No. 11-157

In the
Supreme Court of the United States

SCOTT BEASON, LARRY SPENCER, ALLISON SLAPPY, LISA PAYNE, AND MARY AMBRIDGE,
Petitioners,
v.
ROBERT BENTLEY, GOVERNOR OF THE STATE OF ALABAMA, AND COLONEL HUGH B. MCCALL, DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, IN THEIR OFFICIAL CAPACITIES,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Alabama Supreme Court err when it summarily affirmed an unpublished trial court order that held that the "public issue" exception to the bar on nonparty preclusion applies to the limited facts of this case?

PARTIES TO THE PROCEEDING

Scott Beason, Larry Spencer, Allison Slappy, Lisa Payne, and Mary Ambridge instituted this litigation against the Governor of Alabama and the Director of the Alabama Department of Public Safety, in their official capacities. At the time suit was filed, these offices were held by Bob Riley and Colonel J. Christopher Murphy, respectively. Today, these offices are held by Robert Bentley and Colonel Hugh B. McCall, respectively. Pursuant to Rule 43(b) of the Alabama Rules of Appellate Procedure, the current officeholders were automatically substituted as parties while the case was pending in the Supreme Court of Alabama.

Colonel F.A. "Bubba" Bingham, who has been identified by the *Beason* Plaintiffs as a respondent here, briefly held the office of Director of the Alabama Department of Public Safety. Colonel Bingham was automatically substituted for Colonel Murphy in the Supreme Court of Alabama, and, thereafter, Colonel McCall was automatically substituted for him. Ala. R. App. P. 43(b).

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JURISDICTION

This Court does not have jurisdiction. The Alabama Supreme Court unanimously affirmed the Circuit Court's final order on March 4, 2011, Pet. App. 1, and overruled the *Beason* Plaintiffs' application for rehearing on May 6, 2011, Pet. App. 19. Ninety days later, on August 4, 2011, the *Beason* Plaintiffs timely filed their petition, invoking 28 U.S.C. § 1257(a). Pet. at 1. However, the *Beason* Plaintiffs have not identified a "specific, and concrete injury" arising from the Alabama courts' judgment that would give them standing to petition for a writ of certiorari. Accordingly, as explained more fully at pages 8-10 *infra*, this Court lacks jurisdiction.

ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 509 to the Alabama Constitution provides:

> English is the official language of the state of Alabama. The legislature shall enforce this amendment by appropriate legislation. The legislature and officials of the state of Alabama shall take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced. The legislature shall make no law which diminishes or ignores the role of English as the common language of the state of Alabama.

> Any person who is a resident of or doing business in the state of Alabama shall have standing to sue the state of Alabama to enforce this amendment, and the courts of record of the state of Alabama shall have jurisdiction to hear cases brought to enforce this provision. The legislature may provide reasonable and appropriate limitations on the time and manner of suits brought under this amendment.

Ala. Const. Art. I, § 36.01, alternatively cited as Amendment 509.

STATEMENT

The case is about the Alabama courts' interpretation of an unusual state constitutional amendment, Amendment 509, which creates a cause of action to challenge State policies that are alleged to undermine the place of English as the State's "common language." "Any person who is a resident of or doing business in the state of Alabama" can file such a suit, whether or not he or she has a personal stake in the suit's outcome. Ala. Const. Amend. 509. In the decision under review, the Alabama courts held that this Amendment does not authorize *ad seriatim* litigation over the same state policies against the same state officers. Accordingly, the Alabama courts dismissed this suit—the second successive challenge to the State's multi-language driver's license exam—even though the nominal plaintiffs in this case are different from the first.

A. Alabama Constitutional Amendment 509

In June 1990, Alabama voters approved Amendment 509, which declared English the official language of the State. The Alabama Department of Public Safety had previously administered the written portion of the driver's license test in multiple languages. But in 1990, the Department then began administering the test only in English. (C. 11, 158, 423).

Litigation over the Department's policy shortly followed. A plaintiff class challenged the policy of giving the test only in English, alleging a violation of disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964. *Alexander v. Sandoval*, 532 U.S. 275, 278-79 (2001). The district court ruled in favor of the plaintiff class, *Sandoval v. Hagan*, 7 F.Supp.2d 1234 (M.D. Ala. 1998), and the parties reached an agreement: in exchange for a stay of the district court's order, the Department would give the test in multiple languages pending appeal. (C. 105-07).

Although this Court eventually reversed the *Sandoval* decision, finding that the plaintiffs had no private right of action under Title VI, the Department did not return to the English-only policy. Instead, it continued to administer the test in multiple languages under an "English-plus" policy. Between 2003 and 2008, the Department offered the test in Arabic, Chinese, Farsi, French, German, Greek, Japanese, Korean, Russian, Spanish, Thai, and Vietnamese in addition to English and American Sign Language. (C. 401-03).

B. The *Cole* Litigation

Approximately four years after this Court decided *Sandoval*, the Southeastern Legal Foundation, Inc., which represents Petitioners here, wrote to the Alabama Governor threatening litigation if the Department did not return to the English-only policy. (C. 109-10). When the policy was not changed, the Southeastern Legal Foundation, Inc. filed the first challenge to the English-plus policy on May 17, 2005 on behalf of nominal plaintiffs R.W. Cole, J.P. Hendrick, Thomas F. Schenzel, Stuart Shipe, and Charles Van Brock. BIO App. 16a-29a.[1]

The *Cole* plaintiffs filed suit in state court against the Governor and Director of the Department of Public Safety, in their official capacities. BIO App. 16a-19a. The *Cole* Complaint alleged that each plaintiff was "a citizen of the State of Alabama." BIO App. 18a. Critically, the *Cole* Complaint made no allegations of any private interest on the part of the individual plaintiffs. BIO App. 16a-29a.

The *Cole* plaintiffs sought "a declaratory judgment that Alabama's policy of offering its driver's license examination in languages other than English violates Ala. Const. Art. I, § 36.01" and "a permanent injunction prohibiting Defendants from maintaining any policy that allows candidates for Alabama driver's licenses to be tested in a language other than English." BIO App. 17a.

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[1] The *Cole* Complaint was attached to the State Defendants' motion for summary judgment without the exhibits that had been attached in *Cole*. (C. 138-47). It is reproduced in the Appendix here in the same manner.

On February 2, 2006, on cross-motions for summary judgment, the trial court entered summary judgment for the State Defendants and against the *Cole* plaintiffs on the merits of their claim. (C. 148-55).

The *Cole* plaintiffs appealed the trial court ruling, and the Supreme Court of Alabama affirmed. *Cole v. Riley*, 989 So.2d 1001, 1005 (Ala. 2007). The Court held that the plaintiffs had not satisfied their burden of establishing that the State's decision to administer the driver's license test in multiple languages violated Amendment 509.

C. The *Beason* litigation

Less than a year later, the same public-interest law firm that had represented the *Cole* plaintiffs filed a nearly identical state-court suit. This time, the nominal plaintiffs were Scott Beason, Larry Spencer, Allison Slappy, Lisa Payne, and Mary Ambridge. As in the *Cole* litigation, the sole named defendants in the *Beason* complaint were the Governor and Director of the Department of Public Safety in their official capacities. Pet. App. 1a-13a.

Like the *Cole* plaintiffs, the *Beason* Plaintiffs sought "a declaratory judgment that Alabama's policy of offering its Driver's License Examination in languages other than English violates Ala. Const. Art. I, § 36.01" and "a permanent injunction prohibiting Defendants from maintaining any policy that allows candidates for Alabama driver's licenses

to be tested in a language other than English." BIO App. 2a.[2]

And like the *Cole* plaintiffs, the *Beason* Plaintiffs brought the suit as residents of Alabama. BIO App. 3a. The *Beason* Plaintiffs, like those before them, identified no personal injuries or interests. In fact, the "factual allegations" section of the Complaint does not mention the *Beason* Plaintiffs at all. BIO App. 4a-9a.

