

Case No. 08-30922

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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DARDENNE,

Appellant,

VS.

LIBERTARIAN PARTY, et al.,

Appellees.

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On Appeal From the United States District Court  
For the Middle District of Louisiana,  
The Honorable James J. Brady, District Court Judge

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BRIEF FOR APPELLEES

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**Case No. 08-30922**

**CERTIFICATE OF INTERESTED PERSONS**

To the best of my knowledge, the following are the only interested persons in this appeal:

1. Bob Barr, Plaintiff/Appellee;
2. Paul R. Baier, attorney for Appellant;
3. The Honorable James J. Brady, Judge of the United States District Court for the Middle District of Louisiana;
4. Mark R. Brown, attorney for Plaintiffs/Appellees;
5. Celia R. Cangelosi, attorney for Defendant/Appellant;
6. Jay Dardenne, Defendant/Appellant;
7. Libertarian Party, Plaintiff/Appellee;
8. Libertarian Party of Louisiana, Plaintiff/Appellee;
9. Michael W. McKay, attorney for Plaintiffs; and
10. Wayne Root, Plaintiff/Appellee.

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Mark R. Brown

Dated: \_\_\_\_\_

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### **Recommendation for Oral Argument**

Should the Court conclude that this case may not be moot, Appellees believe that oral argument would be helpful to the Court's understanding of the issues in this case.

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### **Statement of Jurisdiction**

This is an interlocutory appeal from a grant of preliminary relief. Appellate jurisdiction in this Court is proper under 28 U.S.C. § 1292(a)(1).

### **Standard of Review**

The grant of a preliminary injunction is reviewed for an abuse of discretion. Factual findings must be accepted unless clearly erroneous. Pure questions of law are reviewed de novo. *See Nichols v. Alcatel USA*, 532 F.3d 364 (5<sup>th</sup> Cir. 2008).

### **Statement of the Issues**

1. Whether the District Court's factual conclusion that Hurricane Gustav caused Appellees' to miss Louisiana's September 2 and September 5 filing deadlines for presidential candidates is clearly erroneous?
2. Whether the District Court's factual conclusion that the Secretary of State's Office was officially closed from September 2 through September 7 is clearly erroneous?
3. Whether the District Court abused its discretion in concluding that Article II of the Constitution likely prohibits state

executive authorities, including Appellant, from unilaterally establishing the state's presidential qualification deadline?

### **Statement of the Case**

Appellees filed suit against Appellee, Louisiana's Secretary of State, on September 15, 2008, claiming that Appellee had unconstitutionally refused their qualifying papers for Louisiana's presidential ballot. The crux of Appellees' argument was that the Secretary of State's office was closed on the legislatively created qualifying dates, September 2, 2008 and September 5, 2008, due to Hurricane Gustav, did not re-open until September 8, 2008, and then unilaterally announced that qualifying papers were due by the end of that business day.

Appellees charged that the Louisiana Secretary of State lacked statutory and constitutional authority (under U.S. Const., art. II) to establish a qualifying date for presidential candidates. Instead, the legislature's intent was to give candidates of recognized political parties three extra days beyond the qualifying deadline, see La. R. S. § 18:1253E, which necessarily means that

here the deadline should have been no sooner than September 11 (three days after the Secretary re-opened his office).

Because all State offices were closed on the legislatively established dates, September 2 and September 5,<sup>1</sup> respectively, Appellees argued that those dates could not be constitutionally enforced. The Secretary's September 8 deadline, meanwhile, was constitutionally *ultra vires* (under Article II of the United States Constitution) and could not be enforced either. That left to the District Court the task of identifying the proper deadline for presidential candidates. Because the Louisiana Legislature had provided a three-day safe-harbor for recognized political parties, see La. R. S. § 18:1253E, and because the State's Governor, acting pursuant to an express delegation by the Legislature, had extended all deadlines in all "legal, administrative and regulatory proceedings" to September 12, 2008, see R #16 (copy of Governor's Order), Appellees argued that the qualifying deadline should be no

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<sup>1</sup> September 5 was the deadline for "recognized political parties" under La. R.S. § 18:1253E, which gives recognized political parties an additional 72 hours from the September 2 deadline to file their qualifying papers.

sooner than September 11, 2008 (which is three days after the Secretary re-opened his office). And because Appellees had perfected and filed their qualifying papers on September 10, 2008, the Libertarian Party of Louisiana's candidates should be placed on the ballot.

The District Court, the Honorable James J. Brady, District Judge, held an evidentiary hearing on September 22, 2008, see R # 18, and awarded preliminary relief to the Libertarian Party, the Libertarian Party of Louisiana, and their presidential ticket, the following day. See R # 19. The Libertarian Party, Libertarian Party of Louisiana, Bob Barr and Wayne Root (hereinafter collectively referred to as "the Libertarian Party") were granted a preliminary injunction because the Court concluded that the Secretary was in fact officially closed from September 2 through September 7, the Libertarian Party was prevented by this closure from filing on either September 2 or September 5, Hurricane Gustav would have prevented Appellees from filing on these dates anyway, and the Libertarian Party filed its qualifying papers with

the Secretary on September 10, 2008.<sup>2</sup> Judge Brady specifically ordered in his written opinion that the Appellant place the names of the Libertarian Party candidates for President and Vice-President, Bob Barr and Wayne Root, on the Louisiana election ballot. See R # 20; Record Excerpts 4 at 10-11.

The Secretary of State took an emergency appeal to the Fifth Circuit on September 25, 2008. See R # 21. The following day, the Fifth Circuit entered an Order staying the preliminary injunction. (R #28.) The presidential election was held on November 4, 2008 without the names of Bob Barr and Wayne Root on the presidential ballot.

