

Case No. 09-30307

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

**LIBERTARIAN PARTY; LIBERTARIAN PARTY OF LOUISIANA; BOB
BARR; WAYNE ROOT; SOCIALIST PARTY USA; BRIAN MOORE,**

Plaintiffs – Appellants

versus

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

Defendant – Appellee

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

**BRIEF FOR APPELLANTS,
LIBERTARIAN PARTY, LIBERTARIAN PARTY OF LOUISIANA, BOB
BARR, WAYNE ROOT, SOCIALIST PARTY USA, BRIAN MOORE**

Mark R. Brown
303 E. Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 236-6956 (fax)
Attorney for Appellants

Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Stewart Alexander, Plaintiff
2. Bob Barr, Plaintiff/Appellant
3. The Honorable James J. Brady, District Judge
4. Mark R. Brown, Attorney for Plaintiffs/Appellants
5. Celia R. Cangelosi, Attorney for Defendant/Appellee
6. Jay Dardenne, Defendant/Appellee
7. Libertarian Party, Plaintiff/Appellant
8. Libertarian Party of Louisiana, Plaintiff/Appellant
9. Michael McKay, Attorney for Plaintiffs
10. Brian Moore, Plaintiff/Appellant
11. Wayne Root, Plaintiff/Appellant
12. Socialist Party USA, Plaintiff/Appellant
13. Stone, Pigman, Walther, Wittmann, LLC-BR, Attorney for Plaintiffs

Mark R. Brown
Attorney of Record for Appellants

Dated: _____

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Recommendation for Oral Argument

Appellants believe that oral argument would be helpful to the Court's understanding of the issues in this case. Appellants' argument under Article II of the United States Constitution is somewhat novel, and their argument under Rule 4(d) appears to be one of first impression in this Circuit. The Court might consider consolidating argument in the present case with that in *Moore v. Hosemann*, No. 09-60272 (5th Cir.) (pending), which raises similar issues.

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Statement of Jurisdiction

This is an appeal from a final judgment of the United States District Court for the Middle District of Louisiana dismissing Appellants' Complaint, entered on April 6, 2009 (Dkt. # 63). *See* 28 U.S.C. § 1291. Appellant's Notice of Appeal was filed on April 20, 2009. (Dkt. # 64).

Standard of Review

Because Appellant's Complaint was dismissed under Rule 12(b), the standard of review is *de novo*. Appellants' factual allegations are to be taken as true and all reasonable inferences are to be drawn in their favor. *See U.S. ex rel. Rafizadeh v. Continental Common, Inc.*, 533 F.3d 869, 872 (5th Cir. 2008).

Statement of the Issues

1. Whether Appellants' election-law challenge to the Louisiana Secretary of State's unconstitutional decision to shorten the qualifying period was rendered moot by the intervening election.
2. Whether the "capable of repetition, yet evading review" exception preserves Appellants' election-law challenge notwithstanding the intervening election.
3. Whether the Secretary has the authority under Article II of the United States Constitution to regulate presidential elections.

4. Whether the Secretary is subject to service of process under Rule 4(e) of the Federal Rules of Civil Procedure when sued in his official capacity for prospective declaratory and injunctive relief.
5. Whether the Secretary was under a Rule 4(d) duty to waive service of process.

Statement of the Case

Appellants—the Libertarian Party of Louisiana (a recognized political party in Louisiana), its presidential ticket, the Socialist Party USA (which is not formally recognized in Louisiana), and its presidential candidate—filed suit under 42 U.S.C. § 1983, Article II of the Constitution, and the First and Fourteenth Amendments, 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 Appellants’ argument focused on the effects of Hurricane Gustav, which roared into Louisiana over the Labor Day weekend. Because of Gustav, the state officially closed its offices between September 2 and September 8, 2008. *See* Complaint ¶¶ 13-14 (and accompanying Exhibits) (Dkt. # 1). This meant that the legislatively-created deadline for filing qualifying papers for presidential candidates—September 2 for the 2008

presidential election cycle, *see* La. Rev. Stat. § 18:1253(E)¹—had to be adjusted. It clearly could not be enforced.

The Governor of Louisiana, acting pursuant to an express delegation of power from the Legislature, on August 29, 2008, issued an Order extending all deadlines in “legal, administrative and regulatory proceedings” to September 12, 2008.² Both the Libertarian Party and the Socialist Party USA’s presidential candidates qualified by this date. *See* Complaint ¶¶ 23, 25 (Dkt. # 1).

Meanwhile, the Secretary on September 8, 2008, announced a new deadline in Louisiana for presidential qualifying papers. That new deadline was September 8, 2008. *Id.* ¶¶ 20-21. Because they had no advance warning and were still suffering the effects of Hurricane Gustav—and given the Governor’s announced September 12 deadline—Appellants’ presidential candidates could not and did not qualify by this date. *Id.* ¶¶ 19-20.

¹ Section 18:1253(E) states that qualifying papers for presidential candidates must be filed with the Defendant “prior to 5:00 p.m. on the first Tuesday in September of each year in which a presidential election is to be held.” *See* Complaint ¶ 10 (Dkt. # 10). September 5 was the alternative 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. *See* Complaint ¶ 10 (Dkt. # 10). Appellant’s Office was officially closed on this day, also.

² This Executive Order was filed with the District Court on September 22, 2008 *See* Dkt. # 16.

Appellants charged that the Secretary of State lacked constitutional authority under Article II of the United States Constitution to shorten Louisiana's deadline. *Id.* ¶¶ 35-36. The Governor had announced on August 29 that September 12, 2008 was the new deadline. The Secretary cited no delegation of power or statutory authority to establish a different, shorter, time frame.³

The District Court, the Honorable James J. Brady, held an emergency hearing on September 22, 2008. *See* Dkt. # 18. The following day, the District Court ordered that the names of the Libertarian Party's candidates for President and Vice-President, Bob Barr and Wayne Root, be placed on the Louisiana election ballot. *See* Dkt. # 19. It issued a written order to that effect on September 25, 2008. *See* Dkt. # 20.