The State Defendants moved for summary judgment, arguing that *res judicata* barred the re-litigation of this public-issue case in light of the *Cole* litigation. (C. 126-55). The State explained that a state trial court and the Alabama Supreme Court had rejected a challenge to the State's driver's test policy in a suit against these very same State officers.

The *Beason* Plaintiffs' response included substantially identical affidavits from each nominal Plaintiff (C. 181-240), making legal conclusions as to whether privity existed between them and the *Cole* Plaintiffs (C. 181-82, 193-94, 205-06, 217-18, 229-30); Pet. App. 170-84.

After a hearing (C. 567, 571), the Circuit Court dismissed the *Beason* Plaintiffs' action as barred by *res judicata*. (C. 570-82); *see also* Pet. App. at 2-18.

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[2] The *Beason* Plaintiffs contend that their Complaint is different from the *Cole* Complaint because "the *Beason* Plaintiffs sought, among other things, to correct the factual shortcomings of the earlier *Cole* litigation." Pet. at 7 (footnote omitted). The asserted difference appears to be that the *Beason* Plaintiffs add the theory that the alleged violation occurs because the English-plus policy "effectively remov[es] the motivation for non-native speakers to learn English." Pet. at 7.

The court held that the *Beason* Plaintiffs were barred from re-litigating this public law case because they shared "substantial identity of the parties" with the losing *Cole* Plaintiffs. (C. 573-82).

The Alabama Supreme Court affirmed without opinion.

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied. There are serious questions as to whether this Court has jurisdiction to review the judgment below because Petitioners have not been injured by the challenged policy.

Moreover, this Court has recognized that, in cases such as these, "the States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a [plaintiff] any standing at all." *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 803 (1996). The Alabama courts applied this body of federal law and held that, on the unique facts of this case, no federal interest was affected by the application of state-law *res judicata* principles.

To invoke a federal interest here, Petitioners propose a strained and unnatural reading of *Taylor v. Sturgell*, 553 U.S. 880 (2008). *Taylor* is a case about the application of federal *res judicata* principles to a federal statute. It does not constrain a State court's application of its own *res judicata* principles to a state-law claim. And Petitioners' reading of *Taylor* has apparently not been accepted

by any lower court. Accordingly, and at the very least, there is no split of authority on the meaning of *Taylor* that would warrant certiorari review only three years after *Taylor* was issued.

In short, the Alabama Supreme Court's decision hardly amounts to a "disregarding" of "this Court's binding precedent," as Petitioners' suggest. Pet. 3. In the unpublished order that the Alabama Supreme Court affirmed, the trial court cited this Court's decisions in *Richards* and *South Central Bell* and carefully applied the *Richards* standard to the particular facts of this case. That fact-bound determination was not erroneous and, in any event, is not eligible for, nor worthy of, certiorari review.

I. Petitioners lack standing to invoke this Court's jurisdiction.

At the threshold, the Court lacks jurisdiction over the petition for the fundamental reason that Petitioners lack standing under Article III of the Constitution. The Court should deny certiorari on that ground, which is dispositive.

The *Beason* Plaintiffs would not have had standing to file this suit in federal court. The requisite elements of Article III standing are well established: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Here, the *Beason* Plaintiffs have not been personally affected by Alabama's English-plus driver's license policy. They have alleged no "concrete and

particularized" injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–574 (1992). If it were not for the peculiar citizen-suit standing provided by Amendment 509 or another state-law standing doctrine, this lawsuit most likely could not have been filed in state court. And it most certainly could not have been filed in federal court.

Because the judgment below does not itself harm the *Beason* Plaintiffs, it is not subject to review. When parties to a state-court case would not have had standing under federal law to bring the case, this Court "may exercise [its] jurisdiction on certiorari [only] if the judgment of the state court [itself] causes direct, specific, and concrete injury to the parties who petition for our review." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 623-624 (1989) (Opinion of Kennedy, J.). An "undifferentiated, generalized grievance about the conduct of government" is insufficient. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam). *Accord Doremus v. Board of Education of Hawthorne*, 342 U.S. 429 (1952) (taxpayers could not appeal from adverse state judgment due to generalized injury arising from denial of federal claim). The Alabama courts' judgment did not work a "direct, specific, and concrete injury" on Petitioners. The Alabama courts did not enjoin Petitioners, order them to pay damages, or otherwise impose "a defined and specific legal obligation, one which causes them direct injury." *ASARCO*, 490 U.S. at 618 (Opinion of Kennedy, J.). *See also id.* at 634 (Rehnquist, C.J., concurring in part and dissenting in part) ("The Court now says that . . . the *Doremus* case is good law for plaintiffs who lack standing but lost in the

state court on the merits of their federal claim . . ..."). Like the State's English-plus driver's license test, the judgment below does not affect the Petitioners in their personal capacity. Instead, Petitioners merely allege a generalized grievance under the Alabama Constitution.

At the very least, the serious questions about this Court's jurisdiction counsel strongly in favor of denying the petition. Were this Court to grant certiorari, it may well dismiss certiorari as improvidently granted at some later date—long after the parties' and Court's resources have been spent. This Court has dismissed certiorari under similar circumstances before: state litigation in which the parties have no "personal stake in the outcome of the case [and are] proceeding as a private attorney general . . . on behalf of the general public of the State." *Nike, Inc. v. Kasky*, 539 U.S. 654, 661 (2003) (Stevens, J., concurring in dismissal). The Court should deny the petition in light of this jurisdictional infirmity.

II. This case involves the mere application of a well-established legal rule to the facts of this case.

Petitioners erroneously suggest that the Alabama Supreme Court's jurisprudence exhibits a "recalcitrance" toward this Court's due process precedents.[3] Pet. at 13. To the contrary, the Alabama

[3] Petitioners' amicus ProEnglish attempts to raise additional constitutional issues, which were not raised before the state courts and have not been advanced by Petitioners.

Supreme Court has recognized that in light of this Court's decision in *Richards v. Jefferson County, Ala.,* 517 U.S. 793 (1996), "[a]n elastic concept of privity violates due process of law." *Morris v. Cornerstone Propane Partners, L.P.*, 884 So.2d 796, 799 (Ala. 2003). Far from defying these precedents, the trial court's order, and the Alabama Supreme Court's decision summarily affirming that order, faithfully applied *Richards* and its progeny to the particular facts of this case.

A. This Court has recognized a public-issue exception to the rule against nonparty preclusion.

The Due Process Clause requires a State to afford notice and a hearing before depriving a person of life, liberty, or property. Accordingly, in *Hansberry v. Lee*, 311 U.S. 32 (1940), this Court explained: "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Id.* at 40. This Court reiterated the principle in broad terms when dealing with cases in which an individual's private rights are at stake (i.e. private-interest cases). *See*

"[T]his Court will not consider an argument advanced by amicus when that argument was not raised or passed on below and was not advanced in this Court by the party on whose behalf the argument is being raised." *McCleskey v. Zant*, 499 U.S. 467, 523 (1991). Thus, these claims, raised for the first and only time by ProEnglish, are not properly before the Court.

e.g., Blonder-Tongue Lab., Inc. v. Univ. of Illinois Found., 402 U.S. 313, 329 (1971); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979). At the same time, however, this Court left room to distinguish private-interest cases like *Hansberry* from public-issue cases that do not seek to vindicate any private right, and in which nonparties may be precluded from bringing subsequent suits. *Richards* expressly recognized the dichotomy.