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<sup>2</sup> Appellees, the Socialist Party USA, Brian Moore and Stewart Alexander, who filed their qualifying papers on September 11, 2008, were denied injunctive relief by Judge Brady because of a defect in their qualifying papers. Appellees, the Socialist Party USA, Brian Moore and Stewart Alexander, thereafter filed a cross-appeal seeking emergency injunctive relief in an effort to gain access to the ballot. This Court denied that relief on September 26, 2008. (R # 29). Following the election, these Appellees/Cross-Appellants moved (without objection) to voluntarily dismiss their appeal. That motion was granted on November 24, 2008. Because of their loss in the District Court and their voluntary dismissal of their cross-appeal, the Socialist Party USA, Brian Moore and Stewart Alexander have no stake in this interlocutory action.

## **Statement of Facts**

Judge Brady found and described the essential facts of the case:

Hurricane Gustav hit Louisiana on Monday, September 1, 2008, causing serious damage to many of the State's parishes. Especially hard hit was East Baton Rouge Parish and the state offices situated here. The Secretary of State's Office was officially closed on September 2 through September 7. On Monday, September 8, 2008, Defendant's office reopened and announced that all candidates' papers that were due on September 2, if not previously delivered, had to be delivered to Defendant's office by 5:00 p.m. that day. No official notice of this new deadline was posted on the Defendant's website, nor was it generally disseminated to the public. In fact, the two Plaintiffs [the Libertarian and Socialist Parties] were not advised of the Secretary's decision until past 3:00 p.m. on the 8th and were told to file their slates by 5:00 p.m. that day.

... The Libertarian Party did not complete its submission of notarized affidavits until September 10, 2008, two days past Defendant's deadline. The Defendant's personnel did not approve the printer's proof of the Presidential election ballot until mid-morning of September 11 and thus could have easily added the Libertarian slate which had been filed on the 10th.

By letters dated September 12, 2008, Defendant notified Plaintiffs that they had failed to perfect the necessary submissions by September 8 and that their candidates for President would not be placed on the November 4, 2008 ballot in Louisiana.

Record Excerpts 4 at 4-5.

## **Summary of Argument**

1. This interlocutory appeal is moot because the election on which it is based is final and complete. No order from this Court can change the outcome, either by ordering Appellees' names on the ballot or taking them off the ballot.

2. Appellant violated the Constitution by attempting to enforce the September 2 and September 5 deadlines. The Supreme Court has stated that minor parties and independent candidates must be afforded a reasonable opportunity to qualify. Closing down on the legislatively established qualifying deadlines and demanding that candidates qualify on these dates nonetheless is not constitutionally reasonable.

Appellant's September 8 deadline, moreover, cannot be enforced because it falls outside the Secretary's constitutional powers. Article II of the Constitution delegates to the Louisiana Legislature the power to regulate presidential elections.

3. Appellant's argument that a "forgetful elector" caused Appellees to fail to register is a strawman. It is only relevant if one assumes that September 8 is a legally enforceable deadline. It

has no bearing on Appellees' not qualifying on either September 2 or September 5. Indeed, because Judge Brady found that Appellant was closed on these dates, a forgetful elector could not have been a cause of Appellees' failing to register on these days.

Even assuming it is relevant, it is consistent with Judge Brady's finding that Hurricane Gustav caused Appellees' to miss the legislatively-established deadlines.

### **Argument**

#### **I. Appellant's Interlocutory Appeal is Moot.**

Appellees requested both preliminary and permanent injunctive and declaratory relief in the District Court. See Complaint (R #1). The present interlocutory appeal is only from the District Court's award of preliminary injunctive relief, (R #21) which was thereafter stayed by this Court. (R #28). Because the election has intervened, Appellant's interlocutory appeal has been rendered moot.

The general rule is that an interlocutory appeal of a grant of preliminary relief is rendered moot by fulfillment of the preliminary order's terms, see, e.g., *Honig v. Students of*



*California School for the Blind*, 471 U.S. 148, 149 (1985) (“No order of this Court could affect the parties’ rights with respect to the injunctions we are called upon to review.”); *Operation King’s Dream v. Connerly*, 501 F.3d 584, 591 (6<sup>th</sup> Cir. 2007) (observing that challenge to injunction was moot since the matter was certified for the ballot and the election was past), or the occurrence of irrevocable events that render reversal of the preliminary relief meaningless. *See, e.g., DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974) (per curiam) (challenge to preliminary injunction was rendered moot by student’s near completion of education). Likewise, an interlocutory appeal of a denial of preliminary relief is rendered moot when subsequent events make clear that preliminary relief is meaningless. *See, e.g., Padilla v. Lever*, 463 F.2d 1046, 1049 (9<sup>th</sup> Cir. 2006) (“The plaintiffs’ ... claim for injunctive relief [preventing the election] has become moot. The recall election has occurred ....”).

In the context of elections, of course, the Supreme Court and lower courts have commonly invoked the “capable of repetition, yet evading review” doctrine to overcome temporal obstacles. *See,*

*e.g.*, *Norman v. Reed*, 502 U.S. 279 (1992) (applying exception to preserve challenge to Illinois’s election laws); *American Civil Liberties Union of Ohio v. Taft*, 385 F.3d 641 (6<sup>th</sup> Cir. 2004) (applying exception to preserve challenge to Ohio’s election laws).

However, this exception does not save interlocutory appeals challenging the grant or denial of preliminary relief. The Sixth Circuit in *Bogaert v. Land*, 543 F.3d 862, 864 (6<sup>th</sup> Cir. 2008), for example, recently explained that while the holding of an election moots interlocutory challenges to awards and denials of preliminary relief, “[d]ismissal of these preliminary-injunction appeals ... does not render moot the underlying district court litigation. ... Should the district court enter further orders or a judgment ..., an adversely affected party ... may seek further review ....”