Appellants, the Socialist Party USA and Brian Moore, who filed their qualifying papers on September 11, 2008, were denied emergency relief by

³ The Libertarian Party, moreover, claimed that the Louisiana Legislature's intent was to give candidates of recognized political parties three days beyond the stated qualifying deadline, see La. R. S. § 18:1253E, which necessarily meant the Libertarian Party's deadline for the 2008 presidential election should have been no sooner than September 11 (three days after the Secretary re-opened his office). *See* Complaint ¶ 41 (Dkt. # 1).

the District Court because it concluded as a preliminary matter that their qualifying papers were defective. *See* Dkt. # 20.⁴

The Secretary took an emergency appeal to this Court on September 25, 2008. *See* Dkt. # 21. The following day, this Court stayed the preliminary injunction entered in favor of the Libertarian Party. *See* Dkt. #28. Factual disputes, together with equitable considerations, led the Court to conclude that preliminary injunctive relief placing Barr's and Root's name on the ballot was not warranted.

The Socialist Party USA, Brian Moore and Stewart Alexander, filed an interlocutory cross-appeal seeking emergency injunctive relief in this Court immediately after the Secretary appealed. *See* Dkt. # 25. This Court denied emergency relief on September 26, 2008. *See* Dkt. # 29.

The presidential election was held on November 4, 2008 without the names of the Libertarian Party's and Socialist Party USA's presidential candidates. Following the election, the Socialist Party USA, Moore and Alexander, who were Cross-Appellants in the interlocutory appeal, moved (without objection) to voluntarily dismiss their appeal. *See* Dkt. # 41. That motion was granted effective November 26, 2008. At the suggestion of the Libertarian Party, the Libertarian Party of Louisiana, Bob Barr and Wayne

⁴ The Socialist Party USA and Moore continue to contest that preliminary determination. *See* Complaint at ¶ 25 (Dkt. # 1).

Root, and with the agreement of the Secretary, this Court on March 2, 2009 dismissed the Secretary's interlocutory appeal from the award of preliminary relief to the Libertarian Party. *See* Dkt. # 61.

Following the filing of their Complaint, Appellants, pursuant to Rule 4(d) of the Federal Rules of Civil Procedure, requested that the Secretary waive service of process. The Secretary refused. Appellants duly served the Secretary and filed the Return on September 23, 2008. *See* Dkt. # 17. Appellants thereafter on January 12, 2009 moved the District Court to award costs and attorney's fees pursuant based on the Secretary's failure to waive pursuant to Rule 4(d). *See* Dkt. # 45.

The District Court on March 24, 2009 dismissed the Appellants' Complaint and refused to award costs and attorney's fees pursuant to Rule 4(d). *See* Dkt. # 62.⁵ It concluded that the action was moot and was not saved by the "capable of repetition, yet evading review" exception. It also

⁵ The District Court also denied Appellants' Motion to Amend the Complaint, *see* Dkt. # 44, which was filed on January 8, 2009. *See* Dkt. # 62 (denying Motion to Amend). The Amendment would have provided greater specificity to the Complaint's factual allegations, as well as adding a claim to money damages against the Secretary in his individual capacity. Appellants do not separately appeal the denial of their Motion to Amend. Rather, Appellants argue that the Complaint was not mooted by the election and thus should be reversed on that ground.

found that because the Appellant' suit was against the State of Louisiana, Rule 4(d) did not apply.

The District Court issued its formal judgment for the Secretary on April 6, 2009. *See* Dkt. # 63. Appellants filed their Notice of Appeal from this final judgment on April 20, 2009. *See* Dkt. # 64.

Statement of Facts

Appellant, Brian Moore, was the Socialist Party USA's candidate for President during the 2008 election. *See* Complaint ¶ 1 (Dkt. # 1). Appellants, Bob Barr and Wayne Root, were the Libertarian Party's and Libertarian Party of Louisiana's candidates for President and Vice-President, respectively, during the 2008 presidential election. *Id.* ¶ 3. Appellant, the Libertarian Party of Louisiana, is a recognized political party in Louisiana. *Id.* ¶ 5.

Appellee was (and remains) the Louisiana Secretary of State (hereinafter "the Secretary"), and was at all relevant times for purposes of this action engaged in state action under color of law. *Id.* ¶ 6. The Secretary was sued in his official capacity for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201. *Id.* ¶ 7. Appellants sought both preliminary relief in order to have their names printed on Louisiana's 2008 presidential ballot, *id.* at ¶ 46, and to have the Secretary's action

permanently declared unconstitutional and permanently enjoined. *See id.* ¶¶ 44, 45, 47.

Louisiana’s deadline for filing presidential qualifying papers was in 2008 (and remains) “5:00 p.m. on the first Tuesday in September” *Id.* ¶ 10 (quoting La. Rev. Stat. § 18:1253(E)). For the 2008 election cycle, the qualifying date was Tuesday, September 2, 2008. *Id.* ¶ 11. Louisiana law also provides a safe harbor for recognized political parties, which extends the filing deadline for 72 hours. *Id.* For the 2008 election cycle, the qualifying date for recognized political parties was September 5, 2008. *Id.* ¶ 12.

Because of Hurricane Gustav, which invaded Louisiana over the Labor Day weekend, Louisiana officially closed its offices—including the Secretary’s Office—from September 2 through September 5, 2008. *Id.* ¶ 13. *See also id.* ¶ 17.⁶ Louisiana did not reopen its offices until Monday, September 8, 2008. *Id.* ¶ 14.⁷ “Because of Hurricane Gustav and [the

⁶ 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 Tuesday. (<http://emergency.louisiana.gov/Releases/090108StateOfficesClosed.html>).

⁷ Louisiana’s state offices were not re-opened, according to this same web page, until Monday, September 8, 2008. See Press Release: State Government Offices to Open Monday (<http://emergency.louisiana.gov/Releases/090708state.html>).

Secretary's] closing of its Office, [Appellants] were unable to meet the September 2, 2008 deadline." *Id.* ¶ 19.

On Monday, September 8, 2008, the Secretary re-opened and "announced without warning that all candidates' papers that were due on September 2, 2008—if not previously delivered—had to be personally delivered to the Secretary of State's office by 5 PM that day. No official notice of this new deadline was posted on the [Secretary's] web page, nor was it generally disseminated to the public." *Id.* at 2.

