No. 16-109

In the Supreme Court of the United States

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS; TEA PARTY LEADERSHIP FUND AND ALEXANDRIA REPUBLICAN CITY COMMITTEE,

Petitioners,

and

AMERICAN FUTURE PAC,

Petitioner – Intervenor,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Dan Backer
DB CAPITOL STRATEGIES, PLLC
203 S. Union St., Suite 300
Alexandria, VA 22314
(202) 210-5431
DBacker@DBCapitolStrategies.com
Counsel for Petitioners

Michael T. Morley*
COOLIDGE-REAGAN FOUNDATION
1629 K St., Suite 300
Washington, DC 20013
(860) 778-3883
michael@coolidgereagan.org
Counsel for Petitioners & Petitioner-Intervenor

*COUNSEL OF RECORD

Legal Printers LLC, Washington DC • 202-747-2400 • legalprinters.com

Jerad Najvar
NAJVAR LAW FIRM
4151 Southwest Fwy. #625
Houston, TX 77027
(281) 404-4696
jerad@najvarlaw.com
Counsel for Petitioner-Intervenor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Sources

ARGUMENT

I. THIS COURT SHOULD RESOLVE WHETHER THE SAME-PLAINTIFF REQUIREMENT OF THE "CAPABLE OF REPETITION, YET EVADING REVIEW" DOCTRINE APPLIES IN ELECTION-LAW CASES

In the few weeks since this Petition for Certiorari was filed, courts have applied the "same plaintiff" requirement of the "capable of repetition, yet evading review" doctrine in yet more election-law cases to determine whether the plaintiffs would have their day in court. *See, e.g.*, *Cromwell v. Kobach*, No. 15-9300-JAR-JPO, 2016 U.S. Dist. LEXIS 99850, at *27-30 (D. Kan. July 29, 2016) (dismissing lead plaintiff's challenge to a proof-of-citizenship requirement for voter registration as moot because he would not again be subject to the challenged regulation); *cf. Missourians for Fiscal Accountability v. Klahr*, No. 15-2172, 2016 U.S. App. LEXIS 13767, at *11-12 (8th Cir. July 29, 2016) (holding that the plaintiff political committee's claims were not moot because it would be subject to the challenged statutes again in the next election cycle). Whether the same-plaintiff requirement applies to election-law cases is a crucial question that will continue to arise repeatedly and requires definitive resolution.

The Government's arguments cast no doubt upon the compelling need for certiorari. This case presents a pure question of law that has thoroughly percolated throughout the federal judiciary for years, dividing eight circuits and causing rifts within this Court's own precedents. It involves a fundamental

question of Article III jurisdiction specifically concerning election-related cases, an area of critical concern in a well-functioning democracy. The split has led to unacceptable unfairness, with the ability of plaintiffs to maintain materially identical constitutional challenges depending on the jurisdiction in which they are able to file.

1. The Government contends that the various election law cases in which this Court did not apply the same-plaintiff requirement were *sub silentio* overturned in 1975, when this Court purportedly "first recognized the same-plaintiff requirement" in *Weinstein v. Bradford*, 423 U.S 147 (1975) (per curiam), and *Sosna v. Iowa*, 419 U.S. 393 (1975). Opp. at 11. This argument is flawed.

First, the Government itself recognizes that "'[t]his Court does not normally overturn . . . earlier authority *sub silentio*.'" Opp. at 11 (quoting *Shalala v. Ill. Council on Long Term Care Inc.*, 529 U.S. 1, 18 (2000)). Second, the same-plaintiff requirement was not "first recognized" in those 1975 cases, but rather had been applied and enforced before then. *See, e.g.*, *De Funis v. Odegaard*, 416 U.S. 312, 319 (1974); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 178-79 & n.4 (1968).

Finally, this Court continued applying the election-law exception to the same-plaintiff requirement even after 1975. *See Anderson v. Celebrezze*, 460 U.S. 780, 784 n.3 (1983); *Mandel v. Bradley*, 432 U.S. 173, 175 n.1 (1977). Thus, this Court should not simply disregard Justices Scalia's and O'Connor's recognition of the body of precedent establishing the election-law exception to the same-plaintiff requirement. *Honig v. Doe*, 484 U.S. 305, 335 (1988) (Scalia, J., dissenting).