*Land* involved a District Court’s preliminary injunction ordering Michigan’s Secretary of State to re-examine recall petitions without considering a constitutionally objectionable standard. After she did, she certified the recall measure for the ballot and sent it to the printers. The parties agreed that this

could not be undone. *Id.* For this reason, the Sixth Circuit ruled the interlocutory appeal challenging the District Court’s order moot.

Even the dissenting judge in *Land* agreed that once the election passed, the interlocutory appeal would be moot: “This Circuit and other Circuits repeatedly have held that an appeal from a preliminary injunction ordering an issue or candidate to be placed on or stricken from a ballot becomes moot when the election is completed and the results final.” *Id.* at 871 (Clay, J., dissenting) (citations omitted).<sup>3</sup> Judge Clay further noted that the “capable of repetition, yet evading review” exception was not controlling: “While some short-term injunctions might fall within this doctrine, this is not such a case because there is no reasonable basis for expecting that [the candidate] or the Secretary will be subjected to a similar preliminary injunction before the merits of the underlying controversy are resolved by the district court.” *Id.* at 868 n.5 (Clay, J., dissenting).

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<sup>3</sup> Judge Clay disagreed with the majority simply because the election had not yet been completed.

Because the election here is final and complete, Appellant's challenge to the preliminary injunction is moot. Whether viewed as a grant of relief or denial (since this Court stayed the Order), the appeal should be dismissed, the District Court's preliminary injunction and this Court's stay should be vacated, see *U.S. Bancorp Mortgage v. Bonner Mall Partnership*, 513 U.S. 18, 22-23 (1994) ("vacatur 'clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance'"), and the case left with the District Court for any further proceedings. See *Bogaert v. Land*, 543 F.3d 862, 864 (6<sup>th</sup> Cir. 2008) (observing that "capable of repetition, yet evading review" doctrine could save future orders from mootness).

## **II. Appellant Violated the Constitution.**

Assuming that this Court reaches the merits of this appeal, the District Court did not abuse its discretion by issuing a preliminary injunction. See *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364 (5<sup>th</sup> Cir. 2008) (stating that abuse of discretion standard applies to grant of preliminary injunction). Judge Brady's factual

conclusions are not dearly erroneous, and his legal conclusions about the meaning of the federal Constitution are likely correct.

The District Court's injunction preventing Louisiana from enforcing its September 2, September 5, and newly announced September 8 deadlines makes perfect constitutional sense. The First and Fourteenth Amendments require that states afford candidates and parties a reasonable procedure and reasonable opportunity for gaining access to the ballot. *See Anderson v. Celebrezze*, 460 U.S. 780 (1992). Closing on the deadline and for five days thereafter, and expecting candidates to qualify when the state's offices are closed, is far from reasonable. Here, the Appellant virtually concedes that the September 2 and September 5 deadlines were rendered unenforceable by Hurricane Gustav and the state's closure. Why else would the Secretary have announced a new deadline? Appellant cannot have it both ways. Either it was open or it was not. Here, it clearly was not. Hence, neither the September 2 nor September 5 deadlines can be enforced.

Even assuming the Secretary's Office was quasi-open, as argued by Appellant, the District Court found that

the hurricane forced the evacuation of many of their electors who were needed to complete each party's respective qualifying papers, which were due on September 2. Each witness also testified that he encountered numerous problems when trying to communicate with the Secretary of State's office regarding whether or not the office was opened or closed the week of September 2. In fact, even after a number of failed attempts by Mr. Monteleone [the Libertarian Party of Louisiana's coordinating officer] to contact the office of the Secretary of State during the week of September 2, he did not receive any response back until 3:15 p.m. on Monday, September 8.

The hardships and the extreme circumstances faced by those seeking to file their party's qualifying papers, in the midst of a natural disaster like Hurricane Gustav and the resulting power outages and impediments in many avenues of communication, must be taken into consideration ....

Record Excerpts 4 at 8-9. Hence, substantial evidence established that Hurricane Gustav not only closed the Secretary of State's Office on September 2,<sup>4</sup> it prevented Appellees from filing on

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<sup>4</sup> The Secretary's suggestion that notwithstanding his Office's being closed he accepted "filings made by mail and commercial carrier" on September 2 and September 5 is unproven, to say the least. The affidavit trumpeted by the Secretary as proving that his office was open to accept papers on September 2 and September 5—attested to by Merietta Spencer Norton—states that personnel were present "during the qualifying period" to take

September 2 and September 5. Even if Appellant's Office was open and it notified Appellees that it remained open (which it did not do), Appellees could not have filed their qualifying papers. Gustav prevented it.

Numerous additional facts and circumstances—on top of the witnesses' testimony presented to the District Court—buttress the District Court's specific factual conclusions. Louisiana's official web page announced that "all state governmental offices on Tuesday, September 2, 2008 [are closed] due to Hurricane Gustav." See Press Release: All State Government Offices Closed

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delivery "by hand ..., mail and commercial carrier." The qualifying period in Louisiana began over a month before Gustav; undoubtedly someone was present at some point during the time before Gustav to accept qualifying papers by hand, mail and commercial carrier. This says nothing about whether the Secretary's office was open on September 2 and September 5 and the mail and commercial carriers were running on those days. According to the United States Postal Service, the mail was not fully operational in affected areas, including New Orleans and Baton Rouge, even as late as September 5, 2008. Roads in Baton Rouge were closed. Nancy Underwood could not get to work—at the Secretary's office—for a week.

Tuesday.<sup>5</sup> They were not re-opened, according to this same web page, until Monday, September 8, 2008.<sup>6</sup>

Much of the State had been ordered to evacuate, New Orleans was a disaster-area, and Baton Rouge experienced flooding and downed trees that disrupted power.<sup>7</sup> In Baton Rouge, local officials encouraged everyone to stay off the roads on September 2, 2008. And for several days power was out and roads were blocked.

Indeed, Nancy Underwood, the Supervisor of Elections and the official with whom Monteleone had been dealing in the days

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<sup>5</sup><http://emergency.louisiana.gov/Releases/090108StateOfficesClosed.html>).