"Because of the continuing effects of Hurricane Gustav, and a lack of prior notice from [the Secretary] that [the Secretary's] new filing deadline would be immediately enforced, [Appellants] were not able to file their qualifying papers on September 8, 2008." *Id.* ¶ 20.

The Louisiana Party of Louisiana tendered its presidential qualifying papers to the Secretary on September 10, 2008. *Id.* ¶ 23. The Secretary rejected this filing, but agreed to keep the papers in a file in his office. *Id.* ¶ 24. The Socialist Party USA tendered its qualifying papers to the Secretary on September 11, 2008. *Id.* ¶ 25. The Secretary date-stamped the papers, but refused to accept them. *Id.* ¶ 26. The Secretary informed Appellants that they would not be included on Louisiana's 2008 presidential ballot because they had not qualified by September 8, 2008. *Id.* ¶¶ 21, 22.

Over the course of the last twenty years, Louisiana has experienced the effects of no fewer than ten named hurricanes in the month of September: Hurricane Ike (which made landfall on September 13, 2008); Gustav (landfall on August 31, 2008); Humberto (landfall on September 13, 2007); Rita (landfall on September 24, 2005); Georges (landfall on September 27, 1998); Frances (landfall on September 10, 1998); Andrew (landfall on August 26, 1992); Gilbert (landfall on September 15, 1988); and Florence (landfall on September 9, 1988).⁸ Louisiana's is clearly susceptible to tropical storms and hurricanes, especially in late August and September.

Louisiana's Legislature has prepared for natural disasters, including hurricanes, and their effects on legal deadlines. It has passed two laws that authorize extensions of deadlines when natural disasters strike. One law was used by the Governor in the present case, only to be ignored by the Secretary of State. Louisiana Revised Statute § 29:721.D(1) provides the Governor with the power to

Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency.

⁸ See *Hurricanes in Louisiana History* (www.thecajuns.com/lahurricanes.html).

Acting under this grant of power, the Governor extended all deadlines in “legal, administrative and regulatory proceedings” to September 12, 2008.⁹ 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 between citizens, which has created an obstruction to citizens attempting to timely exercise their rights.” *See* Dkt. #16.¹⁰

Meanwhile, La. Rev. Stat. § 18:401.1.B, which could have been used by the Secretary but was not, states:

The governor may, upon issuance of an executive order declaring a state of emergency or impending emergency, suspend or delay any qualifying of candidates, early voting, or elections. The governor shall take such action only upon the certification of the secretary of state that a state of emergency exists.

Why the Secretary did not attempt to invoke this measure in the context of candidate-qualifying is not clear. In contrast to candidates’ qualifying dates,

⁹ This Executive Order was filed with the District Court on September 22, 2008. *See* Dkt. # 16. A copy can be viewed at <http://www.deq.louisiana.gov/portal/portals/0/news/pdf/JindalOrder.pdf>.

¹⁰ Further evidence of the magnitude of the disaster is found in the United States District Court for the Eastern District of Louisiana’s extending all deadlines until September 22, 2008.

Congressional primaries, as well as municipal elections, were postponed for one month following Gustav.¹¹

The magnitude of the disaster that unfolded in Louisiana, and the reasonableness of Appellants' allegations, can be gleaned from several different objective sources. 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."¹² By September 2, 2008, FEMA had designated most of Louisiana, including Baton Rouge and New Orleans, disaster areas.¹³

The *Times-Picayune* in New Orleans on August 31, 2008 reported that almost two million people, acting pursuant to governmental orders and encouragement, had evacuated southern Louisiana. See Ed Anderson, 1.9

¹¹ On its web page, the Secretary's Office states 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. That same page then states a new election schedule, "**ADJUSTED FOLLOWING HURRICANE GUSTAV.**" *Id.* (emphasis in original).

¹² See <http://www.fema.gov/news/event.fema?id=10468>.

¹³ See <http://www.fema.gov/news/event.fema?id=10489>.

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.*¹⁴

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 government officials feared it to be worse than Hurricane

¹⁴ Courts 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.” F. R. Evid. 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.” F. R. Evid. 201(f). Courts can take notice of news reports, as well, and may reference material on the Internet. *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 cites web page). Official documents, like the Governor’s orders closing offices and extending deadlines, may also be properly noticed by courts.

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*.¹⁵ Devastating in terms of

¹⁵ <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

communication and transportation was the fact that trees and power lines were knocked down across Baton Rouge. Local authorities requested that people stay home. A curfew was put in place. Major power outages were reported.

Simply put, southern Louisiana was a disaster-area. And because presidential candidates in Louisiana must gather electors from each of the state's congressional districts, Gustav made it impossible to comply. Appellants could not gather notarized signatures from the southern part of the state. Appellants could not comply with Louisiana's September 2 deadline. "Because the [Appellants] could not physically appear at the [Secretary's] Office on September 2, 2008 ..., the Legislature's September 2, 2008 [deadline] was rendered unenforceable by an 'Act of God.'" *See* Complaint ¶ 30 (Dkt. # 1). "Because [the Secretary] was not officially open to receive candidates' qualifying papers on September 2, 2008, the Legislature's September 2, 2008 [deadline] for filing was abandoned as a deadline by the State of Louisiana." *Id.* ¶ 29.

the city tonight, drenched in black from major power outages. The Times-Picayune calls Gustav's ride through Baton Rouge 'unexpectedly strong.'" *Id.*

Summary of Argument

1. Appellants Complaint was not rendered moot by the intervening election because it is “capable of repetition, yet evading review.” Appellants challenge the constitutional authority of the Secretary to regulate presidential elections. Here, the Secretary shortened the qualifying deadline prescribed by the Governor following Hurricane Gustav. The Secretary, who acted without any delegation of power from the Legislature, exceeded his constitutional authority under Article II of the United States Constitution. Because Louisiana frequently encounters hurricanes and tropical storms during presidential qualifying periods, it is likely that the Secretary will again act in such a fashion. Regardless of whether Appellants will be adversely affected, this likelihood renders their action “capable of repetition, yet evading review.” The District Court erred by not applying this recognized exception and dismissing the Complaint.