1. *Richards* concerned a successive challenge to a tax levied by a county. 517 U.S. at 795. The Alabama Supreme Court had concluded that earlier litigation, *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), precluded the *Richards* suit. 517 U.S. at 796. Relying on *Hansberry*, this Court reversed. *Id.* at 797-805. The Court explained that "State courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes," but cautioned that "extreme applications of the doctrine of *res judicata* may be inconsistent with" federal rights. *Id.* at 797.

Critically for present purposes, the *Richards* defendant had argued that the challenge to the tax was a "public issue" such that "the people may properly be regarded as the real party in interest and thus that petitioners received all the process they were due in the *Bedingfield* action." *Richards*, 517 U.S. at 803. This Court rejected that argument on the facts of that case; there, "the underlying right [was] personal in nature," *id.* at 802 n. 6 (emphasis added). The *Richards* plaintiffs had a personal right not to pay unlawful taxes.

The Court's reasoning on that issue is key for the purposes of this case:

> Our answer requires us to distinguish between two types of actions brought by taxpayers. In one category are cases in which the taxpayer is using that status to entitle him to complain about an alleged misuse of public funds, *see, e.g., Massachusetts v. Mellon*, 262 U.S. 447, 486-489 (1923), or about other public action that has only an indirect impact on his interests, *e.g., Stromberg v. Board of Ed. of Bratenahl*, 64 Ohio St.2d 98, 413 N.E.2d 1184 (1980), *Tallassee v. State ex rel. Brunson*, 206 Ala. 169, 89 So. 514 (1921). As to this category of cases, we may assume that the States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all.
>
> Because the guarantee of due process is not a mere form, however, there obviously exists another category of taxpayer cases in which the State may not deprive individual litigants of their own day in court. *By virtue of presenting a federal constitutional challenge to a State's attempt to levy personal funds*, petitioners clearly bring an action of this latter type. *Cf. ibid.* (distinguishing between "public" and "private" actions). . . .

Richards, 517 U.S. at 803 (emphasis added). That is, the *Richards* Court recognized that there are public-issue cases, in which "the States have wide latitude

to establish procedures not only to limit the number of judicial proceedings that may be entertained." *Id.* The application of *res judicata* to nonparties in *Richards* was unconstitutional only because *Richards* was not such a public-issue case and was instead a "private action" to which the general bar on nonparty preclusion applied. *Richards*, 517 U.S. at 803. The *Richards* plaintiffs challenged a tax on their "personal funds."

2. The *Richards* Court drew the *Richards* dichotomy from the common law. In setting out the public-issue exception to the nonparty-preclusion rule, *Richards* cited to *Stromberg v. Board of Ed. of Bratenahl*, 413 N.E.2d 1184 (Ohio 1980), and *Tallassee v. State ex rel. Brunson*, 89 So. 514 (Ala. 1921), both of which had recognized the dichotomy. 517 U.S. at 803.

a. *Brunson* was "an action in the nature of a quo warranto against the municipality of Tallassee and the individuals acting as its mayor and alderman, for the purpose of dissolving it as a corporate entity and ousting the individual respondents from the exercise of the powers of their office." 89 So. at 516.

The Alabama Supreme Court disposed of the case on *res judicata* grounds, as there had been an earlier "proceeding in the nature of a quo warranto . . . in the name of the state, on relation of J.H. Cole and J.H. Cole individually, against the town of Tallassee and the individuals holding the positions of mayor and alderman thereof, seeking the dissolution of the corporate entity upon practically the same grounds as appear in the instant case." *Id.* That is, a different plaintiff had brought the same challenge against the same officers.

The *Brunson* Court began by noting "that the relator in the former litigation, as well as in the instant case, does not seek the assertion or protection of any private right, but merely acts for and on behalf of the public generally." *Brunson*, 89 So. at 516. "[I]n such cases, where no private interest is involved, the right sought to be enforced is a public right, wherein the people are regarded as the real party in interest." *Id.* The *Brunson* Court recognized that "the nominal parties in the two suits are different, yet [reasoned] the real parties are the same, for the actors in both suits represented the public, and the respondents represented not only the municipality but the inhabitants thereof." *Id.* at 517.

Accordingly, under the circumstances, the *Brunson* Court concluded:

> Only a public question was involved. Only the public interest concerned, and if the mere fact of a change in the nominal party is to prevent the application of the rule of res judicata, there could then be no stability of decision upon questions of this character, which would always be open to attack.

89 So. at 517.

b. In *Stromberg*, which the *Richards* Court also cited, the Ohio court applied a similar analysis regarding public-interest cases:

> Appellant essentially argues that as a taxpayer he has a private right, independent of the Bratenahl board of education, to relitigate the same public issue determined against the board. This may be true where causes of action are not the same or where

> the taxpayer has a different private right not shared in common with the public; *however, a judgment for or against a governmental body is binding and conclusive as res judicata on all residents, citizens and taxpayers with respect to matters adjudicated which are of general and public interest*.

Stromberg, 413 N.E.2d 1184 at 1186 (citation omitted; emphasis added).

B. The Alabama courts applied this well-established case law to the facts of this case.

The trial court's decision below—and the Alabama Supreme Court's summary affirmance—faithfully applied the *Richards* standard to the particular facts of this case.

Unlike the *Richards* case, in which private taxpayers sought to challenge the County's right to levy taxes *that they had paid*, *Richards*, 517 U.S. at 803, the application of *res judicata* in this case does not deprive the *Beason* plaintiffs of any "life, liberty, or property" interest that would require the State to provide due process. Instead, as the state court correctly held, the *Beason* Plaintiffs have not suffered any injury for which they are seeking redress; they are pursuing litigation on behalf of the public to challenge state policies that do not affect them in their personal capacity. That they can even bring such an action is thanks only to the uniquely expansive standing provision in Amendment 509, under which any person who resides or does business

in Alabama can challenge state action as inconsistent with the amendment.

1. The trial court's decision turned on how the *Richards* standard applies to suits brought under Amendment 509. The trial court found that "this case concerns a public issue: whether Alabama's policy of offering the written portion of the driver's license examination in multiple languages complies with Amendment 509." Indeed, the court explained, because of Amendment 509's unusual enforcement scheme, a case like this one "is necessarily a public issue case, which is brought on behalf of the public at large." "This is so," the Court concluded, "because no personal interest exists." Pet. App. 14.

2. The trial court's conclusion was compelled by the record below.

a. The *Beason* Plaintiffs challenged, under the "official English" Amendment to the Alabama Constitution, the Alabama Department of Public Safety's policy of offering the written portion of the Alabama driver's license test in multiple languages. BIO App. 1a-13a. The *Beason* Plaintiffs had not been affected by the challenged policy. Instead, the gravamen of their complaint was that the Plaintiffs did not approve of the test being given *to other persons* in any language other than English. BIO App. 4a-9a.

b. The *Beason* Plaintiffs' Complaint sought to validate generalized interests of the State and its citizenry, rather than protect any private interest. It did so in the following ways:

- Paragraph 22 of the Complaint spoke of the harm at issue as Alabama's "vital interest in

ensuring that only those qualified to do so are permitted to operate motor vehicles." BIO App. 8a.