<sup>6</sup> See Press Release: State Government Offices to Open Monday (<http://emergency.louisiana.gov/Releases/090708state.html>).

<sup>7</sup> At the end of the day, of course, neither New Orleans nor Baton Rouge was placed under martial law. Some suggested before Hurricane Gustav landed, however, that martial law might be declared. See, e.g., Michel Chossudovsky, Hurricane Gustav: National Emergency Environment Sets the Stage for the McCain Election Campaign (<http://www.globalresearch.ca>) ("Given the gravity of the natural disaster, a Martial Law situation suspending normal functions of civilian administration could be adopted in the affected area.").



and weeks leading up to September 2, testified that she could not make it to work for the entire week after Hurricane Gustav hit. She testified that she did not know whether the office was open or closed because she was without power and phone service. See Transcript of Hearing Before the District Court, September 22, 2008, at 86-88 (R # 18).

Neither major party qualified on September 2, and only *one* minor political party—from California—successfully made its way to Baton Rouge that day. Witnesses testified in the District Court that the Secretary's phones were not operational on September 2, 2008—at least no one was answering them. Record Excerpts 4 at 8-9. Whether Appellees could have faxed in their papers that day is nothing less than surmise. In any case, because the phones were not being answered, Record Excerpts 4 at 8-9, Appellees could not have known of such an option.

Further, the United States Mail was not fully operational on September 2, 2008<sup>8</sup> (or for several days thereafter), and many if

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<sup>8</sup> The United States Postal Service web page reported on September 5, 2008 that "Postal Service employees are on site in the areas affected by Hurricane Gustav and are receiving updated

not most businesses in and around New Orleans and Baton Rouge were closed on September 2 due to Gustav.<sup>9</sup>

The Governor, acting under emergency powers delegated to him by the Legislature, extended all deadlines in “legal, administrative and regulatory proceedings” to September 12, 2008.<sup>10</sup> The Governor’s Order stated that “as a direct consequence of the disaster, evacuation, and subsequent flooding and power outages, there are extreme challenges to communication networks

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information pertaining to the progress being made in those locations. Our primary concern is the safety of our employees and the security of the U.S. Mail. *Once safety can be guaranteed and power is restored, we fully intend to resume delivery and collection operations.* Until then, however, affected areas can expect some service delays and we ask you to be patient.” <http://www.usps.com/communications/news/serviceupdates/gustav.htm> (emphasis added).

<sup>9</sup> See

[http://www.beaumontenterprise.com/news/local/hurricane\\_gustav-related\\_closures\\_08-31-2008.html](http://www.beaumontenterprise.com/news/local/hurricane_gustav-related_closures_08-31-2008.html).

<sup>10</sup> This Executive Order was filed with the District Court on September 22, 2008 (R # 16). Respondent argued in the District Court that this Executive Order did not apply to candidate qualifying procedures. Why this might be so is far from clear. In any case, the Governor’s Order presents additional proof that Gustav was catastrophic and rendered established deadlines meaningless.

between citizens, which has created an obstruction to citizens attempting to timely exercise their rights.” (R # 16). The United States District Court for the Eastern District of Louisiana extended deadlines for lawyers in several parishes until September 22, 2008.

Evidence, moreover, conclusively shows that Hurricane Gustav caused election authorities in Louisiana to postpone its Congressional primaries, as well as some municipal elections, originally scheduled for September 6, 2008, to October 4, 2008. On its web page, the Secretary’s Office stated that “Hurricanes Gustav and Ike and their after-effects necessitated several changes in the fall elections cycle. The Sept. 6, 2008 closed congressional primary elections are postponed, as well as some municipal elections.” See [www.sos.louisiana.gov](http://www.sos.louisiana.gov). That same page then announced a new election schedule, “**ADJUSTED FOLLOWING HURRICANE GUSTAV.**” *Id.* (capitals and emphasis in original). This not only shows that that Hurricane Gustav impacted all deadlines across Louisiana, it also demonstrates that Appellant recognized the problem. Appellant

acknowledged that adjustments in the election cycle were required. Why he had to ignore state law and the Governor's Order is left unclear. But he clearly recognized that delays were inevitable.

If these official reports, the testimony of Appellees' and Appellant's witnesses, and Judge Brady's familiarity with what happened in Louisiana (and Baton Rouge) are not sufficient, additional contemporaneous newspaper accounts<sup>11</sup> and governmental announcements make clear the magnitude of the crisis. They make clear that Hurricane Gustav wreaked havoc and made it impossible for Appellees to qualify on September 2.

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<sup>11</sup> Courts can use news reports, as well as information on the Internet, to inform their understandings of events. See, e.g., *Richlin Security Services Co. v. Chertoff*, 128 S. Ct. 2007, 2011 (2008) (noting that the lower court had taken judicial notice of hourly rates posted on the Internet); *Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1621 & n.18 (2008) (Supreme Court uses web page for information). Official documents, like the Governor's orders closing offices and extending deadlines, are properly noticed by courts as the equivalent of "legislative facts." See FEDERAL RULE OF EVIDENCE 201(a) Advisory Committee Notes to 1972 Proposed Rules.

Judge Brady, who lived through the Hurricane, could take both personal and judicial notice of these facts.<sup>12</sup>

On August 29, 2008, the Federal Emergency Management Agency (FEMA) publicly “announced that federal aid has been made available to supplement state and local response efforts due to the emergency conditions resulting from Hurricane Gustav beginning on August 27, 2008, and continuing.”<sup>13</sup> By September 2, 2008, FEMA had designated most of Louisiana, including Baton Rouge and New Orleans, disaster areas. See <http://www.fema.gov/news/event.fema?id=10489>. The Times-Picayune in New Orleans on August 31, 2008 reported that almost

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<sup>12</sup> Judges are free to take judicial notice of facts that are “not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” FEDERAL RULE OF EVIDENCE 201(b). Events like natural disasters qualify for judicial notice. See, e.g., *Kozinski v. Schmidt*, 436 F. Supp. 201, 205 (D. Wis. 1977) (stating that courts are free to take notice of the fact that “floods and natural disasters ... frequently result in large-scale destruction of property and dislocation of families.”). Judicial notice, moreover, “may be taken at any stage of the proceeding.” FEDERAL RULE OF EVIDENCE 201(f).

