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

PETITION FOR REHEARING EN BANC BY APPELLANTS, LIBERTARIAN PARTY, LIBERTARIAN PARTY OF LOUISIANA, BOB BARR, WAYNE ROOT, SOCIALIST PARTY USA, BRIAN MOORE

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Case No. 09-30307

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

/s/Mark R. Brown Dated: January 28, 2010
Mark R. Brown
Attorney of Record for Appellants

Rule 35(b)(1) Statement

I profess a well-reasoned belief that the panel decision conflicts with decisions of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit, *see Moore v. Hosemann,* Nos. 09-60272 & 60424, __ F.3d __ (5th Cir., Dec. 18, 2009); *Honig v. Doe,* 484 U.S. 305 (1988); *Doe v. MySpace, Inc*., 528 F.3d 413 (5th Cir. 2008); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 2007); *Bennett v. Spear*, 520 U.S. 154 (1997); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316 (5th Cir. 2009); and *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167 (2000); *see* Fed. R. App. P. 35(b)(1)(A); and also involves a question of exceptional importance, that is, whether Rule 4(e), and thus Rule 4(d)'s waiver requirement, applies to state officials sued under 42 U.S.C. § 1983 in their officials capacities for prospective relief, which opinion of the panel conflicts with decisions of the First and Second Circuits. *See Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24 (1st Cir. 1988); *Caisse v. DuBois*, 346 F.3d 213 (1st Cir. 2003); and *Stoianoff v. Commissioner of Motor Vehicles*, 208 F.3d 204 (2d Cir. 2000) (Table) (2000 WL 287720).

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Statement of the Issues

1. Whether the panel's holding that Appellant's challenge to the Secretary's decision to shorten Louisiana's qualifying deadline is not capable of repetition contradicts this Court's prior decisions, including that in *Moore v. Hosemann,* Nos. 09-60272 & 60424, __ F.3d __ (5th Cir., Dec. 18, 2009) (2009 WL 4881559).

2. Whether requiring that Appellants prove that the Secretary is likely to unilaterally shorten qualifying deadlines again in order to avoid dismissal under Rule 12(b) contradicts Supreme Court and Fifth Circuit precedent.

3. Whether the burden of persuasion to show that the Secretary will act illegally again was properly placed on Appellants.

4. Whether Rule 4(e) (and consequently Rule 4(d)) can be applied to a state official sued in his official capacity for prospective relief under 42 U.S.C. § 1983.

Statement of Course of Proceedings and Disposition

Appellants filed suit under 42 U.S.C. § 1983, Article II of the United States Constitution, and the First and Fourteenth Amendments, against Louisiana's Secretary of State, in his official capacity, on September 15, 2008. They sought prospective relief, claiming that the Secretary had unconstitutionally refused their qualifying papers for Louisiana's presidential ballot.

Hurricane Gustav closed the State's offices on the day presidential qualifying papers were due, September 2, 2008, *see* La. Rev. Stat. § 18:1253(E),

and for several days thereafter. For this reason, the Governor of Louisiana, acting pursuant to an express delegation of power from the Legislature, on August 29, 2008, issued an Executive Order extending deadlines in all "legal, administrative and regulatory proceedings" to September 12, 2008. Appellants filed their qualifying papers before this date.

Upon reopening on September 8, 2008, however, the Secretary announced his own deadline for presidential qualifying papers—September 8. Because they had no warning, were still suffering from Hurricane Gustav, and had relied on the Governor's previously announced September 12 deadline, Appellants did not qualify by the end of this day.

Appellants' Complaint charged that the Secretary lacked constitutional authority under Article II to shorten the Governor's deadline. Article II delegates to the State "Legislature" the power to regulate presidential elections. *See Bush v. Gore,* 531 U.S. 98 (2000); *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000). Faced with a natural disaster, Louisiana's Governor properly exercised authority delegated to him by the Legislature. The Secretary, in contrast, had no delegated authority to establish any unilateral deadline, let alone a shorter time frame than that established by the Governor.