- Paragraph 23 asserted that the Department's policy "results in significant unnecessary expenditures of taxpayer funds." BIO App. 8a.
- The Complaint's first count asserted that the State Defendants are "fail[ing] to insure that the role of English as the common language of the State of Alabama is preserved and enhanced" and that their "actions further violate Ala. Const. Art. I, § 36.01 in that they ignore and diminish the role of English as the common language of the State of Alabama." BIO App. 9a.
- The Complaint's second count alleged that "Defendant[']s actions in administering the Alabama driver's license examination in languages other than English violates Ala. Const. Art. I, § 36.01 *and the public purposes it serves*," and asserted that the Plaintiffs were "entitled to attorney's fees *as their action in bringing this lawsuit will confer a benefit upon the public*." BIO App. 10a (emphasis added).

In other words, the Complaint establishes the *Beason* Plaintiffs as nominal plaintiffs with an abstract interest in a public question. If they wanted to add or substitute plaintiffs, it would be necessary to adjust only the first paragraph of the Complaint, which lists the plaintiffs by name, BIO App. 2a, and the "parties" section of the Complaint, which lists the name and address for each plaintiff and adds that plaintiff Beason is a State Senator, BIO App. 3a. No other changes to the Complaint would be required.

3. Petitioners and their amicus ProEnglish fail to identify any injury that the *Beason* Plaintiffs suffered by the use of the State's English-plus driver's license test and which gave rise to their Amendment 509 claim. In fact, the brief of ProEnglish underscores that the *Beason* Plaintiffs are pursuing claims on behalf of the public, not for any private individual redress. ProEnglish argues that the *Beason* Plaintiffs should be able to pursue this successive suit to vindicate a laundry list of public policy concerns, such as (1) removing from the roadways "[d]rivers who cannot read and understand English," who are purportedly a "threat to the safety of all motorists, including themselves," (2) deterring "fraud and the increase[d] risk of cheating," which foreign-language exams purportedly "invite," and (3) preventing the "obstruct[ion]" of "law enforcement and emergency response personnel," who purportedly must be multilingual to communicate with drivers. ProEnglish Br. 17-20. This is a classic public-interest claim for *Richards* purposes, and the trial court acted well within its discretion when it determined that those concerns had been adequately addressed the first time around by the *Cole* Plaintiffs.

* * *

In short, the Alabama courts faithfully applied this Court's precedents to the unique facts of this case. Amendment 509 provides expansive standing, but it does not countenance *ad seriatim* litigation over the same policies against the same state officers by different nominal plaintiffs. Although Petitioners would quibble with the Alabama courts' interpretation of Amendment 509, the application of

res judicata to this case has not affected Plaintiffs' life, liberty, or property. This case does not warrant plenary review.

III. *Taylor v. Sturgell* does not support the petition.

Petitioners do not challenge the trial court's conclusion that this is a public-interest case for *Richards* purposes. Instead, Petitioners argue that this Court's decision in *Taylor v. Sturgell*, 553 U.S. 880 (2008), limited the *Richards* public-interest exception to situations in which a state legislature—rather than a state *court*—has established limits on a plaintiff's ability to assert a successive public-interest lawsuit. That argument does not merit certiorari review.

A. There is no split of authority on the meaning of *Taylor*, which the lower courts have applied in a manner consistent with the courts below.

Petitioners do not cite any court that has held that *Taylor* abrogated the *Richards* public-issue exception except when a state *legislature* enacts statutory limits on public-issue lawsuits. Petitioners do not even cite any case in which the rule in *Taylor* has been extended to state-law causes of action. And consistent with the decisions below, the lower courts that have considered the question have declined to extend *Taylor* in that manner. Without some split of

authority on this issue, there is nothing for this Court to resolve.

The *Taylor* Court expressly spoke to federal-law causes of action, not to state-law causes of action. In *Taylor*, this Court held that "[t]he preclusive effects of a judgment in *a federal-question case decided by a federal court* should . . . be determined according to the established grounds for nonparty preclusion described in this opinion." 553 U.S. at 902 (emphasis added). *Taylor* concerned a federal Freedom of Information Act lawsuit against the Federal Aviation Administration. *Id.* at 885. The lower courts had held that the lawsuit was barred by a prior lawsuit another plaintiff had brought against the FAA. Those courts had relied on the doctrine of "virtual representation," a term to which different courts had given different meanings. *Id*. at 884, 888-91, 892, 895-96.[4] When the FAA invoked the *Richards* public-issue exception, this Court held that the exception did not apply on the facts of that case. It gave two reasons why.

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[4] It is true that the phrase "virtual representation" was used in the briefing in the lower courts and that it appears in the Circuit Court's decision. *See e.g.,* (C. 507, 577). However, this is no reason to believe that the Supreme Court of Alabama is in error. As the *Taylor* Court acknowledged, "Although references to 'virtual representation' have proliferated in the lower courts, our decision is unlikely to occasion any great shift in actual practice. Many opinions use the term 'virtual representation' in reaching results at least arguably defensible on established grounds." *Taylor*, 553 U.S. at 904 (citation omitted). The public issue aspect of this case was argued in both the Circuit Court and in the Supreme Court of Alabama. *See* e.g. (C. 508-10); *Brief of the Appellees* at 29-38, 40-46.

First, this Court held that the FOIA action was not a "public-issue" case. The Court explained that a FOIA suit sought to make "information available not to the public at large, but rather to the 'person' making the request." *Id.* at 902. Likewise, "in contrast to the public-law litigation contemplated in *Richards*, a successful FOIA action results in a grant of relief to the individual plaintiff, not a decree benefiting the public at large." *Id.* at 902–03. Here, of course, the Alabama courts made exactly the opposite determination about the state-law cause of action under Amendment 509.

Second, out of apparent separation-of-powers concerns, this Court concluded that the right branch of government to place limits on federal causes of action is "Congress," rather than "this Court." *Id.* at 903 (emphasis deleted). Accordingly, in the course of that discussion, this Court noted, in a footnote, that public-issue lawsuits could fall within the "recognized exception[]" to the rule against nonparty preclusion for "special statutory schemes that expressly limit subsequent suits." *Id.* at 903 n.12.

Neither of these reasons casts any doubt on the *Richards* public-interest exception as applied by a state court to a state-law cause of action. Since *Taylor* was decided, a number of courts have held that its discussion of federal *res judicata* principles does not apply at all to state-law causes of action. *See Sierra Club v. Two Elk Generation Partners, Ltd. Partnership*, 646 F.3d 1258, 1268 (10th Cir. 2011) ("Because the Wyoming Supreme Court has not adopted *Taylor*, and because *Taylor* did not address [the preclusion of state-law claims], we will not rely on *Taylor* here."); *State ex. Rel. Schachter v. Ohio*

Pub. Emps. Retirement Bd., 905 N.E.2d 1210, 1218 (Ohio. 2009) ("In *Taylor* . . . the court expressly limited its holding to federal cases."); *City of Chicago v. St. John's United Church of Christ*, 935 N.E.2d 1158, 1168 (Ill. App. 2 Dist. 2010) ("*Taylor* in no way addressed, let alone overruled, this state's common law regarding privity."). And, after *Taylor*, state courts have continued to hold re-litigation of public interest causes of action to be barred, even in the absence of a statutory scheme limiting the number of suits. *See McNeil v. Legislative Apportionment Comm'n*, 828 A. 2d 840, 860-61 (N.J. 2003) (explicitly invoking *Richards*); *see also Forum For Equal. PAC v. McKeithen*, 893 So. 2d 738, 745 (La. 2005) (holding public-issue litigation barred without invoking *Richards*); *In re Coday*, 130 P.3d 809, 817 (Wash. 2006) (*en banc*) (same). Alabama is unaware of any court that has held that *Taylor* abrogated the public-interest exception recognized by *Richards* or made a statutory scheme a prerequisite to its invocation. Without a split of authority on this question, there is no basis for certiorari.