<sup>13</sup> See <http://www.fema.gov/news/event.fema?id=10468>.

two million people, acting pursuant to governmental orders and encouragement, had evacuated southern Louisiana. See Ed Anderson, 1.9 million people evacuate south Louisiana, THE TIMES-PICAYUNE, Aug. 31, 2008. More than 90% of the residents of southern Louisiana abided by the call to evacuate. *Id.*

This same news account reported that “[t]he Governor told people to expect a twelve-foot storm surge. ‘Now is the time to get out of harm’s way,’ Jindal said at a mid-day news conference. ‘There is still time for people to evacuate. Take this hurricane seriously. Evacuate. Take this storm seriously.’” *Id.*

News accounts establish, moreover, that before Gustav hit on September 2, some feared it to be worse than Katrina. That is why people throughout Louisiana got out of ‘harm’s way’ days in advance:

Warning that Hurricane Gustav is the "mother of all storms," Mayor Ray Nagin late Saturday ordered a mandatory evacuation of the West Bank of New Orleans for 8 a.m. Sunday and the east bank for noon.

"We want 100 percent evacuation," Nagin said. "It has the potential to impact every area of this metropolitan area."

Katrina had a footprint of about 400 miles, he said. Gustav is about 900 miles and growing, Nagin said.

"This is worse than a Betsy, worse than a Katrina," he said.

Leslie Williams, Nagin orders evacuation in face of 'mother of all storms,' THE TIMES-PICAYUNE, Aug. 30, 2008.

Baton Rouge was not spared. On August 30, the Times-Picayune reported that "[t]he mayor speculated that Gustav is so fierce Baton Rouge likely will experience 100 mph winds." *Id.* Gustav delivered. USA Today reported, quoting the Baton Rouge Advocate, that "The Gulf storm's move past Baton Rouge has left 'a path of destruction some officials say is worse than the devastation Hurricane Betsy left in 1965.'" See Gustav packs a punch in Baton Rouge, USA TODAY.<sup>14</sup> Although Baton Rouge was not flooded like New Orleans following Katrina, there was flooding

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<sup>14</sup> <http://blogs.usatoday.com/ondeadline/2008/09/gustav-packs-a.html>. The report continues: "Gustav tore down trees, power lines and traffic signals throughout the parish, leaving 300,000 residents without power and causing enough damage to initiate a 10-hour curfew and the Red Cross to open at least two shelters. *Advocate* partner WBRZ News 2 has video overlooking the city tonight, drenched in black from major power outages. The Times-Picayune calls Gustav's ride through Baton Rouge 'unexpectedly strong.'" *Id.*

reported. More devastating in terms of communication and transportation, trees and power lines were knocked down across the city. Local authorities requested that people stay home. A curfew was put in place. Major power outages were reported.

Indeed, the District Court concluded that “especially hit hard was East Baton Rouge Parish and the state offices situated here (i.e., Baton Rouge).” Record Excerpts 4 at 4. Witnesses testified that the Secretary’s Office did not answer phones, had no working web page, and did not otherwise respond to inquiries during this time. The District Court stated that “even after a number of failed attempts by Mr. Monteleone to contact the office of the Secretary of State during the week of September 2, he did not receive any response back until 3:15 p.m. on Monday, September 8.” Record Excerpts 4 at 9.

A District Court’s factual findings should not be set aside unless they are clearly erroneous. *See In re Volkswagen of America*, 545 F.3d 304, 309 (5<sup>th</sup> Cir. 2008). Here, the District Court’s factual findings that Hurricane Gustav closed Appellant’s Office, inflicted “hardships and ... extreme circumstances” on



everyone in Louisiana (including Appellees), caused “power outages and impediments in many avenues of communication,” basically shut down the state for one week, and prevented Appellees from filing on September 2 and on September 5 are fully supported by the record.

It seems clear that Judge Brady could reasonably conclude that a natural disaster the size of Hurricane Gustav caused great hardship to the people of Louisiana. He could also reasonably find that the Hurricane interrupted normal routines, scattered needed electors,<sup>15</sup> closed notary offices, stopped the mail, and stalled commercial delivery services. The District Court’s findings that Appellant was closed from September 2 through September 7, 2008, and that Gustav played a large part in Appellees’ belated delivery of their papers to Appellant’s Office are not clearly erroneous. Thus, the September 2 and September 5 deadlines, given these factual findings, clearly could not be legally enforced.

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<sup>15</sup> Louisiana law requires one elector from each congressional district, meaning that Petitioners needed notarized signatures from electors in New Orleans, which was evacuated.

**A. The District Court Properly Exercised its Equitable Powers to Develop a Remedy.**

Once one recognizes the facts behind what happened in Louisiana the week of Hurricane Gustav, the constitutional calculus is simple. Louisiana officially closed its Secretary of State's Office—which it announced to the public—from September 2 through September 7, 2008. It did not announce its September 8 reopening until sometime on September 7, and then provided Appellees with less than two hours notice of the necessity of their filing their qualifying papers by 5:00 PM that same day.

The question the District Court struggled with was how to fix the obvious First and Fourteenth Amendment problems created by Gustav and the state's closure. Appellant argued to the District Court that it possessed the power to not only announce a new deadline, but also to give candidates less than two hours' notice.