2. The Government also argues that recognizing an election-law exception to the same-plaintiff requirement "would be inconsistent with this Court's recent election-law decisions in *Davis v. FEC*, 554 U.S. 724 (2008), and *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL*)." Opp. at 10. This Court allowed the plaintiffs in those cases to litigate their claims, despite possible mootness concerns, because the challenged provisions would likely apply to them again in the future. *Id.*

As noted above, however, cases such as *Davis* and *WRTL* may not be read as *sub silentio* overruling "'earlier authority'" from this Court recognizing and applying the election-law exception to the same-plaintiff requirement. Opp. at 11 (quoting *Shalala*, 529 U.S. at 18). Moreover, because the plaintiffs in *Davis* and *WRTL* would be subject to the challenged provisions again, this Court did not need to determine whether the election-law exception remained good law. In short, *Davis* and *WRTL* neither considered the issue nor overturned any of this Court's earlier precedents regarding it. *See Moore v. Hoseman*, 591 F.3d 741, 744-45 (5th Cir. 2009); *Kucinich v. Texas Democratic Party*, 563 F.3d 161, 164-65 (5th Cir. 2009).[1]

3. The Government further claims that, in the cases in which this Court recognized the election-law exception to the same-plaintiff requirement, "the normal requirements of the capable-of-repetition [doctrine] either were satisfied or presumably could have been satisfied." Opp. at 12. But the

[1] The same analysis applies to the other cases the Government cites, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 774-75 (1978), and *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988). Opp. at 11.

Government may not dispose of inconvenient precedents by ignoring this Court's actual reasoning and holdings and substituting some hypothetical alternate analysis the Court did not employ.

In *Moore v. Ogilvie*, 394 U.S. 814, 815 (1969), the case remained justiciable after the election because the "burden" that the challenged legal provision "placed on the nomination of candidates for statewide offices remain[ed] and control[led] future elections." Likewise, in *Storer v. Brown*, 415 U.S. 724, 727 (1974), this Court held that the "capable of repetition" doctrine applied because "the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections." *See also Dunn v. Blumstein*, 405 U.S. 330, 332 n.2 (1972) (holding that the "capable of repetition" doctrine applied because the "laws in question remain[ed] on the books" and posed a "problem to voters"). These rulings lack any consideration of whether the challenged provisions would or could apply to the same plaintiffs again. Rather, as Justices Scalia and O'Connor recognized in *Honig*, these cases "focus[] instead upon the great likelihood that the issue will recur between the defendant and the other members of the public at large." 484 U.S. at 335 (Scalia, J., dissenting). This Court should grant certiorari to affirm the continued validity of that exception.[2]

[2] The Government's attempt to cast doubt on Petitioners' initial standing to bring this case is baseless. Opp. at 16. The Government points out that the founders of Stop REID and American Future PAC "'control[led] the timing of their registrations relative to any particular election.'" *Id.* (quoting Pet. App A42). Regardless of when Stop REID and American Future PAC were formed, however, they still would have been subject to the six-month waiting period, which arose as a matter of statute, *see* 52 U.S.C. § 30116(a)(1)(A), (a)(2)(A), (a)(4), rather than their founders' decisions.

4. The Government additionally asserts that Petitioners' claims would have remained justiciable had this case been certified as a class action. Opp. 6-7, 11, 12.[3] Under the law of the Fourth Circuit and other jurisdictions, however, Petitioners had the right to seek effectively classwide injunctive relief, enjoining the law with regard to all similarly situated PACs, even without class certification. *See Sandford v. R.L. Coleman Realty Co.*, 573 F.2d 173, 178 (4th Cir. 1978) ("Since the plaintiffs could receive the same injunctive relief in their individual action as they sought by the filing of their proposed class action, class certification was unnecessary in order to give the plaintiffs the injunctive relief they requested through class certification . . . . "); *see, e.g., League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 248-49 (4th Cir. 2014) (enjoining state from shortening the early voting period for any voters, even though the case was not a class action). *But see Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 392-93 (4th Cir. 2001). Thus, all of the rationales that led this Court to eliminate the "same plaintiff" requirement in class-action cases apply

[3] The Government dismisses *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973) (cited in Opp. at 12), on the grounds that it was a class action. In determining that the case remained justiciable, however, the Court did not consider its status as a class action. *See id.*

with equal force here. *Cf. Sosna*, 419 U.S. at 401-02.[4]

Indeed, when a plaintiff seeks injunctive or declaratory relief against an allegedly unconstitutional statute, many circuits refuse to certify a class. They reason that certification is unnecessary because the same effectively classwide relief is available, regardless of whether the suit proceeds as a class action. *See* Daniel Tenny, Note, *There is Always a Need: The "Necessity Doctrine" and Class Certification Against Government Agencies*, 103 MICH. L. REV. 1018, 1019 n.8 (2005) (collecting cases).