The District Court ordered that the names of the Libertarian Party's candidates be placed on the ballot. The Secretary took an emergency appeal, and

the Fifth Circuit thereafter stayed the injunction. The election was held on November 4, 2008 without Appellants' names on the ballot.

Acting pursuant to Rule 4(d), Appellants had (contemporaneously with filing their Complaint) requested that the Secretary waive service of process. The Secretary refused. Appellants served the Secretary and moved the District Court to award costs and attorney's fees as provided in Rule 4(d).

Following the election, the District Court granted the Secretary's Rule 12(b) motion to dismiss and denied Appellants' Rule 4 motion for costs and fees. Appellants appealed, with oral argument taking place on December 3, 2009.

A panel of this Court (Stewart, Dennis and Haynes, JJ.) on January 21, 2010, affirmed the District Court in a published opinion. *Libertarian Party v. Dardenne*, No. 09-30307, __ F.3d __ (5th Cir., Jan. 21, 2010) (copy attached). The panel concluded that the controversy was not "capable of repetition," but was moot. The panel also rejected Appellants' Rule 4(d) claim to costs and fees.

Statement of Relevant Facts

Hurricane Gustav struck Louisiana over the 2008 Labor Day weekend. Louisiana announced to the public that its offices were officially closed from

September 2 through September 5, 2008.[1] Louisiana did not reopen its offices until Monday, September 8, 2008.[2]

Over the course of the last twenty years, Louisiana has experienced no fewer than ten named hurricanes in the month of September.[3] Recognizing this reality, Louisiana's Legislature has prepared for natural disasters and their effects on deadlines. It has passed two laws authorizing the Governor to extend deadlines when natural disasters strike. 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.[4]

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[1] See Press Release: All State Government Offices Closed Tuesday. (http://emergency.louisiana.gov/Releases/090108StateOfficesClosed.html).

[2] *See* Press Release: State Government Offices to Open Monday (http://emergency.louisiana.gov/Releases/090708state.html).

[3] *See* Hurricanes in Louisiana History (www.thecajuns.com/lahurricanes.html).

[4] Louisiana Revised Statute § 18:401.1.B further provides that 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." Although this law was not used, it demonstrates that the Secretary has no authority to shorten deadlines.

The Governor relied on this delegated power to issue Executive Order BJ 08-92, which extended deadlines in all "legal, administrative and regulatory proceedings" to September 12, 2008. *See* Dkt. #16 (copy of Governor's Order). 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." *Id.*

In sum, southern Louisiana was a disaster-area with no operational state offices from September 2 through September 7. Its qualifying deadline was extended by the Governor to September 12. The Secretary, in contrast, insisted on September 8. The operative constitutional question focuses on which governmental official has the authority to establish deadlines for presidential elections under Article II of the United States Constitution—the Governor or the Secretary.

Argument

I. The Panel's Conclusion that the Controversy is Moot Contradicts Circuit and Supreme Court Precedent.

This Court and the Supreme Court have on numerous occasions applied the well-worn rule that election disputes are not moot following elections. *See, e.g.*, *Federal Election Commission v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007); *Kucinich v. Texas Democratic Party*, 563 F.3d 161 (5th Cir. 2009). Instead,

election challenges survive because they are "capable of repetition, yet evading review." *Id.*

Both the Supreme Court and this Court have held that election challenges present "the paradigmatic circumstances in which … full litigation can never be completed before the precise controversy (a particular election) has run its course." *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006) (footnote and citation omitted). For this reason, there need only be a reasonable likelihood that a similar dispute might arise again for the exception to apply.

This standard is not demanding. The Supreme Court observed in *Honig v. Doe*, 484 U.S. 305, 319 n.6 (1988), that it routinely "found controversies capable of repetition based on expectations that, while reasonable, *were hardly demonstrably probable*." (Emphasis added and citations omitted). The Court went on to state that its "concern in these cases, as in all others involving potentially moot claims, was whether the controversy was *capable* of repetition and not ... whether the claimant had demonstrated that a recurrence of the dispute was more probable than not." *Id.* (emphasis in original).