The District Court disagreed. It ruled that a state executive agent does not have the unilateral authority under Article II of the United States Constitution to regulate presidential elections. Record Excerpts 4 at 5-7. Rather, only the state Legislature can

regulate federal elections. *Id.* And the Louisiana Legislature had declared that recognized political parties (like the Libertarian Party of Louisiana) are entitled to file their qualifying papers 72 hours after the close of the initial qualification period. Because the state did not reopen until September 8, the District Court reasoned, the statutory deadline, as envisioned by the Legislature, should at least have been extended to September 11. *Id.* at 9-10. The Secretary, it found, had no constitutional authority to shorten this period.

**B. Article II Prohibits the Secretary from Establishing Deadlines.**

The District Court reasonably concluded that Article II of the United States Constitution prohibits Appellant from unilaterally truncating the qualifying period for presidential candidates. Article II, the District Court concluded, delegates to the state “Legislatures” the authority to regulate presidential elections. The Secretary therefore exceeded his powers under Article II by unilaterally announcing that September 8, 2008 was the deadline.

Section 1 of Article II provides that “[e]ach State shall appoint, in such Manner *as the Legislature* thereof may direct, a Number of Electors” to vote for President. U.S. CONST., ART. II, § 1, cl. 2 (emphasis added). This Election Clause, like its counterpart in Article I (prescribing that state “Legislatures” have the authority to regulate congressional elections) dictates that only Louisiana’s *Legislature* can prescribe the manner of electing the President of the United States.

This issue arose in *Bush v. Gore*, 531 U.S. 98 (2000), where the Supreme Court ruled that Florida’s method of counting votes for President violated the Equal Protection Clause of the federal Constitution. In the lead-up to its decision, the Court in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), first addressed whether the Florida Supreme Court’s interpretation of Florida’s election laws strayed beyond what Article II, § 1 allowed. “As a general rule,” the Court stated, “this Court defers to a state court's interpretation of a state statute.” *Id.* at 76. “But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential

electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.” *Id.*

Because it was “unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2,” *id.* at 78, the Court vacated the Florida Supreme Court’s interpretation of the election code and remanded for further proceedings.

When the case returned to the Supreme Court, the Chief Justice, joined by Justices Scalia and Thomas, added his thoughts on the meaning of Article II. The Chief Justice concluded that the Florida Supreme Court violated Article II, § 1 by deviating from the directions of the Florida legislature: “[in] a Presidential election, the clearly expressed intent of the legislature must prevail.” *Id.* at 120.<sup>16</sup>

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<sup>16</sup> The Chief Justice in *Bush v. Gore* relied, in part, on *McPherson v. Blacker*, 146 U.S. 1 (1892), for the proposition that Article II delegates regulatory power over Presidential elections to the states’ *legislatures*, not their courts. “In *McPherson v. Blacker*, 146 U.S. 1 (1892), we explained that Art. II, § 1, cl.2, ‘convey[s] the

The Supreme Court, moreover, has made clear on a number of occasions that the Constitution's use of the term "Legislature" has a meaning separate and apart from "State."<sup>17</sup> "Legislature"

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broadest power of determination' and 'leaves it to the legislature exclusively to define the method' of appointment. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." 531 U.S. at 113. He concluded that "in a Presidential election the clearly expressed intent of the legislature must prevail. And there is no basis for reading the Florida statutes as requiring the counting of improperly marked ballots ...." *Id.* at 121.

<sup>17</sup> The same issue arose in the context of congressional elections in *Lance v. Coffman*, 127 S.Ct. 1194 (2007), where a state court drew Colorado's congressional districts in the absence of a proper legislative plan. Not long after the state court's action, the legislature passed a new plan, which was challenged before the Colorado Supreme Court. Those favoring the judicial plan argued that Colorado's constitution prohibited a mid-census apportionment by the legislature. Those who supported the legislative plan argued that Art. I, § 4 of the federal Constitution precluded a state court from drawing districts for congressional elections—at least where the legislature had acted. The Colorado Supreme Court ruled in favor of the judicial plan in *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (2003) (en banc), finding that a judicial apportionment did not offend the Elections Clause of Art. I, § 4 of the United States Constitution. Following the dismissal of a collateral challenge filed by Colorado voters in federal court, the Court was asked in *Lance v. Coffman*, 127 S.Ct. 1194 (2007), to overturn the apportionment plan. It did not because it concluded the plaintiffs' lacked standing.

does not mean “State,” nor does it mean “legislative” or “quasi-legislative” power.

Justice Stevens (joined by Justice Ginsburg) made this clear in *California Democratic Party v. Jones*, 530 U.S. 567, 602 (2000) (Stevens, J., dissenting), where the Court invalidated California’s adoption of a blanket primary under the First Amendment. While Justice Stevens disagreed with the majority over its application of the First Amendment, he agreed that California’s initiative was likely invalid. This was so, he argued, because the blanket primary—which was also applied to congressional elections—was not adopted by the California legislature: “Although this distinction is not relevant with respect to elections for state offices, it is unclear whether a state election system not adopted by the legislature is constitutional insofar as it applies to the manner of electing United States Senators and Representatives.”

*Id.* at 602.<sup>18</sup>

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<sup>18</sup> Justice Stevens balked at the suggestion that Art. 1, § 4 was necessarily intended to accept a state’s Legislature as created and empowered by that State’s Constitution. California’s Constitution, for example, “provide[d] that ‘[t]he legislative power of this State is vested in the California Legislature ..., but the

Justice Stevens pointed to history to support his interpretation: “the United States House of Representatives has determined in an analogous context that the Elections Clause's specific reference to ‘the Legislature’ is not so broad as to encompass the general ‘legislative power of this State.’” *Id.* Justice Stevens specifically referenced *Baldwin v. Trowbridge*, 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46, 47 (1866), which reported that the Elections Clause

power is conferred upon the *legislature*. But what is meant by ‘the legislature?’ Does it mean the legislative power of the State, which would include a convention authorized to prescribe fundamental law; or does it mean the legislature *eo nomine*, as known in the political history of the country? The [C]ommittee [of Elections for the U.S. House of Representatives] have adopted the latter construction.