Requiring class certification of challenges to legal provisions governing the electoral process is a pointlessly formalistic gesture. Rule 23(b)(2) governs class actions in which the plaintiff seeks declaratory or injunctive relief. FED. R. CIV. P. 23(b)(2). When a court certifies a Rule 23(b)(2) class, it need not give the putative class members notice, an opportunity to be heard, or the chance to opt out. *See id.* R. 23(c)(2)(A); *see* Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 610 (2015). And when a plaintiff challenges the constitutionality of an

[4] This case is comparable to *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975), which the Court held remained justiciable after the plaintiff's claim became moot, in part because "[t]he attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in this case." Likewise, here, Petitioners' counsel include experienced political law practitioners who have represented, presently represent, and will continue to represent in the future numerous political committees subject to the six-month waiting period at issue.

election-related provision as a matter of law, its claim is necessarily common to, and typical of, all potential class members. *Cf.* Fed. R. Civ. 23(a)(2)-(4).

Indeed, in most election-law cases, no meaningful class can be certified. In cases where courts have applied the election-law exception to the same-plaintiff requirement, the alternative would have been to certify a plaintiff class of all present and future voters (*i.e.*, nearly the entire population, including children), or anyone who might ever run for office. Certifying a class of any non-connected PAC created at any point in the future that receives at least 50 contributions, contributes to at least 5 candidates, and is registered with the FEC for less than six months is not much more practicable. Justiciability in election law cases should not turn on the certification of effectively limitless classes of unidentifiable people and hypothetical future groups.

5. Perhaps most importantly, this case gives the Court an opportunity to insulate the federal judiciary from the morass of politics without sacrificing its institutional obligation to enforce the Constitution. Preserving the election-law exception to the same-plaintiff requirement will make it easier for this Court to adjudicate critical election-related issues outside the context of particular elections where the outcome hangs in the balance, and the identities of the candidates who would immediately benefit from different possible rulings are definitively known. *Cf. Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

Both the concept of mootness and the "capable of repetition, yet evading review" doctrine are at least

partly prudential. Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562 (2009). Affirming the election-law exception to the same-plaintiff requirement would be a prudent way of preserving the federal judiciary's legitimacy as it grapples with an ever-increasing number of acrimonious election-related disputes. *See* Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 442 (discussing the need for "heightened legitimacy for the courts" in election cases). For these reasons, this Court should grant *certiorari*.

II. THIS COURT SHOULD CONSIDER PETITIONERS' EQUAL PROTECTION CLAIM BECAUSE THE FOURTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S EQUAL PROTECTION AND CAMPAIGN FINANCE JURISPRUDENCE

This Court also should grant *certiorari* to reject the Fourth Circuit's radical reinterpretation of this Court's Equal Protection jurisprudence, which the Government enthusiastically embraces. *See* Opp. at 19.

1. It has long been a fundamental tenet of Equal Protection law that "all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Ctr, Inc.*, 473 U.S. 432, 439 (1985); *accord Lawrence v. Texas*, 539 U.S. 558, 579 (2003). In this case, materially identical political committees are subject to dramatically different restrictions on their ability to contribute to political parties based solely on whether they have been registered with the FEC

for six months. This Court repeatedly has invalidated laws that discriminate among materially identical political associations based on whether they are new or established. *See, e.g., Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 176-77, 183-87 (1979) (applying strict scrutiny and invalidating law that invidiously subjected newer political parties to different ballot access requirements than established parties); *Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968) (same).

Moreover, the statutory scheme of which this discrimination is a part is completely irrational. The Government has not offered a coherent explanation for this bizarre, internally inconsistent system. Nor has it attempted to explain why contributions to political parties that were perfectly acceptable throughout the first six months of a PAC's existence somehow become more pernicious or corrupting once the group hits that six-month mark.

The Government asks this Court to tacitly accept the Fourth Circuit's theory of "different but equivalent." In the Government's view, Congress may treat materially identical groups differently with regard to the exercise of constitutionally protected rights so long as the "'overall' restrictions" to which the groups are subject are purportedly comparable. Opp. at 17 (quoting Pet. App. A27). Such reasoning does not accord with contemporary Equal Protection doctrine. *See Cleburne*, 473 U.S. at 439.

