

No. 21-10034

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

TREVA THOMPSON, *et al.*,
Plaintiffs-Appellants,

v.

HON. JOHN H. MERRILL,
in his official capacity as Secretary of State of Alabama, *et al.*,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:16-cv-783-ECM-SMD

**STATE APPELLEE'S REPLY IN SUPPORT OF THEIR
MOTION TO DISMISS PLAINTIFF DARIUS GAMBLE**

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January 20, 2023

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1(a)(1) and 26.1-2(c), the undersigned counsel certifies that the following listed persons and parties may have an interest in the outcome of this case:

1. Alabama Attorney General's Office;
2. Alabama Board of Pardons and Paroles;
3. Alabama Secretary of State's Office;
4. Allen, Hon. Wes;
5. Amunson, Jessica;
6. Ayers Sr., Marc J.;
7. Beito, David T.;
8. Blacksher, James U.;
9. Bokat-Lindell, Noah B.;
10. Borden, Gray M.;
11. Bowdre, A. Barrett;
12. Bowie, Blair;
13. Bradley Arant Boult Cummings LLP;
14. Brasher, Hon. Andrew J.;
15. Campaign Legal Center;
16. Capel, Hon. Wallace;

17. Cappell & Howard P.C.;
18. Chynoweth, Brad A.;
19. Coody, Hon. Charles S.;
20. Corley, Laura;
21. Danahy, Molly E.;
22. Davis, James W.;
23. Derfner, Armand;
24. Derfner & Altman;
25. Diaz, Jonathan;
26. Doyle, Hon. Stephen Michael;
27. Dyar, Robert F.;
28. Engelhardt, Todd;
29. Fairbanks, Philip G.¹;
30. Faulkner, Rep. David;
31. Fedornak, Melissa T.;
32. Francois, Aderson B.;
33. Gaber, Mark P.;

¹The trial court clerk's office inadvertently added Mr. Fairbanks as defense counsel. He was never counsel in the case and has no known interest in it. He is included here because he was included in earlier filings.

34. Gamble, Darius;
35. Giles, Antwoine;
36. Greater Birmingham Ministries;
37. Gwathney, Leigh;
38. Harris, Julie;
39. Head, Lyn;
40. Hebert, J. Gerald;
41. Hipp, Jason;
42. Howell, Laura E.;
43. Institute for Public Representation, Georgetown University Law
Center;
44. Jackson, Caleb;
45. Jenner & Block LLP;
46. Karlan, Pamela;
47. Kidd, Quentin;
48. King, Pamela;
49. LaCour Jr., Edmund G.;
50. Lang, Danielle M.;
51. Lanier, Timothy;
52. Llewellyn, Patrick D.;

53. Mangan, Mary;
54. Marks, Hon. Emily C.;
55. Marshall, Hon. Steve;
56. McCrary, Peyton;
57. McGuire, J. Mitch;
58. McGuire & Associates;
59. Merrill, Hon. John H.;
60. Messick, Misty S. Fairbanks;
61. Mobile County Board of Registrars;
62. Montgomery County Board of Registrars;
63. Newby, Larry Joe;
64. Noblin, George;
65. Owen, Karen L.;
66. Public Citizen Litigation Group;
67. Reynolds, Anna;
68. Riser, Robert V.;
69. Ross, Jay;
70. Sahlie, Cindy;
71. Sinclair, Winfield J.;
72. Smith, Daniel A.;

73. Snipes III, James;
74. Stanford Law School;
75. State of Alabama;
76. Stewart, Michael E.;
77. Strange, Hon. Luther;
78. Swetnam, Melissa;
79. Thompson, Treva;
80. United States of America;
81. Walker, Clifford;
82. Walker, Hon. Susan Ross;
83. Ward, Cam;
84. Watkins, Hon. W. Keith;
85. Weller, Christopher W.;
86. Woodard, Jeff;
87. Yow, Mario D.;
88. Yun, Jennifer J.; and,
89. Zimmer, Jennifer.

Respectfully submitted this 20th day of January, 2023.