2. The Secretary is subject to service of process under Rule 4(e) of the Federal Rules of Civil Procedure when sued in his official capacity for prospective declaratory and injunctive relief. Because he is subject to service under Rule 4(e), he is under a duty under Rule 4(d) to waive service of process. The District Court erred by holding that the Secretary was not

subject to Rule 4(e) and not placed under a duty to waive service of process under Rule 4(d).

Argument

I. Appellants' Constitutional Complaint is Not Moot.

This case is about power. Who in Louisiana has the power to fix qualifying deadlines for presidential elections? The Secretary insists that he possesses this power. Article II of the United States Constitution, history and Supreme Court precedent prove that he does not.

In order to understand why this controversy is “capable of repetition, yet evading review,” a description of the Appellants’ constitutional arguments is necessary.

A. The Constitution Vests the Power to Regulate Presidential Elections in State Legislatures.

According to Article II of the United States Constitution, State “Legislatures” are given the power to direct the appointment of presidential electors. *See* U.S. Const., art. II, § 1, cl.2. Here, the Louisiana Legislature selected Tuesday, September 2, 2008. Because of Hurricane Gustav, however, that date became unenforceable.

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, of course, is far from reasonable.¹⁶ One suspects that is why both the Secretary and the Governor chose to extend the deadline in Louisiana. If the deadline were not extended, after all, the Republican presidential ticket would not have qualified.¹⁷

The result in Louisiana was conflicting deadlines. The Governor, acting under an express delegation of power from the Legislature, extended all deadlines in “legal, administrative and regulatory” proceedings until September 12. The Secretary shortened this deadline to September 8. Regardless of whether the Secretary's Office was open or closed between

¹⁶ *McCarthy v. Briscoe*, 429 U.S. 1317 (1976), illustrates this point. Eugene McCarthy sought ballot access as an independent presidential candidate in Texas, only to be turned away by Texas officials. Texas law prohibited independent candidates from running for office. The Supreme Court agreed with the District Court that Texas's ban on independent candidacies “clearly” violated the Constitution; according to the Court, it was “was constitutionally invalid for failure to provide independents a reasonable procedure for gaining ballot access . . .” *Id.* at 1319 (emphasis added). *See also Anderson v. Celebrezze*, 460 U.S. 780 (1992) (declaring Ohio's early deadline unconstitutional).

¹⁷ The Secretary's records state that the Republican presidential ticket in Louisiana filed on “09/08/08.” *See* Louisiana Secretary of State Multi-Parish Candidate Data Inquiry Candidates for Election Date: 11/04/08 (<http://www400.sos.louisiana.gov/cgibin/?rqstyp=CNDMD&rqsdata=110408&ID=01017141>).

September 2 and September 8, because the Secretary shortened a deadline put in place by the Governor, the constitutional question persists.

The Secretary here concedes that Hurricane Gustav required that Louisiana adjust the presidential qualifying period. Holding parties and candidates to the Legislatively-created September 2 deadline was not an option. Fairness, the First, and the Fourteenth Amendments all dictated that Louisiana extend the deadline. The constitutional question then is whether the Secretary had the power to do it? Indeed, the constitutional question is whether the Secretary had the power to shorten an emergency deadline established by the Governor under La. Rev. Stat. § 29:721.D(1).

This issue was recently addressed in *Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008), where Ohio's Secretary of State attempted to enact a filing deadline for minor-party presidential candidates in Ohio. She deemed her action necessary because Ohio's legislatively enacted deadline was deemed invalid by the Sixth Circuit in 2006. Because the Ohio legislature had yet to enact a new deadline, the Secretary simply created one. The District Court invalidated her effort:

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. ... 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 1011. The court correctly concluded that “[t]hese constitutional provisions provide for no role on the part of the executive branch of state government as to the election of President or members of the House of Representatives.” *Id.* (emphasis added).

The Court in *Brunner* relied on *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 that 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,” it unanimously stated, “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 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.* 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 vacated the Florida Supreme Court’s interpretation of Florida’s election code and remanded for further proceedings. *Id.*

When the case returned to the Supreme Court, the Chief Justice, joined by Justices Scalia and Thomas, concurred in the result, 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 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. 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.*¹⁸

Justice Stevens (joined by Justice Ginsburg) agreed with this analysis in the context of congressional elections—which are governed by Article I’s requirement that election procedures be established by state “Legislatures”—in *California Democratic Party v. Jones*, 530 U.S. 567, 602 (2000) (Stevens, J., dissenting). There, the Supreme Court majority

¹⁸ The Chief Justice relied on *McPherson v. Blacker*, 146 U.S. 1 (1892), which “explained that Art. II, § 1, cl.2, ‘convey[s] 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.

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 the law was likely invalid under Article I, § 4. This was so, he argued, because the blanket primary—which was also applied to congressional elections—was adopted by popular initiative, rather than 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 602.¹⁹

¹⁹ A similar issue arose in *Lance v. Coffman*, 127 S. Ct. 1194 (2007), where a state court drew Colorado’s congressional districts in the absence of a legislative plan. Not long after the state court’s action, the legislature passed a new plan, which was duly challenged before the Colorado Supreme Court. Those favoring the judicial plan argued that Colorado’s constitution prohibited a mid-census apportionment. 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. The Colorado Supreme Court ruled in favor of the judicial plan in *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Col. 2003) (en banc). Specifically, it found that judicial apportionment did not offend the Elections Clause of Art. I, § 4 of the United States Constitution. *Id.* at 1231. Following the dismissal of a collateral challenge filed by voters in federal court, the Supreme Court took up *Lance v. Coffman*, 127 S. Ct. 1194 (2007), to address which apportionment plan was valid. It was prevented from reaching the merits of the Elections Clause question by the plaintiffs’ lack of standing. *Id.* at 1198. The Colorado Supreme Court’s conclusion does not support the Secretary’s action here. It instead stands only for the proposition that state *courts* have the authority to interpret state law and fix remedies for its violation.