B. *Taylor* is inapposite.

The interpretation of *Taylor* that has been adopted by the lower courts is right: *Taylor* does not eliminate the power of a state court to limit *ad seriatim* re-litigation in public-issue cases arising under state law, regardless of whether a state legislature has created a statutory scheme to control the state-law suits. Petitioners' contrary reading of *Taylor* is erroneous for at least three reasons.

First, *Taylor* was a private-right case, 553 U.S. at 902-03, and the six exceptions to nonparty preclusion set out therein were not meant to apply in public-issue cases as well. This Court was clear that the listing of exceptions was "[f]or present purposes," that "[t]he established grounds for nonparty preclusion could be organized differently," and, importantly, that "[t]he list that follows is meant only to provide a framework for our consideration of virtual representation, not to establish a definitive taxonomy." *Id.* at 893 & n.6. Here, of course, the Alabama courts have interpreted the unique right of action created by Amendment 509 as a public-interest right of action.

Second, *Taylor* was a case involving a federal cause of action and *res judicata* in federal court. *Taylor* had no reason to consider whether state courts have latitude to adopt their own *res judicata* principles in cases arising under state law in state court. Nor would this Court have had any reason to encroach on state sovereignty and dictate which branch of state government may set the limits on successive state-law, public-issue litigation. The Court in *Taylor* was simply emphasizing Congress' ability to impose constraints on FOIA litigation in light of the private right it had created, and was itself resisting a push to invoke an "extraordinary application of the common law of preclusion" in federal court. 553 U.S. at 903.

Third, *Taylor* did not purport to modify *Richards*, and *Richards* itself did not insist that a statutory scheme was a prerequisite for the application of the public-issue exception: "in any event, the Alabama Supreme Court did not hold here that petitioner's

suit was of a kind that, under state law, could be brought only on behalf of the public at large." 517 U.S. at 804. In fact, *Richards* gave every indication that the federal courts will defer to the state courts' determinations as to whether a particular state-law case falls within the public-issue exception. The fact that Amendment 509 authorizes the Alabama Legislature to regulate the cause of action does not prevent the Alabama courts from applying common law rules—such as *laches*, a duty to prosecute litigation once commenced, and the doctrine of *res judicata*. If for no other reason, this is true because an authoritative interpretation of the state-law cause of action created by Amendment 509 can only come from Alabama's highest court. *See Riley v. Kennedy*, 553 U.S. 406, 409 (2008) ("A State's highest court is unquestionably 'the ultimate exposito[r] of state law.' *Mullaney v. Wilbur*, 421 U.S. 684, 691 [(1975)].").

* * *

Absent an asserted split or another compelling ground supporting certiorari, there is no reason for this Court to review an unpublished state trial-court decision, summarily affirmed in an unpublished appellate-court order, applying the *Richards* rule to a unique state-law cause of action.

IV. This case is not otherwise a good candidate for review on a writ of certiorari.

This Court does not routinely review lower courts' unpublished summary dispositions. And this would be a bad case in which to start, for two reasons.

First, a federal court has held that the very relief that the *Beason* Plaintiffs are seeking—an English-only driver's license test—violates federal law. *See Sandoval v. Hagan*, 197 F.3d 484, 509 (11th Cir. 1999). Although reversed by this Court on procedural grounds, *Sandoval* finds purchase in the decisions of other courts that have reviewed strict English-only policies for constitutional infirmity. *See, e.g., In re Initiative Petition No. 366*, 46 P.3d 123, 126 (Okla. 2002). The State takes no position on whether the *Sandoval* ruling was correct or whether the decision continues to be enforceable. *But see Garrett v. University of Alabama at Birmingham Board of Trustees*, 344 F.3d 1288 (11th Cir. 2003) ("decisions of this court remain binding, notwithstanding grant of certiorari and reversal on other issues."). Nonetheless, it would be passing strange for this Court to expend its limited resources on the question presented here—whether to reinstate a state-law complaint that seeks to make a State use a licensing test that a federal court of appeals has expressly held to violate federal law.

Second, plenary review would not be a prudential use of this Court's resources because the *Beason* Plaintiffs' claims are doomed to fail on the merits. The plain language of Amendment 509 says nothing about governments in Alabama operating in English only. It makes English Alabama's official language—not its only language. And other States are like Alabama in that their state laws require official state documents to be in English, but their driver's licensing tests can still accommodate persons without English proficiency. *See, e.g.*, Ga. Op. Att'y Gen. No. 95-44, 1995 Ga. Opp. Att'y Gen. 117,

available at 1995 WL 788331, *1 (Dec. 1, 1995) ("A close reading of this Resolution . . . indicates that it does not . . . either mandate the exclusive use of the English language or prohibit the use of other languages.").

In fact, the merits may well have motivated the Alabama Supreme Court's decision. The Alabama Supreme Court "can affirm a trial court's judgment for any reason, even one not specifically given by the trial court." *Wilson v. Athens-Limestone Hosp.*, 894 So. 2d 630, 634 (Ala. 2004). Here, that reason may have included the merits. Even the trial court took *sua sponte* notice of the lack of merit to the complaint, stating that "I don't think we have a claim here" on the merits in addition to *res judicata*. Pet. App. 191-92. And, of course, only one year before this lawsuit was filed, the Alabama Supreme Court rejected a challenge under Amendment 509 of the same state driver's license test that the *Beason* Plaintiffs are attacking. S*ee Cole v. Riley*, 989 So. 2d 1001, 1015 (Ala. 2007).

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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November 25, 2011

APPENDIX

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APPENDIX A

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

SCOTT BEASON, LARRY SPENCER, ALLISON SLAPPY, LISA PAYNE, and MARY AMBRIDGE,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. CV-2008-1338
BOB RILEY, Governor of the State of Alabama, and COLONEL J. CHRISTOPHER MURPHY, Director of the Alabama Department of Public Safety, in their official capacities,	)	**JURY TRIAL DEMANDED**
Defendants.	)	

PLAINTIFFS' ORIGINAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. Plaintiffs Scott Beason, Larry Spencer, Allison Slappy, Lisa Payne, and Mary Ambridge, all residents of the State of Alabama, come before this Honorable Court to challenge, as violative of the Alabama Constitution, the policy of the Alabama Department of Public Safety ("ADPS") of offering the Alabama driver's license examination in languages other than English.

2. Pursuant to Alabama Rules of Civil Procedure 57 and 65, Plaintiffs seek (a) a declaratory judgment that Alabama's policy of offering its Driver's License Examination in languages other than English violates Ala. Const. Art. I, § 36.01; and (b) a permanent injunction prohibiting Defendants from maintaining any policy that allows candidates for Alabama driver's licenses to be tested in a language other than English.

II. JURISDICTION AND VENUE.

3. This Court has jurisdiction over this action pursuant to Ala. Const. Art. I, § 36.01 and Sections 12-11-30, 12-11-31 and 6-6-222 of the Code of Alabama.

4. The Circuit Court of Montgomery County is the proper venue for this action pursuant to the common law of the State of Alabama.

III. PARTIES

5. Plaintiff SCOTT BEASON is a resident of the State of Alabama who resides at [redacted], Gardendale, Jefferson County, Alabama. Mr. Beason serves as a State Senator for the 17th Senate District.

6. Plaintiff LARRY SPENCER is a resident of the State of Alabama who resides at [redacted], Wetumpka, Elmore County, Alabama.

7. Plaintiff ALLISON SLAPPY is a resident of the State of Alabama who resides at [redacted], Birmingham, Jefferson County, Alabama.

8. Plaintiff LISA PAYNE is a resident of the State of Alabama who resides at [redacted], Alabaster, Shelby County, Alabama.