*Id.* at 603 n.11.

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people reserve to themselves the powers of initiative and referendum.” *Id.* at 602-03. “The vicissitudes of state nomenclature,” Justice Stevens opined, “do not necessarily control the meaning of the Federal Constitution.” *Id.* at 603.



In *Baldwin v. Trowbridge*,<sup>19</sup> Michigan's Legislature in the midst of the Civil War passed a law that allowed its soldiers to cast ballots for congressional candidates and presidential electors even though the soldiers were not physically present in Michigan. In those days, absentee ballots did not commonly exist, and in fact the Michigan Constitution required physical presence. One congressional candidate (Trowbridge) won the election with the assistance of the soldiers' votes. The other (Baldwin) would have won if the soldiers' votes were, under the Michigan Constitution, excluded. The United States House Committee of Elections ruled that the votes were properly cast; the Michigan Constitution could not control the Legislature in the context of federal elections. The full House agreed by a vote of 108 to 30 and Trowbridge was seated.

Although Justice Stevens did not decide the issue in *Jones*, the Supreme Court has resolved the question of executive

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<sup>19</sup> This account is drawn from CHESTER A. ROWELL, A HISTORICAL AND LEGAL DIGEST OF ALL THE CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIRST TO THE FIFTY-SIXTH CONGRESS 1789-1901, 200-01 (1901).

authority over matters constitutionally directed to states' "Legislatures" in a somewhat different context. In *Hawke v. Smith*, 253 U.S. 221 (1920), the Court rejected Ohio's claim that the ratification of a proposed federal Constitutional amendment by the Ohio Legislature was subject to a popular referendum process applied to all other laws. Article V of the United States Constitution provides that amendments proposed by the Congress can either be ratified by state conventions or legislatures: "The method of ratification is left to the choice of Congress." *Id.* at 226. Regardless, the Court observed in *Hawke*, "[b]oth methods of ratification, by Legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people." *Id.* at 226-27.

The Supreme Court specifically rejected the claim that "the federal Constitution requires ratification by the legislative action of the states through the medium provided at the time of the proposed approval of an amendment." *Id.* at 229. "This argument is fallacious in this—ratification by a state of a

constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.” *Id.* Thus, ratification must be by a State’s Legislature, and the Legislature alone. It cannot be by referendum and cannot be delegated to an agency or court.

Whether this logic applies to Articles I and II, as well as Article V, was answered by the *Hawke* Court’s use of the Seventeenth Amendment to support its conclusion. As explained in *Hawke*, 253 U.S. at 228, the Seventeenth Amendment—which provides for the popular election of Senators—was necessary for the very reason that Article I, § 3 required that a State’s Senators be “chosen by the Legislature thereof ....” U.S. Const., art. I, § 3, cl. 1. Because the Constitution delegated to Legislatures the power of selecting Senators, these Legislatures could not delegate the power to the people. The Seventeenth Amendment was necessary to achieve this result.<sup>20</sup> *Hawke* proves that the

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<sup>20</sup> In *State of Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916), the Court sustained Ohio’s application of its referendum mechanism to a legislatively drawn congressional districting plan. In contrast to *Hawke* and the present case, however, Congress there had expressly authorized the application of referenda

Legislature is supreme when it comes to federal elections. It also suggests that the Legislature cannot easily give away its power.<sup>21</sup>

The United States District Court for the Southern District of Ohio in *Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008), recently recognized the limitations found in Article II in a dispute involving the Ohio Secretary of State's attempt at creating a deadline for qualifying papers for federal elections—including presidential candidates. Because the Sixth Circuit had invalidated Ohio's general deadline for minor-parties

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mechanisms to congressional districting plans. Because Congress has the power under Art. I, § 4 to draw rules for electing federal representatives, Congress's action legitimated what otherwise would have been deemed unconstitutional under Art. I, § 4. There is no suggestion in the present case that Congress has authorized a delegation of regulatory power over federal elections to the Ohio Secretary of State.

<sup>21</sup> In *Smiley v. Holm*, 285 U.S. 355 (1932), the Supreme Court ruled that Art. I, § 4's reference to "Legislature" assumes the basic legislative processes spelled out by the state's fundamental charter. Hence, bicameralism in Ohio is required for the "Legislature" to act, and Ohio's gubernatorial veto can be constitutionally applied to the Legislature's proposed manner of electing federal representatives. Bicameralism and Presentment, after all, are fundamental aspects of legislative action. This is a far cry, however, from holding that the Legislature can delegate all of its authority to the Governor or some other executive agent.

to gain access to the ballot, and had failed to replace the statute, the Secretary adopted a new (more generous) deadline. The court invalidated this deadline under Articles I and II, stating:

Under the Constitution, the Secretary of State, a member of the executive branch of government, has no authority independent of the Ohio General Assembly to direct the method of the appointment of Presidential electors or federal officials. Absent an express delegation of legislative authority, this Court cannot assume that the Ohio General Assembly intended to vest the Secretary of State with the legislative authority conferred in Article I, Section 4 and Article II, Section 1.

...

The general, statutory authority to direct the conduct of electors cannot, as to Articles I and II of the Constitution, serve as a substitute for state legislative action regarding the election of federal officials. Accordingly, the [Secretary's] Directive has no effect and cannot be enforced to prevent the Libertarian Party and its federal candidates from appearing on the Ohio general election ballot.

*Id.* at 1012-13.