Consequently, a plaintiff need not demonstrate that a dispute's recurrence is "demonstrably probable," let alone truly likely to happen. The question is simply whether a dispute is "capable" of repetition. Cast in the facts of the present case—as alleged—the question is whether the Secretary remains capable of setting

deadlines for presidential elections in the future. Given that he continues to insist he has such a power, the answer can only be "yes."

Moreover, one need not show that the very-same election dispute—in all of its nuances and niceties—might happen again. The Supreme Court made this clear in *Federal Election Commission v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2663 (2007), where it stated that "[r]equiring repetition of every 'legally relevant' characteristic of an as-applied challenge—down to the last detail—would effectively … mak[e] this exception unavailable for virtually all as-applied challenges. History repeats itself, but not at the level of specificity demanded by the FEC."

The Fifth Circuit has regularly applied these principles to election controversies and has routinely found them capable of repetition. Indeed, it has even ruled that plaintiffs need not show that they will be harmed again. It is enough that others might suffer injury in the future. *Kucinich v. Texas Democratic Party*, 563 F.3d 161, 164-65 (5th Cir. 2009).

Most recently, this Court in *Moore v. Hosemann*, Nos. 09-60272 & 60424, __ F.3d __ (5th Cir., Dec. 18, 2009) (2009 WL 4881559), rejected a mootness challenge to unilateral actions of the Mississippi Secretary of State in an election setting because it was "unwilling to dismiss [a] case as moot when 'the issues

properly presented, and their effects ... will persist as the [restrictions] are applied in future elections.' " *Id.* at *2 (citation omitted).[5]

Moore and the present case are procedurally and substantively identical. In *Moore*, Mississippi's Secretary of State allegedly shortened the deadline for presidential candidates' qualifying papers. As in the present case, the Secretary had no legislative mandate; he acted unilaterally and (according to the plaintiff) unconstitutionally. The plaintiff's papers arrived late, judged by this new deadline, and the Secretary rejected them. The District Court, after refusing preliminary relief, dismissed the action as moot under Rule 12. This Court reversed, finding that the dispute was capable of repetition.

Moore holds that a Secretary of State's unilateral decision to shorten a filing deadline for presidential candidates' qualifying papers qualifies under the capable of repetition exception. This is true, according to the Court, even though future candidates are likely to abide by the Secretary's decision:

> The Secretary has made it plain that he intends to enforce the 5:00 p.m. deadline in future elections. He adds that the chance is very small that Moore or any other presidential candidate will miss the deadline again. That is beside the point, however. As long as the complained-of deadline is in place, future candidates in Mississippi will be subject to it and will need to conform to its demands. Thus, the effects of the deadline will persist. Given the election law context, Moore's complaint satisfies both prongs of the mootness exception.

Id. at *3.

[5] All page references in *Moore* are to the electronic version contained on Westlaw.

The panel opinion in the present case plainly contradicts *Moore*, as well as the Supreme Court and Fifth Circuit precedent on which *Moore* is based. The panel attempted to distinguish *Moore* by pointing to the Mississippi Secretary's admission that he would apply the same deadline again: "the Secretary here has not made it plain that he intends to unilaterally change filing deadlines in the future, and Appellants have not presented any evidence that would show such an intention." *Libertarian Party v. Dardenne*, No. 09-30307, __ F.3d __ (5th Cir., Jan. 21, 2010), at 5. The panel reiterated several times that Appellants' case was different from *Moore* because "Appellants have failed to present such evidence." *Id.* at 5-6.