Justice Stevens balked at the suggestion that Article I necessarily receives the State’s Legislature as created by the State’s Constitution, which in California “provides that ‘[t]he legislative power of this State is vested in the California Legislature . . . , but the people reserve to themselves the powers of initiative and referendum.’” *Id.* at 602-03. “The vicissitudes of state nomenclature,” he responded, “do not necessarily control the meaning of the Federal Constitution.” *Id.* at 603. “California’s classification of voter-approved initiatives as an exercise of legislative power,” Justice Stevens explained, “would not render such initiatives the act of the California Legislature within the meaning of the Elections Clause.” *Id.*

Justice Stevens further noted that “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.* He cited to *Baldwin v. Trowbridge*, 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46, 47 (1866),²⁰ which reported that the Elections Clause

²⁰ *Baldwin* can also be found in CHESTER H. 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).

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.

In *Baldwin*,²¹ the Michigan legislature during the Civil War passed a law that allowed its soldiers to cast ballots for congressional candidates and its presidential electors even though the soldiers were not present in Michigan. In those days, there were no absentee ballots, and in fact the Michigan Constitution required actual presence. One congressional candidate (Trowbridge) won the election if the soldiers’ votes were counted. The other (Baldwin) would have won if they were excluded. The House Committee of Elections ruled that the votes were proper; the Michigan Constitution was not controlling. Rather, the Michigan legislature had the sole power to regulate federal elections. The full House agreed by a vote of 108 to 30, and Trowbridge was seated.²²

²¹ This account is drawn from C. Rowell, *supra* note 20.

²² The same issue arose in *In re Opinion of Justices*, 45 N.H. 595 (1864). There, the New Hampshire high court ruled that the Legislature had the sole power to regulate federal elections and was not bound by the state constitution.

Although Justice Stevens did not decide the issue (because it was not fully raised by the parties), the Supreme Court has resolved the question of what “Legislature” means in a slightly different context. In *Hawke v. Smith*, 253 U.S. 221 (1920), the Supreme 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 that 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. The Supreme 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 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 of a constitutional amendment must be

by a state’s Legislature, and the Legislature alone. It cannot be by referendum and cannot be delegated to any other entity or agency.

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*, see 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 the states’ Legislatures the power of selecting Senators, these Legislatures could not delegate this power directly to the people. A Constitutional Amendment was necessary to achieve this result. And just as a state’s Legislature cannot delegate its power to regulate federal elections directly to the people,²³ it

²³ 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 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.

cannot delegate this power to an executive agency like the Secretary of State.²⁴

History and precedent thus reveal that the court's conclusion in *Libertarian Party of Ohio v. Brunner* is correct—state administrative officials cannot regulate federal elections. Both the Supreme Court's conservative block of Justices, including then-Chief Justice Rehnquist and Justices Scalia and Thomas, and its liberal block, including Justices Stevens and Ginsburg, agree on this proposition.

Consequently, the Secretary in the present controversy had no authority to fix a deadline for presidential candidates. His September 8 deadline was constitutionally meaningless. Even if the Governor had not acted under a clear legislative delegation of authority, the Secretary's deadline would have been beyond his authority.

This case is really no different from that presented in *Brunner*. There, the Ohio Secretary of State argued that it had been delegated power to

²⁴ 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.

interpret election laws. The *Brunner* court disagreed: “the Directive issued by the Secretary of State does not interpret provisions of legislation or resolve factual disputes arising under Ohio law. Instead, the Directive establishes a new structure for minor party ballot access, a structure not approved by the Ohio legislature.” 567 F. Supp.2d at 1012. “Even if the Ohio General Assembly could delegate its authority to a member of the executive branch,” the court observed, “there is no evidence that the state legislature has specifically delegated its authority to Defendant to direct the manner in which the state of Ohio votes for ... electors to vote for President.” *Id.* “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 II, Section 1.” *Id.*

The Louisiana Secretary’s deadline does not even pretend to be an “interpretation” or “fair reading” of any statute. It is a naked exercise of power. Indeed, it is a naked exercise that contradicts the Legislatively-prescribed emergency protocol spelled out in La. Rev. Stat. § 29:721.D(1), as well as § 18:401.1.

B. This Case is “Capable of Repetition, Yet Evading Review.”

Actions that are “capable of repetition, yet evading review” are not mooted by a plaintiff’s loss of a personal stake in the merits of the controversy. *See, e.g., Moore v. Ogilvie*, 394 U.S. 814 (1969) (holding that election challenge was capable of repetition yet evading review). This Court has routinely applied this exception to election challenges. In *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006), for example, this Court stated that a “[c]ontroversy surrounding election laws ... is one of the paradigmatic circumstances in which the Supreme Court has found that full litigation can never be completed before the precise controversy (a particular election) has run its course.” (Footnote and citation omitted). The Court in *Carmouche* accordingly held that a challenge to campaign finance regulations was not mooted by an intervening election.

Carmouche relied on a long line of Supreme Court cases that have applied the “capable of repetition, yet evading review” exception to election challenges. *See, e.g., Norman v. Reed*, 502 U.S. 279 (1992) (holding that challenge was not moot); *Meyer v. Grant*, 486 U.S. 414 (1988) (holding that challenge was not moot); *Storer v. Brown*, 415 U.S. 724 (1974) (holding that an “as applied” was not mooted by an election); *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981) (holding that an election challenge was not mooted by an intervening election); *Brown v. Chote*, 411

U.S. 452 (1973) (same); *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (same).²⁵

In order to avail itself of the “capable of repetition, yet evading review” exception, a plaintiff must satisfy three requirements: First, the plaintiff must prove that he originally had standing, i.e., an extant injury, when the case was filed. *See* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW – SUBSTANCE & PROCEDURE § 2.13 (2001). Second, the plaintiff must show that the injury is one that qualifies under the exception. *Id.* As explained by *Carmouche*, election challenges routinely qualify under this exception. Third, a plaintiff must establish a “reasonable expectation” that the complained-of governmental conduct will recur in the future. *Id.*

Importantly, the “reasonable expectation” of recurrence need not rise to the level of certainty needed to establish standing in the first instance. In *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), for example, the Sixth Circuit observed that the repetition requirement for the “capable of repetition yet evading review” exception is “somewhat relaxed”

²⁵ This Court’s sister Circuits have also routinely concluded that intervening elections do not moot constitutional challenges to election laws, including ballot restrictions. *See, e.g., Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006) (“Legal disputes involving election laws almost always take more time to resolve than the election cycle permits.”).

and is “easily satisfie[d]” in election cases. *See generally Honig v. Doe*, 484 U.S. 305 (1988).