Consequently, Article II of the Constitution prohibits the Louisiana Secretary of State from announcing a deadline different

from that established by the Louisiana Legislature. September 8, the Secretary's new deadline, can have no force or effect.<sup>22</sup>

### **III. Hurricane Gustav Prevented Appellees From Filing on September 2 and September 5.**

The Secretary has constructed a straw-man around an off-hand remark made by the local chair (Adrien Monteleone) of the state Libertarian Party. Monteleone guessed that one of his electors "forgot" to mail his paper to one of Appellant's agents (Nancy Underwood) on September 8—the new deadline date unilaterally constructed by the Secretary of State. That is why the Libertarian Party of Louisiana did not qualify until September 10. Monteleone made the casual comment to explain why he did not have together all of the Libertarian Party's papers *on September 8* in order to satisfy the Secretary's new deadline. Monteleone's remark had nothing to do with the original

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<sup>22</sup> Whether the Governor's deadline of September 12, 2008 could be applied to presidential candidates is not at issue in this case. Suffice it to say, however, that Appellees would not have challenged the application of the Governor's deadline. Moreover, at least the Governor was expressly delegated the power to establish deadlines in the face of natural disasters by the Legislature. It could well be that the Governor's deadline could be applied to federal elections.

September 2 and September 5 deadlines. Appellees clearly missed these deadlines, as found by the District Court, *because of Hurricane Gustav and the Appellant's Office being closed*.<sup>23</sup>

Appellant, of course, focuses on an alleged “forgetful elector” because his factual case is weak. The argument is nothing less than an attempt to divert the Court’s attention from the two principal factual issues in this case: (1) whether the Secretary’s Office’s was officially closed from September 2 through September 7, 2008, and (2) whether Hurricane Gustav disrupted Appellees’ efforts to gather their qualifying papers from their electors throughout the state and deliver them to the Secretary on either September 2 or September 5.

The Secretary’s “forgetful elector” argument is only relevant if one accepts the Secretary’s premise that his September 8 deadline is a legal and meaningful date. In order to conclude that it is, Appellant has to show he possessed the constitutional authority to set that deadline. Hence, the case comes back to the

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<sup>23</sup> Monteleone’s comment is irrelevant to the Governor’s deadline of September 12, as well as Legislature’s extended deadline of September 11, since *Appellees filed on September 10*.

Secretary's constitutional authority to establish deadlines for presidential elections.

Assuming that Monteleone's comment about a forgetful elector is somehow relevant, it is fully consistent with the District Court's conclusion that Appellees suffered "hardships and ... extreme circumstances," that prevented their filing on September 2, September 5, or even September 8. Record Excerpts 4 at 9. As testified to by Monteleone and found by the District Court, "the hurricane forced the evacuation of many of [Appellees'] electors who were needed to complete [the] party's respective qualifying papers ...." *Id.* Further, Appellees "encountered numerous problems when trying to communicate with the Secretary of State's office regarding whether or not the office was opened or closed the week of September 2." *Id.*<sup>24</sup>

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<sup>24</sup> Monteleone testified that the reason he did not file by September 5 was not because of an alleged "forgetful elector," but was because "we didn't have [the papers] because of the Hurricane." Transcript of Hearing (R # 18) at 71. One can infer from his testimony that but for Gustav, Monteleone would have been able to contact the alleged forgetful elector and insure that he delivered his paperwork before September 5.



Further, one could reasonably conclude that the story about the forgetful elector presented additional proof of the “hardships and extreme circumstances” encountered by Appellees and their electors. Appellees could not reach the Secretary and could not reach their electors. The District Court could reasonably conclude that for one week *after* Gustav, moreover, party members, officials and electors remained scattered, unsettled, and out-of-touch. Filing efforts continued to be disrupted.

This reasonable conclusion is borne out by press reports both before and after Hurricane Gustav’s landfall. Baton Rouge, according to the Associated Press, suffered extensive damage that was not cleared for at least ten days:

Debris piled across medians, drivers passed cautiously under dark traffic lights and at least a few residents camped in front yards to avoid the sweltering heat of houses where power hadn't been restored Wednesday.

This is Baton Rouge, seat of Louisiana government, still hobbled by a blow from Hurricane Gustav 10 days earlier. It struck Louisiana as a Category 2 storm, surprising the capital with its extensive damage, uprooting trees and throwing them across roofs, roads and power lines.

By Wednesday, there was still plenty of cleanup to do. The city's streets were mainly cleared of trees, but the debris remained piled up in front yards and on some homes. A

quarter of the parish lacked power, and schools were shuttered.

Melinda DeSlatte & Doug Simpson, Baton Rouge still digging out 10 days after Gustav, ASSOCIATED PRESS, Sept. 10, 2008.<sup>25</sup>

### **Conclusion**

Assuming this interlocutory appeal is not moot, there are two pivotal constitutional questions raised: (1) whether an extension was rendered necessary by Hurricane Gustav and the Secretary's official closure: and (2) whether the Secretary possessed the constitutional power to shorten deadlines prescribed by the Legislature (September 11, 2008) and Governor (acting under express delegated power) (September 12, 2008). Appellant has not even attempted to defend the validity of his actions under Article II. Rather, he relies on incredible factual assertions and strained inferences to contradict the District Court's findings. The

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<sup>25</sup> Why one elector may have forgotten, moreover, is not even explored by the Appellant. Could it be that he "forgot" because of Gustav? Much of the state, after all, was under an evacuation order as early as August 29, 2008. See Leslie Williams, Nagin orders evacuation in face of 'mother of all storms,' THE TIMES-PICAYUNE, Aug. 30, 2008.

District Court properly rejected the Appellant's claim that Hurricane Gustav had nothing to do with Appellees' failure to file before September 5. Its decision should be AFFIRMED.

Respectfully submitted,

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**Certificate of Service**

I certify that two copies of this Brief, together with an electronic version, were mailed (with first-class postage affixed) to Celia R. Cangelori, 918 Government Street, P.O. Box 3036, Baton Rouge, LA 70821-3031, this \_\_\_ day of December, 2008.

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Mark R. Brown

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Dated: \_\_\_\_\_