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Plaintiffs’ response confirms that Plaintiff Darius Gamble’s claims are moot. Depending on how this Court resolves the remaining Plaintiffs’ *ex post facto* claims, the mootness of Gamble’s claims might not matter. But to the extent the Court has occasion to reach the Gamble-specific *ex post facto* claim that turns on whether he had fair warning that his 2006 drug trafficking crime would lead to his disenfranchisement, *see* Blue Br. 40-43, that claim is moot and should not be considered. Plaintiffs argue otherwise by asking the Court to expand the mootness exception for claims capable of repetition yet evading review to an *ex post facto* claim that can *never* repeat itself because even Gamble must concede that he is *now* fairly on notice that drug trafficking convictions lead to disenfranchisement. Plaintiffs thus note that the district court denied class certification, but they never appealed that ruling, and it is no basis for stretching the bounds of Article III. Gamble’s appeal is moot, and he should be dismissed from this case.

The State Defendants properly moved to dismiss Plaintiff Gamble.

Whether it will matter to this Court’s analysis that Gamble has been pardoned will depend on what analysis this Court adopts. With respect to Gamble’s discrimination claim, the Plaintiffs are right. The Court can rule for the State Defendants without deciding whether Gamble’s claims are moot, and, should the

Court conclude that the summary judgment should not have been granted, then the district court can sort out which Plaintiffs should proceed to trial.

With respect to the *ex post facto* claim, the Court can and should rule that felon disenfranchisement is not punishment and so each of the Plaintiffs' *ex post facto* claims fail, *see* Red Br. at 37-41.² Such a ruling make not turn on whether Gamble retains a claim. Plaintiffs note that they too have arguments that might pretermitt the need to conduct a conviction-specific analysis. App. 74 at 5 n.2, though Defendants of course have not conceded any of those points.

Thus, it may be that if the Court deems disenfranchisement to be punishment, the Court will need to consider the conviction-specific arguments the parties have offered as to Gamble's particular *ex post facto* claim. Bl. Br. at 40-43; Red Br. at 43-44. If the Court reaches those arguments, it may need to reach the issue of Gamble's ability to remain in the appeal.

Gamble's claims are moot.

If the Court does reach the mootness issue, it should hold that Gamble's claims are moot and are not saved by the capable of repetition yet evading review exception to mootness. The exception for challenged actions that are "capable of being

² Citations to page numbers in briefs are to the page number at the bottom of the page. "App." refers to documents filed with this Court that have an ECF stamped document number, "Doc." refers to documents filed with the district court, and page citations correspond to the file-stamped page numbers.

repeated *and* evading review ... is narrow and applies only in exceptional situations.” *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) (*per curiam*) (internal citations and quotation marks omitted).

As to the evading review prong, “the challenged action [must be] in its duration too short to be fully litigated prior to its cessation or expiration.” *Id.* Plaintiffs assert it is sufficient that Gamble’s claims have in fact evaded review, App. 74 at 6, but the exception is not met “if there would be ample opportunity for review at [the] time” the challenged action recurs. *Al Najjar*, 273 F.3d at 1336; *see also Hall v. Secretary of State*, 902 F.3d 1294, 1297 (11th Cir. 2018). Here, Plaintiffs assert that Gamble was disenfranchised for 14 years. App. 74 at 3; *see also* doc. 93 at 6-7. Fourteen years is long enough to litigate a federal court action to conclusion. And, unlike a challenge to a forthcoming election procedure, there is nothing inherently transitory about imposing collateral consequences on a convicted felon. Indeed, Alabama disenfranchises felons for life or “until restoration of civil and political rights[.]” Ala. Const. of 2022, art. VIII, § 177(b).³ Failure to meet this prong is

³ The Alabama electorate adopted a new Constitution during the 2022 General Election. “Based on these election results,” the Governor of Alabama “proclaimed” the “proposed Constitution of 2022 ... to be the official and binding” and that it “shall succeed the Constitution of Alabama of 1901 as the supreme law of this State” STATE OF ALABAMA PROCLAMATION BY THE GOVERNOR (Nov. 28, 2022). The new Constitution took effect on January 1, 2023, Ala. Const. art. XVIII, § 286.01.

sufficient to avoid application of the exception, *Al Najjar*, 273 F.3d at 1336, meaning Gamble's claims are moot.