9. Plaintiff MARY AMBRIDGE is a resident of the State of Alabama who resides at [redacted], Birmingham, Jefferson County, Alabama.

10. Defendant BOB RILEY is the Governor of the State of Alabama. As Governor, Defendant RILEY is charged with duty to enforce the Constitution of the State of Alabama. Additionally, Defendant RILEY has the authority to shape, determine and change ADPS policies regarding the languages in which the Alabama driver's license examination is offered. Defendant RILEY is sued solely in his official capacity.

11. Defendant Colonel J. CHRISTOPHER MURPHY is the Director of ADPS. As Director, Defendant MURPHY has the authority to shape, determine and change the policies of ADPS regarding the languages in which the Alabama driver's license examination is offered. Additionally, Defendant MURPHY is charged with carrying out those policies. Defendant MURPHY is sued solely in his official capacity.

IV. FACTUAL ALLEGATIONS

12. Prior to 1990, ADPS offered the Alabama driver's license examination in fourteen (14) languages. However, on July 13, 1990, the voters of the State of Alabama ratified by a 9-1 margin Ala. Const. Art. I, § 36.01. That Amendment, initially proposed by the Alabama State Legislature in its 1989 session, clearly states that "English is the official language of the state of Alabama." Ala. Const. Art. I, § 36.01 (1990) (attached hereto as Exhibit "A").

13. Ala. Const. Art. I, § 36.01 further provides that all "officials of the state of Alabama," including the state legislature, "shall take all steps necessary to insure that the role of English as the common language of the State of Alabama is preserved and enhanced." Id. The Amendment expressly forbids the Alabama legislature from enacting any law that "diminishes or ignores the role of English as the common language of the state of Alabama." Id.

14. As a direct result of the consideration, passage, public referendum, and enactment of Ala. Const. Art. I, § 36.01, ADPS changed its policy of multilingual testing, and began administering the Alabama driver's license examination exclusively in English. This action was consistent with both legislative intent and the public's understanding of the effect Ala. Const. Art. I, § 36.01 would have on State practices regarding the administration of driver's license examinations. Requiring all applicants to take the Alabama driver's license examination in English tested whether the applicant was able to read and understand sufficient English to follow emergency road signs and obey instructions given by emergency personnel and law enforcement officers. It also provided an incentive for persons who could not speak English to learn English.

15. Following litigation involving the policy of providing the Alabama driver's license examination exclusively in English only, in which the State of Alabama ultimately prevailed, the State of Alabama elected to return to multiple-language administration of the Alabama driver's license examination.

16. Since returning to multiple language Alabama driver's license examination, the State of Alabama has been sued over this decision. During the pendency of the action against the State, the State was asked in discovery to articulate why it returned to the former practice. The state responded:

> [t]he ADPS practice of giving driver license tests in foreign languages preserves and enhances the role of English as the common language of the state of Alabama in accordance with Article I, Section 36.01 of the Recompiled Constitution of Alabama… by requiring persons who do not speak English to learn enough English to read, understand, and obey Alabama's English road signs and facilitates greater integration into the community including, but not limited to, allowing such persons to attend English classes and other similar educational opportunities.

The State insinuated that they had made a reasoned policy decision on the basis of "mobility equals assimilation." However, the State cited no factual or empirical basis for the above response. This was the first and only time in all of the materials provided or identified by the State that this so-called "policy" ever appeared.

17. When asked to identify who was responsible for the above "policy," the State provided a letter from Ken Wallis, Governor Riley's legal advisor, sent on Defendant Riley's behalf. The letter failed to identify any basis for the "policy" or identify who was responsible for the decision to return to the former way of doing things, but it did provide the following

insight as to why the State returned to the multi-language approach:

> I believe that if you thoroughly examine the history of the *Sandoval* case, you will concur that the imposition of an English only policy would not survive an appropriate challenge. Alabama's budgets are tight, and we cannot afford to fight losing and expensive legal battles.

The letter said nothing about promoting integration, assimilation or about the importance of mobility for non-English speakers or enhancing the English language. The letter emphasized that the State was afraid of being sued for economic reasons.

18. Thus, contrary to what Defendants may have claimed previously, defendants have no official policy serving as a basis for giving the Alabama driver's license examination in multiple languages. The Defendants' actions in providing the Alabama driver's license examination in multiple languages is merely a continuation of an unconstitutional decision that has no basis in law or fact.

19. Defendants possess no empirical evidence or studies demonstrating that allowing individuals to take the Alabama driver's license examination in their native language promotes English as the common language of the State of Alabama.

20. Providing the Alabama driver's license examination in numerous native languages removes an important motivational factor for candidates who do not currently speak English to learn English. Thus, such administration diminishes and ignores the role of English as the common language of Alabama.

21. The ability to drive a car does not promote English as the common language of Alabama.

22. Like other states, Alabama has a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles. Alabama's policy of offering the driver's license examination in multiple languages endangers the safety of Alabama drivers. Drivers who cannot understand English pose a significant threat to the safety of other drivers. These individuals cannot understand and therefore cannot follow many traffic signs and directions, hazard warnings, and detour and other highway instructions In addition to the inability to understand warning signs, such persons cannot communicate effectively with police or other public safety personnel in the event of a traffic accident or emergency. Alabama's policy of allowing candidates to take their exams in languages other than English endangers everyone who drives on Alabama roads and highways.

23. Alabama's policy of offering its driver's license examination in multiple languages also results in significant unnecessary expenditures of taxpayer

funds. According to United States Census Bureau figures for 2000, only 1.5 percent of Alabama residents age five years and older "speak English less than very well." Of Alabama's 4,152,000 residents in 2000, 3,990,000 – over 98% - can speak English fluently.[1] The State is therefore using money collected from all Alabama taxpayers to implement an unnecessary, unconstitutional, and dangerous policy.

V. CAUSE OF ACTION

COUNT ONE – VIOLATION OF ALABAMA CONSTITUTION

24. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 23 as though fully set forth herein.

25. The actions of Defendants in maintaining and carrying out a policy of offering the Alabama driver's license examination in languages other than English violate Ala. Const. Art. I, § 36.01, in that they fail to insure that the role of English as the common language of the State of Alabama is preserved and enhanced. Defendants' actions further violate Ala. Const. Art. I, § 36.01 in that they ignore and

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[1] U.S. Census Bureau, "2000 Census of Population and Housing, Profiles of General Demographic Characteristics," published in the U.S. Census Bureau's Statistical Abstract of the United States, 2004-2005.

diminish the role of English as the common language of the State of Alabama.

26. Defendants' actions in continuing a policy of offering the Alabama driver's license examination in languages other than English fail to protect the role of English as the common language of the state of Alabama. Defendants' failure to offer the Alabama driver's license examination exclusively in English also ignores and diminishes the role of English as the common language of the State of Alabama.

COUNT TWO – ATTORNEYS' FEES

27. Defendants actions in administering the Alabama driver's license examination in languages other than English violates Ala. Const. Art. I, § 36.01 and the public purposes it serves. Defendants administer the Alabama driver's license examination in this fashion without basis in law or fact. Plaintiffs have had to resort to the filing of a suit to stop this injurious action. Therefore, Plaintiffs are entitled to attorneys' fees as their action in bringing this lawsuit will confer a benefit upon the public because it should result in the cessation of an improper practice on the part of the Defendants.