Further, the plaintiff in an election challenge need not establish that a particular controversy—in all of its nuances and specifics—is likely to happen again. The Supreme Court in *Federal Election Commission v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2663 (2007), rejected this notion, as it has done on several occasions. There, the Federal Election Commission (FEC) argued that a challenge to campaign finance limitations spelled out in the Bipartisan Campaign Reform Act (BCRA), which had been applied to an issue-advocacy group (Wisconsin Right to Life (WRTL)) during a prior election, was moot because of the intervening election. The FEC further argued that the constitutional challenge could not be saved by the “capable of repetition, yet evading review” exception because it was not likely that the same challenge would arise again. The Supreme Court disagreed:

We have recognized that the “‘capable of repetition, yet evading review’ doctrine, in the context of election cases, is appropriate when there are ‘as applied’ challenges as well as in the more typical case involving only facial attacks.” *Storer v. Brown*, 415 U.S. 724, 737 n. 8 (1974). Requiring repetition of every “legally relevant” characteristic of an as-applied challenge—down to the last detail—would effectively overrule this statement by making this exception unavailable for virtually all as-applied challenges. History repeats itself, but not at the level of specificity demanded by the FEC.

127 S. Ct. at 2663 (citations omitted).

So long as there is a reasonable expectation that a similar controversy will recur, an election challenge is not mooted by an intervening election. This is true whether the challenge is facial or as-applied. Consequently, Appellants need not prove here any expectation that they might miss the state's deadline in the future under the exact same circumstances. Specificity like this is not required. The questions here are whether the Secretary has the authority to regulate presidential elections by setting deadlines, and whether future candidates in Louisiana might be prejudiced or disadvantaged by the Secretary's usurpation of power. If there is any question over the constitutional authority of the Secretary to fix deadlines in presidential elections, the controversy is capable of repetition, yet evading review.

The reason this exception is commonly applied to elections is simple: resolving the matter now as opposed to later saves judicial time and avoids repetitive litigation. The Supreme Court explained in a footnote in *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (which was cited with approval in *Wisconsin Right to Life*):

The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. ... The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of

simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

Resolving the validity of the deadline in the present case, rather than waiting for another case to be filed in 2012 or 2016, makes perfect sense. It will assist everyone who is involved with Louisiana's electoral system. Moreover, resolving the matter now will avoid the future rush to judgment that often accompanies election challenges filed in the weeks or days that run up to elections.

Carmouche, 449 F.3d at 662, further stated that “despite the Supreme Court’s reminder that there must be a ‘reasonable expectation that the same complaining party would be subject to the same action again,’ the Court does not always focus on whether a particular plaintiff is likely to incur the same injury.” Instead, in the context of elections, the *Carmouche* Court observed, it is enough that “other individuals” in the political process might challenge the law in the future. The Court in *Carmouche* specifically quoted footnote 8 in *Storer v. Brown* for this proposition.

Carmouche further relied on *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2 (1972), which stated that “[a]lthough [the plaintiff] now can vote, the problem to voters posed by the Tennessee residence requirements is ‘capable of repetition, yet evading review.’” *Storer* and *Dunn* established that the

same plaintiff need not be subject to the challenged conduct. It is enough that others might encounter a similar problem.

Applying this logic, the Court in *Carmouche*, 449 F.3d at 662, stated that “even if it were doubtful that the [plaintiff] would again attempt to engage in election-related speech in Louisiana, precedent suggests that this case is not moot, because other individuals certainly will be affected by the continuing existence of the [challenged laws].”

Kucinich v. Texas Democratic Party, 563 F.3d 161, 164-65 (5th Cir. 2009), reiterated this holding. In *Kucinich*, this Court concluded that a challenge to a Texas election law was “capable of repetition, yet evading review” even though the plaintiff (Kucinich) could not claim that he would run again:

although Kucinich’s counsel, when pressed at oral argument, could not state whether his client has an intention to run for President in the future and declined to express a belief that Kucinich will again be subject to the party’s oath requirement, we are unwilling to dismiss the case as moot when “the issues properly presented, and their effects [], will persist as the [restrictions] are applied in future elections.”

563 F.3d at 164-65 (some citations omitted). *Kucinich* makes clear that not only is *Carmouche* sound, Appellants’ challenge is capable of repetition yet evading review.

The District Court below concluded that Appellants’ Complaint was not “capable of repetition, yet evading review” because “the requests for

declaratory judgment made in the Complaint ... do not challenge the validity of state election laws, except as arising under a particular combination of events, events that are unusual and unlikely to occur again.” Order at 4-5 (Dkt. # 62). Further, the District Court stated that

the “capable of repetition” exception “only [applies] when the claims ‘challenge...some ongoing underlying policy’ rather than ‘merely attack[ing] an isolated...action, and a litigant should be able to ‘show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest,’ in order for declaratory relief to save a suit from mootness.”

Id. at 5 (quoting *City of Houston v. Texas Department of Housing and Urban Development*, 24 F.3d 1421, 1429 (D.C. Cir. 1994); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125-126 (1974)).

There are two problems with the District Court’s logic. First, Louisiana quite often has had its legal, administrative and regulatory affairs interrupted by Hurricanes. Since 1988, no less than ten named hurricanes have landed in Louisiana in late August or September. *See supra* at 10. Hurricanes are not “isolated actions” in Louisiana. That is why the Louisiana Legislature passed two laws delegating emergency powers to the Governor to extend deadlines under emergency circumstances.

Second, the cases relied upon and quoted by the District Court were not election challenges; nor did they involve the “capable of repetition, yet evading review” exception. *See City of Houston v. Texas Department of*

Housing and Urban Development, 24 F.3d 1421, 1429 (D.C. Cir. 1994); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125-126 (1974); *International United Automobile, Aerospace, Agricultural and Implement Workers of America v. Dana Corp.*, 697 F.2d 718 (6th Cir.1983). They are therefore not relevant to the present situation, where an intervening election has allegedly mooted a ballot access challenge.

