

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA**

LIBERTARIAN PARTY,  
LIBERTARIAN PARTY OF LOUISIANA,  
BOB BARR, WAYNE ROOT,  
SOCIALIST PARTY USA,  
BRIAN MOORE, STEWART ALEXANDER

CIVIL ACTION

NO. 08-582-JJB

VERSUS

JAY DARDENNE,  
In his official capacity as Louisiana  
Secretary of State

**RULING ON MOTION FOR PRELIMINARY INJUNCTION**

**“An ill winde that bloweth no man to good.”<sup>1</sup>**

This matter is before the court on a Motion for Preliminary Injunction (Doc. 2) filed by Plaintiffs the Libertarian Party, the Libertarian Party of Louisiana, Bob Barr, Wayne Root, (hereinafter the “Libertarian Party”) and the Socialist Party USA, Brian Moore, and Stewart Alexander (hereinafter the “Socialist Party USA”) against Defendant Jay Dardenne, in his official capacity as the Louisiana Secretary of State. On September 16, 2008, the court denied Plaintiffs’ motion for a temporary restraining order. A hearing on the motion for the preliminary injunction was conducted on September 22, 2008. Jurisdiction exists pursuant to 28 U.S.C. § 1331.

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<sup>1</sup> John Heywood, Proverbs. Part ii, Chap. IX.

## **Factual Background**

Plaintiffs are two minor political parties, the Libertarian Party (and its Louisiana affiliate) and the Socialist Party USA, and the presidential/ vice-presidential candidates running under the two parties' banners this election year. Defendant is Jay Dardenne, Louisiana's Secretary of State, whose constitutional and statutory duties include the conduct of elections for the State.

Louisiana's statutory scheme requires that "recognized"<sup>2</sup> political parties' presidential candidates and so called "independent"<sup>3</sup> presidential candidates file their qualifying papers and filing fees with the Defendant no later than the first Tuesday in September of each presidential election year, with the deadline falling on September 2<sup>nd</sup> of this year. La. R.S. 18:1253-54. Additionally, pursuant to La. R.S. 18:1253, recognized political parties are afforded an extra seventy-two hours when its State Central Committee has failed to file the proper certifications with the Secretary of State's office by the Tuesday deadline.<sup>4</sup> Because of Hurricane Gustav, and the office closings and evacuations resulting there from, Plaintiffs claim they could not meet these deadlines. Neither the Libertarian nor the Socialist slates were filed by September 2. The Secretary of State, on his own volition, reopened the qualifying period for one day on September 8 but

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<sup>2</sup> La. R.S. 18:1253.

<sup>3</sup> La. R.S. 18:1254.

<sup>4</sup> The state central committee of the recognized party must certify the nominees to the Louisiana Secretary of State by 5:00 p.m. on the first Tuesday in September of the year the presidential election is held. La. R.S. 18:1253(E). If not, the national chairman of the political party, in this case, the national chairman of the Libertarian Party, must do so within seventy-two hours thereafter. La. R.S. 18:1253(E).

neither slate of plaintiffs was filed on that day. The Libertarian slate was ultimately filed on September 10 and the Socialist slate on September 11.

### **Issues Presented**

Plaintiffs challenge the Defendant's refusal to accept their qualifying papers under Art. II §1, cl. 2 of the United States Constitution and the First and Fourteenth Amendments. More specifically, Plaintiffs assert violations of their rights under the First and Fourteenth Amendments, which afford candidates and political parties equal access to election ballots. While the Secretary of State extended the filing deadline until September 8, 2008, Plaintiffs argue that he exceeded his authority—that under Article II, §1, cl. 2 only the state "Legislature" can prescribe rules for presidential elections. Consequently, Plaintiffs contend that Louisiana lacks a constitutionally enforceable deadline and the court must intercede and use a balancing test to set reasonable deadlines. In this regard, Plaintiffs argue that they should have been provided at least four days from the date that the Secretary of State reopened his office on September 8<sup>th</sup> to perfect the filing of the requisite qualifying papers. Plaintiffs seek a preliminary injunction ordering the names of their respective candidates to be placed on the ballot.