2. The Fourth Circuit's holding also directly contravenes this Court's campaign finance jurisprudence, which prohibits the Government from restraining people's First Amendment activities to enforce or preserve some aggregate or "overall" limit.

McCutcheon v. FEC, 134 S. Ct. 1434, 1448-49 (2014). The Government may not vitiate a political committee's ability to contribute to the political parties with which it wants to associate, on the grounds that it has increased that committee's ability to contribute to candidates with whom the committee has no interest in associating. Association is not fungible.

Moreover, the Government expressly declined to demonstrate that the dramatic reduction in limits on contributions to political parties is tailored to combatting actual or apparent corruption. *See* Opp. at 18-19. Yet this Court's campaign finance precedents emphasize that "***[a]ny regulation***" of political contributions "must . . . target . . . corruption or its appearance." *McCutcheon*, 134 S. Ct. at 1441 (emphasis added).

3. Both the Government and the Fourth Circuit insist that this statutory scheme is immune from Equal Protection consideration under *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) ("*CalMed*"). *See* Opp. at 16; Pet. App. A23-A28. Their attempt to shoehorn this case into *CalMed* is an example of square peg, round hole. *CalMed* permitted Congress to impose different contribution limits on "'individuals and unincorporated associations'" than on "'unions and corporations,'" because those entities "'have differing structures and purposes.'" *CalMed*, 453 U.S. at 201 (quoted in Opp. at 17). Fundamentally different entities "may require different forms of regulation." *Id.*

Here, in contrast, Petitioners challenge discriminatory restrictions on entities of the same type: political committees. Political committees that are materially identical in every respect—groups

that may have the same "structure," "purpose," number of contributors, financial resources, and staff size as each other—are permitted to exercise their First Amendment rights to substantially different degrees based solely on whether they have been registered for six months. Yet the Government offers no indication that, after it has been registered for six months, a committee becomes more likely to engage in corruption with political parties (and simultaneously less likely to engage in corruption with candidates).

The Fourth Circuit's ruling thus violates fundamental principles of Equal Protection and campaign finance jurisprudence, and is contrary not only to *McCutcheon*, but *CalMed* itself.

4. This important issue warrants *certiorari*. FEC records show that approximately 1,700 multicandidate PACs are subject to this discriminatorily low limit on contributions to political parties. Collectively, these PACs have raised hundreds of millions of dollars; this case presents the question of whether they have the right to contribute twice as much to political parties. Extraordinary amounts of constitutionally protected associational and expressive activity are at stake.

Furthermore, as a result of this Court's ruling in *Citizens United v. FEC*, 558 U.S. 310 (2010), SuperPACs have come to dominate the political landscape. Funds that cannot be given to political parties due to contribution limits are being diverted, in part, to SuperPACs. *Cf.* Samuel Isaacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999). Super PACs are supplanting the traditional role of political parties in identifying viable candidates for public

office, amassing the resources necessary to support them, and blanketing major media markets with political advertising. *See, e.g.*, Garrick B. Pursley, *The Campaign Finance Safeguards of Federalism*, 63 EMORY L.J. 781, 829-30 (2014); Michael S. Kang, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902, 1923 (2013).

Political parties have traditionally acted as a moderating force in American politics. Samuel Isaacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 674-75 (1998) (discussing median voter theory); Michael W. McConnell, *Moderation and Coherence in American Democracy*, 99 CALIF. L. REV. 373, 376 (2011). Because of the stabilizing role political parties play, this Court has recognized the importance of maintaining our party-based system. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997). Removing these discriminatory irrational burdens on political party fundraising will preserve parties' ability to perform their traditional functions as mediating institutions, offsetting some of the unintended structural consequences of *Citizens United* for the American political system.

CONCLUSION

For these reasons, this Court should grant the petition.

Respectfully submitted,

Michael T. Morley*
COOLIDGE-REAGAN FOUNDATION
1629 K St., Suite 300
Washington, DC 20013
(860) 778-3883
michael@coolidgereagan.org
Counsel for Petitioners
& Petitioner-Intervenor
*COUNSEL OF RECORD

Dan Backer
DB CAPITOL STRATEGIES, PLLC
203 S. Union St., Suite 300
Alexandria, VA 22314
(202) 210-5431
DBacker@DBCapitolStrategies.com
Counsel for Petitioners

Jerad Najvar
NAJVAR LAW FIRM
4151 Southwest Fwy. #625
Houston, TX 77027
(281) 494-4696
jerad@najvarlaw.com
Counsel for Petitioner-Intervenor

OCTOBER 2016