VI. PRAYER FOR RELIEF

WHEREFORE, based on the foregoing, Plaintiffs respectfully pray that this Court:

(a) Assume jurisdiction over this action;

(b) Empanel a jury to decide such triable issues as may exist in the case;

(c) Declare that Defendants' policy of offering the Alabama driver's license examination in languages other than English violates Ala. Const. Art. I, § 36.01;

(d) Enter a permanent injunction prohibiting Defendants from maintaining any policy that allows candidates for Alabama driver's licenses to be tested in languages other than English;

(e) Make such award of costs, attorneys' fees and expenses as may be permitted by law or equity; and

(f) Grant to Plaintiffs such further relief to which they may be justly entitled.

Respectfully submitted this 2nd day of September, 2008.

/s/ D.M. Samsil
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ATTORNEYS FOR PLAINTIFFS

EXHIBIT A

AMENDMENT 509 RATIFIED

English as Official Language of State.

English is the official language of the state of Alabama. The legislature shall enforce this amendment by appropriate legislation. The legislature and officials of the state of Alabama shall take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced. The legislature shall make no law which diminishes or ignores the role of English as the common language of the state of Alabama.

Any person who is a resident of or doing business in the state of Alabama shall have standing to sue the state of Alabama to enforce this amendment, and the courts of record of the state of Alabama shall have jurisdiction to hear cases brought to enforce this provision. The legislature may provide reasonable and appropriate limitations on the time and manner of suits brought under this amendment.

APPENDIX B

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

R.W. COLE, J.P. HENDRICK, THOMAS F. SCHENZEL, STUART SHIPE, AND CHARLES VAN BROCK,

Plaintiffs,

vs. CIVIL ACTION NO. CV-05-1244

BOB RILEY, Governor of the State of Alabama, and W.M. COPPAGE, Director of the Alabama Department of Public Safety, in their official capacities,

Defendants.

SUMMONS

This service by certified mail of this Summons is initiated upon the written request of Plaintiffs' attorneys pursuant to the Alabama Rules of Civil Procedure.

NOTICE TO: Bob Riley, Governor of the
State of Alabama
State Capitol
600 Dexter Avenue
Montgomery, Alabama 36130

The Complaint which is attached to this summons is important and you must take immediate action to protect your rights. You are required to mail or hand deliver a copy of a written Answer, either admitting or denying each allegation in the Complaint, to D.M. Samsil, the lawyer of the Plaintiffs, whose address is:

D.M. Samsil, Esquire
P.O. Box 610369
Birmingham, Alabama 35261

THIS ANSWER MUST BE MAILED OR DELIVERED WITHIN THIRTY (30) DAYS FROM THE DATE OF DELIVERY OF THIS SUMMONS AND COMPLAINT AS EVIDENCED BY THE RETURN RECEIPT, OR A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER THINGS DEMANDED IN THE COMPLAINT. You must also file the original of your Answer with the Clerk of this Court within a reasonable time afterward

/s/ Melissa Rittenour [illegible initials]
CLERK OF COURT

Dated: 5-24-05

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

R.W. COLE, J.P. HENDRICK, THOMAS F. SCHENZEL, STUART SHIPE, and CHARLES VAN BROCK,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. _____
BOB RILEY, Governor of the State of Alabama, and W.M. COPPAGE, Director of the Alabama Department of Public Safety, in their official capacities,	)	**JURY TRIAL DEMANDED**
Defendants.	)	

PLAINTIFFS' ORIGINAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. Plaintiffs R.W. Cole, J.P. Hendrick, Thomas F. Schenzel, Stuart Shipe, and Charles Van Brock, all citizens of the State of Alabama, come before this Honorable Court to challenge, as violative of the Alabama Constitution, the policy of the Alabama Department of Public Safety ("ADPS") of offering the Alabama driver's license examination in languages other than English.

2. Pursuant to Alabama Rules of Civil Procedure 57 and 65, Plaintiffs seek (a) a declaratory judgment that Alabama's policy of offering its driver's license examination in languages other than English violates Ala. Const. Art. I, § 36.01; and (b) a permanent injunction prohibiting Defendants from maintaining any policy that allows candidates for Alabama driver's licenses to be tested in a language other than English.

II. JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to Ala. Const. Art. I, § 36.01 and Sections 12-11-30, 12-11-31 and 6-6-222 of the Code of Alabama.

4. The Circuit Court of Montgomery County is the proper venue for this action pursuant to the common law of the State of Alabama.

III. PARTIES

5. Plaintiff R.W. COLE is a citizen of the State of Alabama who resides at [redacted], Birmingham, Jefferson County, Alabama.

6. Plaintiff J.P. HENDRICK is a citizen of the State of Alabama who resides at [redacted], Birmingham, Jefferson County, Alabama.

7. Plaintiff THOMAS F. SCHENZEL is a citizen of the State of Alabama who resides at [redacted], Wetumpka, Elmore County, Alabama.

8. Plaintiff CHARLES VAN BROCK is a citizen of the State of Alabama who resides at [redacted], Jasper, Walker County, Alabama.

9. Plaintiff STUART SHIPE is a citizen of the State of Alabama who resides at [redacted], Huntsville, Madison County, Alabama.

10. Defendant BOB RILEY is the Governor of the State of Alabama. As Governor, Defendant RILEY is charged with the duty to enforce the Constitution of the State of Alabama. Additionally, Defendant RILEY has the authority to shape, determine and change ADPS policies regarding the languages in which the Alabama driver's license examination is offered. Defendant RILEY is sued solely in his official capacity.

11. Defendant W.M. COPPAGE is the Director of ADPS. As Director, Defendant COPPAGE has the authority to shape, determine and change the policies of ADPS regarding the languages in which the Alabama driver's license examination is offered. Additionally, Defendant COPPAGE is charged with carrying out those policies. Defendant COPPAGE is sued solely in his official capacity.

IV. FACTUAL ALLEGATIONS

12. Prior to 1990, ADPS offered the Alabama driver's license examination in fourteen (14) languages. However, on July 13, 1990, the voters of the State of Alabama ratified by 9-1 margin Ala. Const. Art. I, § 36.01. That amendment, initially proposed by the state legislature in its 1989 session, clearly states that "English is the official language of the state of Alabama." Al. Const. Art. I, § 36.01 (1990) (attached hereto as Exhibit "A").

13. Ala. Const. Art. I, § 36.01 further provides that all "officials of the state of Alabama," including the state legislature, "shall take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced." Id. The amendment expressly forbids the Alabama legislature from enacting any law that "diminishes or ignores the role of English as the common language of the state of Alabama." Id.

14. As a direct result of the consideration, passage, public referendum, and enactment of Ala. Const. Art. I, § 36.01, ADPS changed its policy of multilingual testing, and began administering the Alabama driver's license examination exclusively in English. This action was consistent with both legislative intent and the public's understanding of the effect Ala. Const. Art. I, § 36.01 would have on state practices regarding the administration of driver's license examinations. Requiring all applicants to take the exam in English tested whether the applicant was able to read and understand sufficient English to follow emergency road signs and obey instructions given by emergency personnel and law enforcement officers.

15. In 1996, a group of non-English-speaking Alabama residents sued ADPS, complaining that the state's policy of giving its driver's license examination exclusively in English discriminated against certain individuals on the basis of their national origin, in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*. In response to this lawsuit, Attorney General Bill Pryor argued that the state policy of administering the driver's license examination exclusively in English

> not only…compl[ied] with the requirements of Amendment 509 and not only did it avoid the demeaning assumption that adult residents of the State were unable to learn English when they put their mind to it, but it

> also had the virtue of advancing public safety…. [T]he overriding police-power objective of testing applicants before giving them permission to drive is to ensure that they are capable of driving safely…. An ability to understand road signs, together with an ability to communicate with law enforcement and medical personnel, all support requiring Alabama drivers to be fluent in English….