### **Standard for Granting a Preliminary Injunction**

A preliminary injunction is a powerful remedy used sparingly in cases with a set of extraordinary circumstances. A court will only grant such injunctions when the movant has fully carried his cumulative burden of persuasion on each of the four following factors. *Canal Authority of Florida v. Callaway*, 489 F.2d 567 (5<sup>th</sup> Cir. 1974). To obtain a preliminary injunction in the Fifth Circuit, the Plaintiff must show: 1) a substantial likelihood of success on the merits, 2) a substantial

threat that plaintiff will suffer irreparable injury if injunction is not granted, 3) that threatened injury outweighs any damage that injunction might cause defendant, and 4) that injunction will not disserve the public interest. *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 403 F.3d 324 (5<sup>th</sup> Cir. 2005).

### **Findings of Fact**

The Libertarian Party is a “recognized” political party and the Socialist Party is not. Therefore, pursuant to La. R.S. 18:1254, the Socialist Party USA, as a non-recognized political party in Louisiana, was permitted to qualify a slate of candidates by submission of a nominating petition or by the payment of a qualifying fee by September 2, 2008. Pursuant to La. R.S. 18:1253, the Libertarian Party, as a “recognized” political party, had until 5:00 p.m. on September 5, 2008,<sup>5</sup> to certify its slate of electors and to file the notarized statement of each accepting the nomination.

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.<sup>6</sup> On Monday, September 8, 2008, Defendant’s office reopened and announced that all

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<sup>5</sup> As a “recognized” party, it was entitled by law to an extra seventy-two hours beyond the original filing date so that the national chairman could step in and file the qualifying papers in the event that the state central committee failed to do so. La. R.S. 18: 1253E.

<sup>6</sup> However, according to the testimony of Ms. Underwood, personnel were available at the Office of the Louisiana Secretary of State to accept filings made on September 2.

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 were not advised of the Secretary's decision until past 3:00 p.m. on the 8<sup>th</sup> and were told to file their slates by 5:00 p.m. that day.

The Socialist Party timely filed its fee on September 8 but failed to submit all of the necessary affidavits with its fee. The Socialist Party did not submit all of its requisite affidavits to Defendant until September 11, 2008, three days past the extended deadline afforded by Defendant. 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 10<sup>th</sup>.

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.

**The Secretary of State was not Authorized to Change the Deadline**

When Defendant reopened his office on September 8, 2008, and established a new deadline, he exceeded his constitutional authority. In the

instant case, Plaintiffs correctly contend that only the legislative branch has the authority, under Articles I and II of the United States Constitution, to prescribe the manner of electing candidates for federal office. See *Libertarian Party of Ohio v. Brunner*, \_\_\_ F. Supp. 2d \_\_\_, 2008 WL2795576 (S.D. Ohio 2008). In *Brunner*, the District Court stated:

“...As to members of the Electoral College who determine the President, Article II, Section 1 states: “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.” *Id.* at 3.

The Court in *Brunner* relied on *Bush v. Gore*, 531 U.S. 98 (2000), where the Supreme Court ultimately ruled that Florida’s method of counting votes for President violated the Equal Protection Clause of the federal Constitution, for this proposition. In the lead up to the *Gore* decision, the Supreme 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, this Court defers to a state court’s interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to 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.* at 76.

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 accordingly vacated the Florida

Supreme Court's interpretation of the election code and remanded for further proceedings. *Id.*

In the concurring opinion in *Gore*, the Chief Justice, joined by Justice Scalia and Thomas, agreed with the result—reversing the Florida Supreme Court's "count every vote" remedy—but added another reason for striking down the Florida Supreme Court's scheme. 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." *Gore*, at 120. Because the meaning of Article II presented a federal question, the Chief Justice found that he did not have to defer to the Florida Supreme Court's interpretation of state law. *Id.*<sup>7</sup>

History and precedent both reveal that the legislature's power and authority under Art. II, §1 cl. 2, cannot be circumscribed. Whether it is the inappropriate action of a state supreme court or a state executive officer overstepping his boundaries, it is clear that the state legislature controls the manner of the selection of that state's Presidential electors. Thus, it is only the State Legislature, not the Secretary of State that is vested with the power to create new deadlines for federal elections. Consequently, the court holds that

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<sup>7</sup> The Chief Justice in *Bush v. Gore* relied on *McPherson v. Blacker*, 146 U.S. 1 (1892), for the proposition that Article II delegates regulatory power over Presidential elections to the state's *legislatures*, not their courts. "In *McPherson v. Blacker*, 146 U.S. 1 (1892), we explained that Art. II, §1, cl.2, 'conveys the 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.

the Louisiana Secretary of State exceeded his authority when he extended the deadline for submission of the qualifying papers from September 2 to September 8.<sup>8</sup>