As explained above, courts routinely apply the “capable of repetition, yet evading review” exception to election challenges. None of the cases relied upon by the District Court, and no election cases to Appellants’ knowledge, hold that the “capable of repetition, yet evading review” exception depends upon a named plaintiff’s experiencing an “immediate” and “continuing” injury. Indeed, *Storer*, *Dunn*, *Carmouche* and *Kucinich* all hold the exact opposite. A plaintiff need not claim that he is likely to run again; a plaintiff need not claim that he will be injured again; it is enough that others might run and others might be injured.

It is likely that qualifying periods for candidates and parties in Louisiana will again be adversely impacted by Tropical Storms, Hurricanes, and “no-name” disasters. The Legislature has recognized this reality. Because the risk is real, it would behoove all involved to settle whether the

Secretary has the authority to step in and unilaterally regulate presidential elections.

II. The District Court Erroneously Denied Appellants' Application for Costs and Attorney's Fees Under Rule 4.

Federal Rule of Civil Procedure 4(d)(2) provides that “an individual ... that is subject to service under subdivision (e) ... and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons.” That Rule continues: “If a defendant ... fails to comply with a request for waiver made by a plaintiff ..., the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.”

The goal of Rule 4(d), “as stated by the Advisory Committee, is simple: to ‘eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel.’” 4A C. WRIGHT & A MILLER, FEDERAL PRACTICE AND PROCEDURE § 1092.1. “Both the old and the present versions operate *to provide plaintiffs with a relatively simple process for asking defendants to waive formal service of process*, and to impose upon defendants ‘a duty to avoid unnecessary costs of serving the summons.’” *Id.* (emphasis added).

Rule 4(d)(5) states that “[t]he costs to be imposed on a defendant under paragraph (2) for failure to comply ... shall include the costs

subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.”

In the present case, Appellants complied with the conditions precedent spelled out in Rule 4(d), yet the Secretary refused to waive service. Appellants consequently moved for an award of costs and attorney's fees under Rule 4(d). The District Court denied the motion, stating:

Dardenne, in his official capacity, is not a person to whom Fed. R. Civ. Pro. 4(d) applies, as that rule applies only to those subject to service under Rule 4(e), (f), or (h). Service on a defendant sued in his official capacity must be made under Rule 4(j), as suing a state official in his official capacity is ultimately a suit against the state.

Order at 12 (footnote omitted) (Dkt. # 62).

The District Court erred in holding that a state official sued in his official capacity for prospective declaratory and injunctive relief is the equivalent of the State for purposes of Rule 4. The Supreme Court in *Will v. Michigan Department of State Police*, 491 U.S. 58, 66 (1989), made clear that prospective actions against state officials in their official capacities are not suits against States. It distinguished official-capacity actions against state officials seeking monetary relief—which are treated as actions against the State under 42 U.S.C. § 1983 (and are improper)—from those seeking prospective relief: “Of course, a state official in his or her official capacity,

when sued for injunctive relief, would be a person under § 1983 because ‘official-capacity actions for prospective relief are not treated as actions against the State.’” *Id.* at 71 n.10 (quoting and citing *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985), and *Ex parte Young*, 209 U.S. 123, 159-60 (1908)) (emphasis added). Prospective actions are not treated as suits against states, because as *Ex parte Young*, 209 U.S. 123 (1908), explained, the Eleventh Amendment would prohibit them from being filed in federal court if they were.

There are years of history behind the Supreme Court’s decision in *Will*, and it is not Appellants intent to catalogue the many Supreme Court holdings that preceded *Will*. Suffice it to say this: suits against States by name are improper in federal court because of the Eleventh Amendment. The Supreme Court in *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996), for example, stated that “[t]he Eleventh Amendment ... serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.” The Court in *Will* interpreted § 1983 to be consistent with this Eleventh Amendment precedent. Thus, States cannot be sued under § 1983; “[s]ection 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of

civil liberties.” *Will v. Michigan Department of State Police*, 491 U.S. 58, 66 (1989).

Will further held, again consistently with Eleventh Amendment precedents, *see, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974), that § 1983 official-capacity actions against state officials *seeking money damages* are suits against States. They therefore cannot proceed under § 1983—service of process never becomes an issue. *See Will*, 491 U.S. at 66; *Lapides v. Board of Regents*, 535 U.S. 613, 617 (2002) (reaffirming *Will*’s holding that suits against state officials in their official capacities for money damages are suits against States).

In contrast to official-capacity suits against state officials seeking money damages, the Court in *Will* reiterated that suits *for prospective declaratory and/or injunctive relief* against state officials are not against states: “Of course, a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because ‘official-capacity actions for prospective relief are not treated as actions against the State.’” *Id.* at 71 n.10 (quoting and citing *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985), and *Ex parte Young*, 209 U.S. 123, 159-60 (1908)) (emphasis added). Suits of this nature—commonly called *Ex parte Young* actions—are proper for this very reason. *See Ex parte Young*, 209 U.S. 123,

159-60 (1908). Indeed, it is precisely because § 1983 suits against state officials in their official capacities for prospective injunctive relief are not against States that they are allowed to proceed at all under § 1983 in federal court. *See Ex parte Young*, 209 U.S. 123 (1908). If these suits were judged to be against states, they would be barred from federal court by the Eleventh Amendment. *Id.*

This Court has recognized this distinction on numerous occasions. In *Mayfield v. Texas Department of Corrections*, 529 F.3d 599, 604 (5th Cir. 2008), for example, the Court affirmed a District Court’s dismissal of § 1983 official-capacity claims seeking damages because they were, under *Will*, suits against Texas: “In reaching its conclusion as to the application of sovereign immunity, the district court held that all of Mayfield’s claims against the [state agency] and the employees of the TDCJ charged in their official capacities were barred by the Eleventh Amendment.” It noted, however, that “sovereign immunity is subject to an established exception when it comes to the ability of state officers to invoke its protections. ‘Under *Ex Parte Young*, a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law.’” 529 F.3d at 604 (quoting *McCarthy ex rel. Travis v.*

Hawkins, 381 F.3d 407, 412 (5th Cir. 2004)). Suits like these can proceed because they are not against states. *Id.*²⁶

The majority rule (judged by the number of published opinions) is that Rule 4(e) governs the service of state officials sued in their official capacities for prospective relief under *Ex Parte Young*. The First Circuit in *Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24, 28-30 (1st Cir. 1988), specifically ruled that official-capacity claims against state officials seeking prospective relief are governed by the Rule applicable to individual service, which at that time was codified as Rule 4(d) of the Federal Rules of Civil Procedure.²⁷ The Court explained:

Although we imagine that in most or all cases where a state officer is sued in his official capacity, the state has a major interest in the outcome, the officer remains the actual party to the action. A state officer is often sued in his official capacity because the Eleventh Amendment forbids a direct action against the state. *See Ex Parte Young*.