As to the capable of repetition prong, Plaintiffs rely on election cases to argue for a relaxed application of the same complaining party requirement, App. 74 at 7-10, even though it was not an election that mooted Gamble's claims.⁴ In *Storer v. Brown*, 415 U.S. 724 (1974), and *Hall v. Secretary of State*, 902 F.3d 1294 (11th Cir. 2018), the mootness discussion was triggered by the fact that the election had occurred. *Storer*, 415 U.S. at 737 n.8; *Hall*, 902 F.3d at 1296-98. The same is generally true as to the out-of-Circuit cases Plaintiffs cite. *Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 164 (5th Cir. 2009) ("TDP contends that Kucinich's claim is moot because the 2008 primary election has occurred and no order of the court can affect the rights of the parties with regard to the requested relief.") (internal quotation marks omitted); *see also id.* at 164 n.1 ("each election cycle offers too little opportunity to litigate to conclusion a challenge to an election requirement like this one"); *Lawrence v. Blackwell*, 430 F.3d 368, 370 (6th Cir. 2005) ("Defendants assert that the court of appeals should affirm the district court's dismissal of the complaint because the controversy is now moot since the 2004 election has already taken place."); *see also id.* ("Challenges to election laws are one

⁴ Plaintiffs also refer to a similar relaxation for "cases involving the public interest[.]" App. 74 at 7, but do not develop the idea or cite any authority from this Court to demonstrate that such relaxation is warranted here.

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.”); *Merle v. U.S.*, 351 F.3d 92, 94 (3d Cir. 2003) (“The Government argues that this appeal has been mooted by the occurrence of the 2002 election and the filling of the Congressional office for which Merle wished to be a candidate.”); *Majors v. Abell*, 317 F.3d 719, 722-23 (7th Cir. 2003) (the district court had held that the case was moot because plaintiffs waited until a week before the election to file suit and did not run in the next election); *see id.* at 722 (“The standard example is abortion. A suit by a pregnant woman challenging a state law limiting the right to an abortion is unlikely to be decided before the pregnancy ends one way or another, and so the termination of the pregnancy is held not to terminate jurisdiction. Challenges to election rules are treated the same way.”) (internal citations omitted); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 37 n.12 (1st Cir. 1993) (“The Board suggests that this causal link snapped once the general election concluded, thereby rendering the case moot.”); *McLain v. Meier*, 637 F.2d 1159, 1162 n.5 (8th Cir. 1980) (“We have held that the fact that the election has taken place does not render the controversy about the constitutionality of North Dakota's election laws moot. Regardless of McLain's candidacy in any future election, election law controversies tend not to become moot. Such controversies are

capable of repetition, yet evading review.”) (internal quotation marks and citations omitted).

Only *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000), bears discussion. There, in a suit brought by an out-of-State resident who sought to be a candidate, the State “argue[d] that because the contended seat has been filled, the controversy has been rendered moot[.]” *Id.* at 1033. The court disagreed. “Although the election has passed, Schaefer’s claim is capable of repetition because in the future California would deny him or any other nonresident the right to file a declaration of candidacy. The short span of time between the filing deadline and the election makes such a challenge evasive of review.” *Id.* Then, discussing *Dunn v. Blumstein*, which was a challenge to a residency requirement, the court noted that the Supreme Court did not hold Blumstein’s case “rendered moot by the fact that he had by then resided in the jurisdiction long enough to vote in the next election.” *Id.* The residency requirement would in time be met as a matter of course, just as pregnancies are time-limited. The court continued, “In *Joyner v. Mofford*, 706 F.2d 1523, 1527 (9th Cir. 1983), we followed Dunn stating: ‘If [election law] cases were rendered moot by the occurrence of an election, many constitutionally suspect election laws ... could never

reach appellate review.” *Schaefer*, 215 F.3d at 1033. This analysis is entirely consistent with the State Defendants’ position.⁵

Plaintiffs’ policy arguments fail.