### **Balancing Test Weighs in Favor of Deadline Extension Due to the Hurricane**

The next inquiry is whether the statutory deadlines should be extended by this court. In *Anderson v. Celebrezze*, 460 U.S. 780 (1992), the Supreme Court recognizes the fundamental right of voters to have an effective independent party choice. However, states may impose substantial regulation on elections to prevent chaos; and such state interests are generally found to be sufficient to justify reasonable, non-discriminatory restrictions. The Supreme Court instructs that, ultimately, a balancing test must be used to judge restrictions on ballot access. According to *Anderson*, the court must first analyze the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments. Then, considering the precise interest put forth by the state as justifications for the burden, the court must determine if the state's interest makes it necessary to burden the plaintiff's rights.

Applying this balancing test to the facts at hand, the court finds the magnitude of injury to plaintiffs caused by the September 2 deadline is great. Both Brian Moore (the Socialist Party candidate for President) and Adrien

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<sup>8</sup> If Executive Order No. BJ 08-92 filed by the Governor (Doc.10) were interpreted to apply to this time extension, this would also constitute an action that exceeded his authority as well.



Monteleone (Chairman of the Libertarian Party of Louisiana) testified in court 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 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 when weighed against the state's interest in efficiently getting out voter ballots. By extending the September 2 deadline to September 8, Defendant effectively concedes that a six day extension would not have been unduly disruptive of the normal election process.<sup>9</sup> Therefore, the court finds that plaintiffs' injuries clearly outweigh the burden placed upon the State in extending the September 2 deadline to September 8. Additionally, considering the statutory scheme—that affords recognized parties an additional 72 hour delay—which is only triggered when the

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<sup>9</sup> The Secretary and the Governor so upset the Congressional Primary Elections scheduled for September 6, this signifying to this Court that the State Electoral Process was disrupted.

State Central Committee has failed to act by 5:00 p.m. on the first Tuesday of September—the court finds that it would be unreasonable and unfairly discriminatory to deprive the Libertarian Party of an extension until September 11. Therefore, since the Libertarian Party's documents were received by the Secretary of State's office on September 10, 2008, it should not be denied ballot access.

In contrast, on September 8, 2008, the Socialist Party had submitted its qualifying fee and seven of the nine requisite affidavits. One of the seven was incomplete due to Mr. Stanford's failure to list his address. This is a critical error because without it neither the Secretary nor the electorate have any way of knowing if this individual is from the Congressional District for which he seeks election. See, La. R.S. 18: 1254. The remaining two of the required nine elector affidavits were neither notarized nor delivered until September 11, 2008. The court finds that the Socialist Party has not demonstrated that it was unreasonably deprived of ballot access by its failure to submit all of the proper documentation by the end of business on September 8<sup>th</sup>.<sup>10</sup>

### **Entitlement to Relief**

For the aforementioned reasons, the Libertarian Party has proved a substantial likelihood of success on the merits and the Socialist Party has not. Plaintiffs are threatened with irreparable injury because they risk being excluded

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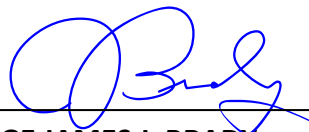
<sup>10</sup> The Socialist may argue that since this court has ordered that a new ballot including the Libertarian slate be printed at this date that it is unfair not to include the their slate as well. The court disagrees. As set forth above, the Socialist have not complied with the state law regarding the information that must be included when an elector qualifies, even as to this date.

from Louisiana's ballot in a national election that impacts the whole nation as well as Louisiana. The election is fast approaching and only emergency relief can preserve their constitutional rights. By all indications, Defendant will incur \$21,550.63 in costs associated with reprinting the ballots to include the candidates of the Libertarian Party. This, however, is a small price to pay for the reinstatement of a group of citizens' fundamental right to vote that will otherwise be unconstitutionally denied to them. The court finds that injunctive relief will benefit the public interest because it will ensure that Louisiana's presidential election complies with the Constitution.

Accordingly, the motion for preliminary injunctive relief is hereby GRANTED as to the Libertarian Party and DENIED as to the Socialist Party.

This Court stays this judgment pending appeal until 5:00 p.m. on Thursday, September 25.

Signed in Baton Rouge, Louisiana, on September 24, 2008



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**JUDGE JAMES J. BRADY**  
**UNITED STATES DISTRICT COURT**  
**MIDDLE DISTRICT OF LOUISIANA**