Id. at 29 (citation omitted).

²⁶ Sister Circuits have also recognized this distinction. In *Scott v. Taylor*, 405 F.3d 1251, 1255 (11th Cir. 2005), for example, the Eleventh Circuit observed that “[t]he exception ... is derived from *Ex parte Young*, which held that official capacity suits for prospective relief to enjoin state officials from enforcing unconstitutional acts are not deemed to be suits against the state and thus are not barred by the Eleventh Amendment.” (Footnote and citation omitted).

²⁷ In 1988, individual service was codified in Rule 4(d). Today’s equivalent is Rule 4(e).

Further, the First Circuit observed that “[t]he very wording of Rule 4(d)(6) implies a self-contained limitation, namely, that it applies to situations where the state or other governmental entity is “subject to suit.” *Id.*²⁸ “If the Eleventh Amendment bars an action against the state, then the latter is not ‘subject to suit’ pursuant to Rule 4(d)(6), and thus the rule is inapplicable.” *Id.* (citing C. WRIGHT & A. MILLER, 4A FEDERAL PRACTICE & PROCEDURE § 1110 (1987)). The Court concluded:

The action is against an individual, albeit in his official capacity, and not against the state. Although the state ... has a great interest in the outcome, it will be the individual Secretary of Agriculture who in an official capacity is going to be bound by the judgment, and who can be held in contempt if a court order is disobeyed. To be sure, service upon the Secretary under Rule 4(d)(1) invites the risk that he will not properly advise the state’s legal officers of the pending action, but that seems an improbable oversight where the public officer is sued in an official capacity. We therefore hold that service upon a state officer in his official capacity is sufficient if made pursuant to Rule 4(d)(1).²⁹

Id. at 29-30.

The First Circuit reiterated this conclusion in *Caisse v. DuBois*, 346 F.3d 213, 216 (1st Cir. 2003), where it stated that “service of process for public employees sued in their official capacities is governed by the rule applicable to serving individuals.” The Court in *Caisse*, 346 F.3d at 216,

²⁸ That language is now contained in Rule 4(j).

²⁹ Rule 4(d)(1) is now codified in Rule 4(e). *See Caisse v. DuBois*, 346 F.3d 213, 216 (1st Cir. 2003).

stated that “to serve the defendants in either an individual or official capacity, [the plaintiff] had to comply with Fed. R. Civ. P. 4(e) providing for service of process on individuals.”³⁰

As *Echevarria-Gonzalez* and *Caisse* make clear, the Secretary here was subject to Rule 4(e). Indeed, as explained by the First Circuit, because Rule 4(j) requires that a governmental entity be “subject to suit,” Rule 4(j) may not even apply to an official-capacity action (for either prospective relief or damages) under § 1983.³¹ Because Rule 4(e) applies, so does the duty to waive service under Rule 4(d). Rule 4(d)(2) states that “[a]n individual ... that is subject to service under subdivision (e) ... has a duty to avoid unnecessary costs of serving the summons.”

Further support is found in *Marcello v. Maine*, 238 F.R.D. 113 (D. Me 2006), which involved a § 1983 action against a state judge in his official capacity for prospective relief. The Court there observed that the judge was

³⁰ The Second Circuit also is leaning in this direction. See *Stoianoff v. Commissioner of Motor Vehicles*, 208 F.3d 204 (2d Cir. 2000) (Table) (2000WL287720) (“service here may be effected pursuant to Rule 4(e), which provides for service upon individuals generally. See, e.g., *Echevarria-Gonzalez* (holding that service on state officer in his official capacity is sufficient if made pursuant to predecessor to Rule 4(e)).”).

³¹ Appellants, however, do not make that argument here. Instead, Appellants simply assert that Rule 4(e) is applicable to the Secretary, when sued in his official capacity under § 1983 for prospective declaratory and injunctive relief.

subject to service of process under Rule 4(e) and thus had a duty under Rule 4(d) to waive process; “Because Judge Anderson ... [was] subject to service under Rule 4(e), Rule 4(d) is applicable to [him].” *Id.* at 115. The Court accordingly ordered the judge to pay the costs of service that he could have easily avoided.

This same conclusion was reached in the context of municipal officials in *Whatley v. District of Columbia*, 188 F.R.D. 1 (D.D.C. 1999). There, the court stated that “municipal government employees are subject to Rule 4(d)(2) of the Federal Rules of Civil Procedure when sued in both their individual and official capacities”. Likewise, in *Mosley v. Douglas County Correctional Center*, 192 F.R.D. 282, 283-84 (D. Neb. 2000), the court made this same statement that municipal employees are subject to Rule 4(d) when sued in their official capacities.

The wealth of published authority therefore has it that governmental employees sued in their official capacities for prospective declaratory and injunctive relief in actions modeled on *Ex parte Young* are subject to service under Rule 4(e). They are therefore subject to the duty to waive found in Rule 4(d).³²

³² Both the *Whatley* and *Mosley* courts found good cause to excuse the officials’ refusals based on the lack of clear authority. But those cases were handed down in 1999 and 2000, respectively, and the courts instructed the

Conclusion

For the foregoing reasons, the final judgment entered by the District Court should be REVERSED, its Order denying expenses and attorney's fees under Rule 4(d) should be REVERSED, and the case should be REMANDED for further proceedings.

Respectfully submitted,

Mark R. Brown
303 E. Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 236-6956
Lead Attorney for Appellants

Certificate of Service

I certify that this Brief, together with an electronic copy, was 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 June, 2009.

Mark R. Brown

officials that in the future they would be held to the duty found in Rule 4(d). Appellee here can hardly claim the same kind of legal surprise relied on in those cases, handed down a decade ago.

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Mark R. Brown
Attorney for Appellant

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