").

To the extent that state laws did not empower the Secretary of State to implement the requirements of the qualifications clause or even forbade her so to act, such laws would have to recede before her oath to support the Constitution and the superior mandate of the Supremacy Clause. "[C]onflicting obligations" under state law are "without effect" in the face of

superseding federal law. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 691-92 (1979). Section 17-14-31 requires the Secretary of State to place the names of national-convention nominees on the presidential ballot without any necessity to examine their qualifications unless the candidates ran in the presidential primaries. This provision cannot diminish the eligibility requirements of the presidential-qualifications clause. "There is no such avenue of escape from the paramount authority of the Federal Constitution." *Sterling,* 287 U.S. at 398.

Further, the Secretary of State may not expressly disavow in her official capacity a requirement of the United States Constitution that she is bound by oath to support and that directly implicates her duties as an executive officer of the State. "The States and their officers are bound by obligations imposed by the Constitution. . . ." *Alden v. Maine,* 527 U.S. 706, 755 (1999). Two scholars observe:

> "[P]owerful rule-of-law concerns militate against the proposition that state actors ought to be able to ignore some parts of the Constitution on the ground that those parts really aren't all that important. The very point of a written constitution, one might think, is to put such arguments off limits to the governmental officials who are bound by the document's requirements."

Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?,* 29 Fla. St. U. L. Rev. 925,

943 (2001). As Chief Justice John Marshall noted: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury v. Madison,* 5 U.S. (1 Cranch) at 176. The statement of the Deputy Secretary of State in an agency capacity that the Secretary of State's "office would not investigate the legitimacy of any candidate" is legally untenable, as is the statement of the Secretary of State in her motion to dismiss that she "has no legal duty to investigate the qualifications of a candidate." Under both the Supremacy Clause and the oath she took to support the United States Constitution, the Secretary of State has a legal duty to observe the presidential-eligibility requirements of Article II, § 1, clause 4 of the United States Constitution. She may not refuse to recognize this duty without violating her oath of office or offending the Supremacy Clause.[24] The absence of a specific state-law requirement to enforce the qualifications clause does not operate as a waiver of her superior duty under federal constitutional law. "The laws of the United States are as much a part of the law of Alabama as its own local laws." *Forsyth v.*

[24] *See U.S. Term Limits,* 514 U.S. at 817 (noting Thomas Jefferson's observation that " 'to add new qualifications to those of the Constitution would be as much an alteration *as to detract from them*' " (quoting letter of Jan. 31, 1814, to Joseph C. Cabell, in 14 *Writings of Thomas Jefferson* 82 (A. Lipscomb ed. 1904) (emphasis added))).

Central Foundry Co., 240 Ala. 277, 282, 198 So. 706, 710 (1940).

IV. Remedy

Under Alabama law, the Secretary of State is bound by the "otherwise qualified" clause of § 17-9-3 in making a decision to print on the general-election ballot the names of presidential candidates nominated by a national convention who have also participated in the presidential-preference primary. Those qualifications include the requirements of the presidential-qualifications clause that the Secretary of State is bound by oath and the Supremacy Clause to observe. Because the mandate of the presidential-qualifications clause is self-executing, its effectiveness does not depend on implementing legislation. Thus, regardless of state law, the Secretary of State has a duty to observe the requirements of the presidential-qualifications clause in certifying any candidate for the presidential ballot in the general election.

Section 17-16-44 forbids any state court from ordering the Secretary of State to decertify the votes cast for a presidential candidate after a general election has taken place. Further, any remedy in regard to the qualifications of a President-elect is a congressional responsibility. Once the election of 2012 occurred and Alabama's electoral votes were certified by the Governor and cast on the day designated, the State lost jurisdiction under both state and federal law to alter its electoral votes, thereby making issues

of ineligibility or decertification moot. Under the "capable of repetition, yet evading review" exception to mootness, however, the circuit court should have granted the petition for a writ of mandamus to the extent of ordering the Secretary of State to recognize and implement in future presidential elections the mandate of the federal constitution that presidential *candidates* satisfy the citizenship requirement of Art. II, § 1, cl. 4, of the United States Constitution.