Given the posture of the present case, however, Appellants are not required to present evidence.[6] Their action was dismissed under Rule 12(b). The panel's evidentiary distinction thus makes no sense. Given its Rule 12 posture, *Moore* did

[6] The panel also faults Appellants for not producing evidence proving that the Secretary's action constituted state policy. *See Dardenne* at 5 n.5. Putting aside the *Twombly* problem with this requirement, it would appear that the Secretary of State as a matter of law is a "final authority," *McMillian v. Monroe County*, 520 U.S. 781, 787 (1997) (holding that sheriff, like the secretary of state, was a final authority whose single decision made policy for Alabama), responsible for making this sort of election policy for the State. *See* La. Const., art. 4, § 7 ("The secretary of state shall head the department and *shall be the chief election officer of the state. He shall prepare and certify the ballots for all elections, promulgate all election returns, and administer the election laws*….") (emphasis added). In any event, it is no more evident that the Mississippi Secretary of State has the power to make policy than the Louisiana Secretary of State. *Moore* therefore cannot be distinguished on this ground.

not say, and could not consistently with established precedents have said, that only cases involving admissions or concessions by election officials are capable of repetition. At the dismissal stage, after all, the Supreme Court and this Court have made it clear that evidence is not required; rather, all factual allegations are to be taken as true and all plausible inferences must be drawn in the plaintiff's favor. *See Doe v. MySpace, Inc*., 528 F.3d 413, 418 (5th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

Moore can only mean that a unilateral action by a Secretary of State to shorten a presidential qualifying deadline presents a conflict that is capable of repetition—at least if the election official is capable (within the definition provided by *Honig v. Doe*) of doing it again. Whether the secretary in *Moore* was likely to do it again happened to present an easy problem because the Mississippi Secretary of State admitted he would. But *Moore* did not say (and could not have said) that such an admission is the only way to establish a reasonable likelihood within the meaning of the capable of repetition yet evading review doctrine.

II. Requiring Evidence at the Dismissal Stage Violates Clear Supreme Court and Circuit Precedent.

The panel's opinion not only contradicts *Moore,* it also runs afoul of the standard for dismissal under Rule 12(b). Contrary to the panel's conclusion, the Appellants are not required at the dismissal stage to present evidence proving that they continue to have Article III standing. The Supreme Court made this clear in

its unanimous decision in *Bennett v. Spear*, 520 U.S. 154, 168 (1997): "while a plaintiff must 'set forth' by affidavit or other evidence 'specific facts' to survive a motion for summary judgment, …, and must ultimately support any contested facts with evidence adduced at trial, '[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for *on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim*.'" (Emphasis added).

The pleadings, reasonable inferences, and appellate Briefs establish that the Appellants present a plausible claim to continuing standing. The Secretary has already shortened the qualifying period once. The Secretary continues to assert that he had the authority to do so, which necessarily means that he thinks he can do it again. The Secretary has cagily avoided claiming he will not.

III. The Burden of Showing that He Will Not Act Illegally Again Falls on the Secretary.

The panel erroneously placed the burden on Appellants to prove that the Secretary would act illegally again. *See Dardenne* at 5. This Court has made clear that the burden of proving mootness under these circumstances is on the governmental official claiming he will not act illegally again. In *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009), to use one example, the Court stated: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to

recur. *This is a 'heavy burden,' which must be borne by the party asserting mootness*." (Quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000)) (footnotes omitted) (emphasis added). At bare minimum, the *Sossamon* Court observed, the governmental official must *claim* that he will not engage in the challenged action again. *Id.* In *Sossaman* this was accomplished by affidavit. In the present case, in contrast, the Secretary has *never claimed* he will not do it again, *see Dardenne* at 5 & n.5, let alone submitted an affidavit to that effect.

* * *

Under the foregoing precedents, the panel's mootness holding should be reheard by the full Court for three reasons. First, it contradicts this Court's holding in *Moore* that a secretary of state's decision to shorten a qualifying deadline is capable of repetition—even if that decision is not compelled or authorized by a state statute. *Contrast Dardenne* at 5-6 n.6 (stating that the present case is different because the Secretary was not enforcing a statute). Next, the panel erred by requiring that the Appellants present evidence proving that the Secretary would act illegally again. *See Dardenne* at 5. This Court's precedents, relying on the Supreme Court's opinions in *Twombly* and *Bennett*, make clear that at the Rule 12(b) dismissal stage, evidence is not required. Third, by placing the burden on the Appellants to prove that the Secretary will act illegally again—when the Secretary

has never even claimed he will not—the panel's opinion contradicts *Laidlaw* and *Sossamon*. *See Dardenne* at 5-6.