Plaintiffs argue that “[t]his case is exceptional because of the district court’s rationale for denying class certification[,]” App. 74 at 10 (emphasis and capitalization omitted), and continue to refer to “the many other similarly situated individuals that [Gamble] represents[,]” *id.* at 12. In their reply brief in support of their motion for class certification, Plaintiffs did raise the possibility of mootness as a reason for class certification, doc. 114 at 12, 14-15, and the district court did say that, “[u]nder the facts alleged,” it “cannot conclude that there is a basis for finding that there is a substantial threat of mootness to any of the named Plaintiffs’ claims[,]” doc. 194 at 9. However, Plaintiffs did not seek a permissive appeal pursuant to Fed. R. Civ. P. 23(f), and they did not brief the issue in their Blue Brief, Bl. Br. at 1. They should not be permitted to revisit the issue now to stretch the boundaries of Article III.

⁵ In a footnote, the Ninth Circuit discounted the importance of Schaefer’s apparent decision to re-locate to California. *Id.* n.1. The court said it was applying the same analysis just discussed but did not grapple with the fact that plaintiff had apparently voluntarily prevented the bar against non-resident candidates from impacting him again. Even so, it appears that Schaefer moved *after* the election at issue had triggered mootness issues, *id.*, while the passage of elections cast no concerns about mootness on Gamble’s claims.

Relatedly, in footnote 5, Plaintiffs argue that the capable of repetition yet evading review exception to mootness should apply “because the Defendant Bureau of Pardons and Paroles is the entity authorized to grant pardons and thus render Plaintiff Gamble’s (as well as Plaintiff King’s) claims moot.” App. 74 at 11 n.5. They cite cases for which they add parentheticals about “pick[ing] off” plaintiffs and voluntary cessation, and they note that other Plaintiffs have previously been dismissed from this case because they received a Certificate of Eligibility to Register to Vote. *Id.*⁶ Two responses are in order.

First, the Alabama Bureau of Pardons and Paroles (ABPP) is not a defendant in this case. Plaintiffs sued the Chair of the Alabama Board of Pardons and Paroles, not the Board itself. Doc. 1. Moreover, the Chair prevailed below on the claims against her, doc. 286, and Plaintiffs did not pursue those issues on appeal, *see* Red Br. at 18-19; Blue Br. at 1.⁷

Second, Gamble wanted a pardon, doc. 215-6 at 3; doc 222-6 at 9, and spoke at his pardon hearing, *Alabama Board of Pardons and Paroles Open Public Meeting Minutes September 1, 2022*, available at <https://paroles.alabama.gov/wp->

⁶Additional Plaintiffs were dismissed because their felony convictions were not included in Ala. Act No. 2017-378.

⁷When this litigation was filed, the Board, with the Governor’s approval, hired an executive to run the agency. Ala. Act No. 2019-393 gave the Governor authority to appoint a Director to run the agency, *see* Ala. Code § 15-22-21, and the agency started referring to itself as the Bureau. The three Board members continue to make decisions about the grant or denial of pardons.

content/uploads/NoReply.Scans_20220913_145723.pdf at 4 (last visited Jan. 20, 2023). When former Plaintiff Pamela King had her pardon hearing, she spoke for herself and so did one of the lawyers for Plaintiffs. *Alabama Board of Pardons and Paroles Open Public Meeting Minutes July 29, 2021*, available at https://paroles.alabama.gov/wp-content/uploads/0429_001.pdf at 2 (last visited Jan. 20, 2023).

In short, Plaintiffs are asking this Court to stretch the boundaries of Article III to allow a Plaintiff whose claims are mooted (following his request for a pardon) to continue in order to protect an uncertified class. The Court should decline.

* * *

For the foregoing reasons, the Court should dismiss Darius Gamble and proceed to resolve the appeal by Plaintiffs Thompson, Lanier, and GBM.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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s/Edmund G. LaCour Jr.

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Counsel for the State Appellees

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CERTIFICATE OF SERVICE

I hereby certify that, on January 20, 2023, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

s/Edmund G. LaCour Jr.

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