Brief of Petitioners, 1999 U.S. Briefs 1908, p. 6. The State of Alabama further argued that

> Title VI merely bars the kind of intentional discrimination barred by the Fourteenth Amendment, which has never included the notion that English-language requirements represent a proxy for discrimination on the basis of national origin…. No part of the legislative history indicates, or even hints, that Title VI was designed to bar generally-applicable English-fluency requirements…. And if the sovereign choice to use a common language in providing government services and to decide when and how to administer driving-license examinations do not represent the types of policy issues that are "traditionally relegated to state

> law," it is difficult to imagine what would meet this test.

Id. at pp. 18-19. Alabama also argued that, because few, if any, ADPS employees are fluent in a foreign language, ADPS must rely on outside entities to monitor and grade foreign language examinations, thereby increasing the potential for fraud. Brief of Petitioners, 2000 WL 1708208 *6.

16. In 1998, a federal district court found that Alabama's policy of giving its driver's license examination exclusively in English discriminated on the basis of national origin in violation of Title VI. Sandoval v. Hagan, 7 F.Supp.2d 1234 (M.D. Ala. 1998). In response to this decision, then-Governor Don Siegelman changed the state's policy so that the Alabama driver's license examination was given in multiple languages, including Chinese, French, German, Japanese, Spanish, English, and Vietnamese. The Eleventh Circuit Court of Appeals affirmed the trial court's decision. Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999).

17. In 2000, then-Congressman (now Governor) RILEY, in accord with the clear mandate of Alabama's voters, joined fourteen of his colleagues in the U.S. House of Representatives in filing an *amicus curiae* brief to the U.S. Supreme Court supporting Alabama's right to give its driver's license examination exclusively in English. In that brief, attached hereto as Exhibit "B", the *amici* vigorously and persuasively argued that Alabama's policy of

giving the exams exclusively in English did not discriminate on the basis of national origin. Specifically, Governor RILEY and his colleagues argued:

> Equating a person's language with the person's national origin has no basis in law or fact. There is no statutory language or legislative history in the civil rights laws with suggests such an equation.
>
> Nor is there any judicial decision which finds such an equation in the civil rights laws….
>
> The equation of language to national origin also has no basis in fact, and would be both over- and under-inclusive. Spanish, for example, is the official language of at least 13 countries, impairing a determination of a speaker's ancestry. Many Hispanic-Americans do not speak Spanish, and many non-Hispanic-Americans do.
>
> Any such equation of language and national origin would [also] affect "original power" core functions of States. Choice of language for internal functions has historically been left to the States. Federal intervention on

> language choice over a vast sweep of State programs will weaken the state's powers.... Absent a clear and explicit abrogation of those State powers, the States should be left to decide – through their own political processes – which language burdens to accept. There is no such clear and explicit abrogation of State power for the language choices in this case.

Brief of *Amicus Curiae*, 2000 WL 1701936 at pp. 9-10. At least six (6) other states – including Alaska, Maine, New Hampshire, Oklahoma, South Dakota, and Wyoming – currently offer their driver's license examinations exclusively in English.

18. In April 2001, the Supreme Court of the United States reversed the lower court decisions and found that Title VI did not create a private right of action for individual plaintiffs. Alexander v. Sandoval, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). In so doing, the Court "assume[d] for purposes of deciding th[e] case that regulations promulgated under Section 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under Section 601." 532 U.S. at 286, fn. 6. The Supreme Court's ruling in Sandoval cleared the way for ADPS to reinstitute its pre-Sandoval policy of administering the Alabama driver's license examination exclusively in English.

19. Despite the Supreme Court's ruling and the clearly evidenced desire of the voters of Alabama that procedures and tests related to the granting of state driving privileges occur exclusively in English, Governor Siegelman chose to maintain the policy imposed by the trial court judge in the original Sandoval decision, of giving the Alabama driver's license examination in multiple languages. That policy remains in effect today. In fact, as of the time of this filing, candidates for an Alabama driver's license can take the test in any one of twelve (12) languages, including Chinese, English, Farsi, French, German, Greek, Japanese, Korean, Russian, Spanish, Thai and Vietnamese.

20. Alabama's policy of offering its driver's license examination in multiple languages violates Ala. Const. Art. I, § 36.01 to the Alabama Constitution, which requires state officials to "take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced." Additionally, allowing candidates to take the exam in their preferred language "diminishes or ignores the role of English as the common language of the state…." Id. Defendant RILEY's failure to order ADPS to change its policy after the U.S. Supreme Court issued its decision in Sandoval constitutes a breach of his duty to enforce Ala. Const. Art. I, § 36.01.

21. Like other states, the State of Alabama has a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles.

Alabama's policy of offering its driver's license examination in multiple languages endangers the safety of Alabama drivers. Drivers who cannot read and understand English pose a significant threat to the safety of other drivers. These individuals cannot understand -- and therefore cannot follow – traffic signs and directions, hazard warnings, and detour and other highway instructions. Last September, one Alabama official attributed the steep rise in Alabama's work-related fatalities -- the large majority of which are due to traffic accidents -- to the fact that a growing number of workers cannot read or understand signs in English.[1] In addition to the inability to understand warning signs, such persons cannot communicate effectively with police or other public safety personnel in the event of a traffic accident or emergency. Alabama's policy of allowing driver's license applicants to take their exams in languages other than English endangers everyone who drives on Alabama roads and highways.

22. Alabama's policy of offering its driver's license examination in multiple languages also results in significant unnecessary expenditures of taxpayer funds. According to US Census figures for 2000, only 1.5 percent of Alabama residents ages five years and older "speak English less than very well." Of Alabama's 4,152,000 residents in 2000, 3,990,000 –

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[1] *The Birmingham News*, "State Workplace Perils Deadly," Sept. 23, 2004.

over 98% - can speak English fluently.[2] The state is therefore using money collected from all Alabamians to implement an unnecessary, unconstitutional, and dangerous policy that, at most, benefits less than 2 percent of the state's population.

V. CAUSE OF ACTION

COUNT ONE – VIOLATION OF ALABAMA CONSTITUTION

23. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 22 as though fully set forth herein.

24. The actions of Defendants in maintaining and carrying out a policy of offering the Alabama driver's license examination in languages other than English violate Ala. Const. Art. I, § 36.01, in that they fail to insure that the role of English as the common language of the state of Alabama is preserved and enhanced. Defendants' actions further violate Ala. Const. Art. I, § 36.01 in that they ignore and diminish the role of English as the official language of the State of Alabama.

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[2] U.S. Census Bureau, "2000 Census of Population and Housing, Profiles of General Demographic Characteristics," published in the U.S. Census Bureau's Statistical Abstract of the United States, 2004-2005.

25. Defendants' actions in continuing a policy of offering the Alabama driver's license examination in languages other than English fail to protect the role of English as the common language of the state of Alabama. Defendants' failure to offer the Alabama driver's license examination exclusively in English also dilutes, ignores and diminishes the role of English as the official language of the state of Alabama.

VI. PRAYER FOR RELIEF

WHEREFORE, based on the foregoing, Plaintiffs respectfully pray that this Court:

(a) Assume jurisdiction over this action;

(b) Empanel a jury to decide such triable issues as may exist in the case;

(c) Declare that Defendants' policy of offering the Alabama driver's license examination in languages other than English violates Ala. Const. Art. I, § 36.01;

(d) Enter a permanent injunction prohibiting Defendants from maintaining any policy that allows candidates for Alabama driver's licenses to be tested in languages other than English;

(e) Make such award of costs, attorney's fees and expenses as may be permitted by law or equity; and

(f) Grant to Plaintiffs such further relief to which they may be justly entitled.

Respectfully submitted this 17th day of May, 2005.

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