IV. This Court's Holding that Rule 4(e) and Rule 4(d) do not apply to State Officials Sued Under § 1983 for Prospective Relief Conflicts with Decisions of the First and Second Circuits.

The panel, relying on this Court's recent decision in *Moore v. Hosemann*, Nos. 09-60272 & 60424, __ F.3d __ (5th Cir., Dec. 18, 2009) (2009 WL 4881559), ruled that state officers sued in their official capacities for prospective relief under § 1983 are not subject to service under Rule 4(e), and hence are not subject to the waiver requirement found in Rule 4(d). The panel relied on *Moore* for this result. *See Dardenne* at 6; *Moore* at *4-5.

The Court's opinion in *Moore* and the panel's conclusion here contradict the First Circuit's opinions in *Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24, 28-30 (1st Cir. 1988), and *Caisse v. DuBois*, 346 F.3d 213, 216 (1st Cir. 2003), as well as an unpublished opinion of the Second Circuit. *See Stoianoff v. Commissioner of Motor Vehicles*, 208 F.3d 204 (2d Cir. 2000) (Table) (2000 WL 287720) ("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)).").

The First Circuit in *Gonzalez-Chapel* ruled that official-capacity claims against state officers seeking prospective relief under § 1983 are governed by the Rule applicable to individual service—which is now codified in Rule 4(e). *Gonzalez-Chapel*, 849 F.2d at 29-30. In *Caisse v. DuBois*, 346 F.3d 213, 216 (1st Cir. 2003), which involved both individual-capacity and official-capacity claims under § 1983, the First Circuit reiterated this conclusion: "service of process for public employees sued in their official capacities is governed by the rule applicable to serving individuals." Thus, the Court in *Caisse*, 346 F.3d at 216, ruled 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."[7]

Because the panel's holding that Rule 4(e) does not apply to official-capacity actions filed against state officers under § 1983 (for future relief) contradicts holdings in two sister Circuits, a hearing by the full Court is justified.

[7] Several District Courts from around the country have relied on these precedents to hold that governmental officers (both state and municipal) sued in their official capacities for prospective relief are subject to Rule 4(d)'s waiver requirement. *See, e.g.,Marcello v. Maine*, 238 F.R.D. 113 (D. Me 2006) (holding that a state judge sued in his official capacity is subject to Rule 4(e) and thus Rule 4(d)'s waiver requirement)); *Whatley v. District of Columbia*, 188 F.R.D. 1 (D.D.C. 1999) (holding that municipal officials sued in their official capacities are subject to Rule 4(d)'s waiver requirement); *Mosley v. Douglas County Correctional Center*, 192 F.R.D. 282 (D. Neb. 2000) (same).

Conclusion

Appellants respectfully suggest that en banc review is appropriate under Federal Rules of Appellate Procedure 35(a)(1) and 35(b)(1)(A) because of conflicts with Supreme Court and Circuit precedent. *See* Arguments I, II, and III, *supra*. Appellants further respectfully suggest that a "question of exceptional importance" exists justifying rehearing en banc under Federal Rules of Appellate Procedure 35(a)(2) and 35(b)(1)(B). *See* Argument IV, *supra*.

Respectfully submitted,

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Certificate of Service

I certify that I filed the foregoing Petition for Rehearing En Banc using the Court's electronic filing system and also e-mailed and mailed (first class postage affixed) copies of the Petition to Celia R. Cangelori, 918 Government Street, P.O. Box 3036, Baton Rouge, LA 70821-3031, celiacan@bellsouth.net, this 28th day of January, 2010.

/s/ Mark R. Brown
Mark R. Brown