The Secretary of State is a constitutional officer. Art. V, § 134, Ala. Const. 1901. The manner in which the Secretary of State implements the federal constitutional mandate falls in the first instance within her executive discretion. *Henley v. Birmingham Trust Nat'l Bank,* 295 Ala. 38, 56, 322 So. 2d 688, 704 (1975) (Maddox, J., dissenting on other grounds) (noting that the attorney general "is a constitutional officer and is vested with executive discretion"). The plaintiffs sought a writ of mandamus from the circuit court ordering the Secretary of State to require from each presidential candidate a verified birth certificate. Presentation of a birth certificate is indeed a common means of determining age and citizenship.[25]

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[25] The plaintiffs assert that "a teenager applying for a learner's license must submit an original, bona fide birth certificate. The same is true for a Boy Scout before he joins a troop." Plaintiffs' brief, at 37. *See* § 32-6-8(b), Ala. Code 1975 (stating that "[t]he age of the applicant [for a learner's license] shall be substantiated by the applicant filing with the department a certified copy of his or her birth certificate"). Federal passport

(Continued on following page)

Although I would not prescribe the manner in which the Secretary of State is to verify eligibility of presidential candidates, I believe she has a duty as the chief elections official of Alabama to implement the natural-born-citizen requirement of Article II, § 4, of the United States Constitution.

V. Conclusion

Although the plaintiffs' request for relief is moot as to the legality, conduct, and results of the 2012 election, under the "capable of repetition, yet evading review" exception to mootness, the circuit court, in my view, should have granted the petition for a writ of mandamus to the extent of ordering the Secretary of State to implement the natural-born-citizen requirement of the presidential-qualifications clause in future elections.

Furthermore, I believe the circuit court should have granted the petition for a writ of mandamus to order the Secretary of State to investigate the qualifications of those candidates who appeared on the 2012 general-election ballot for President of the United States, a duty that existed at the time this petition was filed and the object of the relief requested. Although the removal of a President-elect or a President who has taken the oath of office is within the breast of Congress, the determination of the eligibility of the

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regulations state that a birth certificate is "[p]rimary evidence of birth in the United States." 22 C.F.R. § 51.42(a).

2012 presidential candidates before the casting of the electoral votes is a state function.

This matter is of great constitutional significance in regard to the highest office in our land. Should he who was elected to the presidency be determined to be ineligible, the remedy of impeachment is available through the United States Congress, and the plaintiffs in this case, McInnish and Goode, can pursue this remedy through their representatives in Congress.

For the above-stated reasons, I dissent from this Court's decision to affirm the judgment of the circuit court dismissing this action on the motion of the Secretary of State.

PARKER, Justice (dissenting).

I agree with Chief Justice Moore's dissent with the exception explained below.

I agree with Chief Justice Moore's conclusion that the Secretary of State, as the chief elections official of Alabama, has a duty, under both Alabama and federal law, to ensure that the candidates for President of the United States whose names are placed on an Alabama election ballot meet the applicable qualifications. I write separately, however, to clarify that I do not believe that the Secretary of State has an affirmative duty to investigate, on his or her own volition, all the qualifications of every proposed candidate, but that the Secretary of State's

duty to investigate a potential candidate's qualifications arises once the Secretary of State has received notice that a potential candidate may lack the necessary qualifications to be placed on an Alabama election ballot. For the following reasons, I believe that, in the present case, the Secretary of State received notice sufficient to raise a duty to investigate the qualifications of President Barack Hussein Obama before including him as a candidate on Alabama's election ballot.

This is not the first time that Hugh McInnish has appeared before this Court concerning this issue. On March 6, 2012, one week before Alabama's primary elections were held on March 13, 2012, McInnish filed in this Court a petition for a writ of mandamus requesting that this Court order the Secretary of State

> "to demand that [President] Obama cause a certified copy of his Bona Fide birth certificate to be delivered to her direct from the government official who is in charge of the records in which it is stored, and to make the receipt of such a prerequisite to his name being placed on the Alabama ballot for the March 13, 2012, primary election, and on the ballot for the November 6, 2012, general election."

(Case no. 1110665.) As I noted in my unpublished special concurrence to this Court's order striking McInnish's petition for a writ of mandamus: "McInnish attached certain documentation to his mandamus petition, which, if presented to the appropriate forum

as part of a proper evidentiary presentation, would raise serious questions about the authenticity of both the 'short form' and the 'long form' birth certificates of President Obama that have been made public."

On March 6, 2012, the Secretary of State was served with McInnish's petition for a writ of mandamus, including the attached documentation raising questions about President Obama's qualifications. That documentation served by McInnish on the Secretary of State was sufficient to put the Secretary of State on notice and raise a duty to investigate the qualifications of President Obama before including him as a candidate on an Alabama election ballot.

Therefore, I respectfully dissent from the majority's decision affirming the circuit court's judgment.

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

MCINNISH HUGH, GOODE VIRGIN H JR, Plaintiffs, V. CHAPMAN, BETH, Defendant.	)))))))	Case No.: CV-2012-001053.00

Final Order

This cause having come before the Court on Defendant's Motion To Dismiss, the same having been considered, it is hereby

ORDERED, ADJUDGED AND DECREED said Motion is GRANTED.

DONE this 6th day of December, 2012

/s/ EUGENE W. REESE
CIRCUIT JUDGE