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CIVIL
DISTRICT COURT

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2020-08772

DIVISION C

SECTION 10

THE COUNCIL OF THE CITY OF NEW ORLEANS; COUNCILMEMBER JASON ROGERS WILLIAMS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; COUNCILMEMBER HELENA MORENO, IN HER INDIVIDUAL AND OFFICIAL CAPACITY; COUNCILMEMBER JOSEPH I. GIARRUSSO III, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; COUNCILMEMBER JAY H. BANKS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; COUNCILMEMBER KRISTIN GISLESON PALMER, IN HER INDIVIDUAL AND OFFICIAL CAPACITY; COUNCILMEMBER JARED C. BROSSETT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; COUNCILMEMBER CYNDI NGUYEN, IN HER INDIVIDUAL AND OFFICIAL CAPACITY

VERSUS

R. KYLE ARDOIN, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF THE STATE OF LOUISIANA, AND SANDRA WILSON, ORLEANS PARISH REGISTRAR OF VOTERS

FILED: _____

DEPUTY CLERK

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF FOUNDATION IN SUPPORT OF PLAINTIFFS' PETITION

The American Civil Liberties Union Foundation of Louisiana respectfully submits this amicus brief in support of Plaintiffs' Petition for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, and Declaratory Judgment. Although Plaintiffs no longer seek a preliminary injunction, amicus curiae make the following argument in support of Plaintiffs' claim for declaratory relief.

INTRODUCTION

This case concerns an attempt at voter suppression by Defendant R. Kyle Ardoin, the Louisiana Secretary of State, during an unprecedented historical moment of a global coronavirus pandemic. Amid growing public concern about public health and the U.S. Postal Service's ability to make prompt mail deliveries in advance of the 2020 United States presidential election, authorities such as the New Orleans City Council ("the Council") have sought to expand access to voting. As part of those efforts, the Council has worked with the Orleans Parish Registrar of Voters to establish auxiliary sites in New Orleans where voters can return completed absentee ballots

without having to rely on the mail. However, Secretary of State Ardoin informed the Council that he directed all state registrars of voters to accept hand-delivered absentee ballots *only* on the premises of their offices.

In an Oct. 8, 2020, letter to the Council, Mr. Ardoin expressed his opinion that Louisiana's Election Code does not permit registrars to collect absentee ballots via drop-off sites. This interpretation of the law is incorrect, as he apparently now acknowledges in his Opposition to Plaintiffs' motion, which characterizes this dispute as a "miscommunication." Opp. of Def. R. Kyle Ardoin to Pls. Mot. for Prelim. Inj. at p. 7. Regardless, his Oct. 8 letter to the Council represents an unreasonable, unwarranted restriction on voting rights and an attempt at voter suppression.

ARGUMENT

I. The Election Code does not prohibit absentee ballot drop-off sites.

Mr. Ardoin's opposition to additional drop-off sites does not withstand scrutiny. At bottom, he argues that Louisiana's Election Code—specifically La. R.S. 18:1308(B)—does not "authorize" registrars to accept hand-delivered ballots at locations other than their offices. His October 8, 2020, letter responding to the Council asserts: "To allow for drop-off sites at locations other than registrars' offices would be in direct contradiction of the Election Code (see La. R.S. 18:1308(B))." He claims the law "specifically does not allow" for drop-off sites. But Section 18:1308(B) includes no such prohibition, specific or implied. On the contrary, the statute is permissive, not restrictive. Mr. Ardoin's miserly interpretation is not supported by the statute's text, purpose, or precedent. The fact is, the law permits absentee ballots to be returned to the registrar anywhere the registrar may deem appropriate to take custody or possession. Mr. Ardoin's Opposition to Plaintiffs' motion apparently acknowledges this, stating: "The hand delivery return can be made to any site and at the times indicated where the registrar conducts the operations of his office." Opp. of Def. R. Kyle Ardoin to Pls. Mot. for Prelim. Inj. at p. 8.

La. R.S. 18:1308(B) provides that a marked ballot shall be "returned to the registrar by the United States Postal Service, a commercial courier, or hand delivery." The statute concerns the method by which ballots are returned to the registrar. It does not specify a physical location or dictate the place where the registrar may accept, or take possession of, the delivered ballots. The statute does not contain the phrase "drop-off site," let alone the word "site." From a textual standpoint, Mr. Ardoin's argument that the statute prescribes a specific location is baseless. From

a logical standpoint, the argument belies the fact that the physical location of registrars' offices may change; moreover, some registrars' offices have multiple physical locations that may expand or contract over time.¹ Voters in some parishes, such as Easton Baton Rouge, have more than one location at which to return ballots to their registrar.² It follows that the presence of additional ballot sites in a particular parish is not "unauthorized." Quite the opposite. They exist and effectively function in neighboring parishes.

In her affidavit, filed in this matter on October 19, 2020, Defendant Orleans Parish Registrar of Voters Sandra Wilson affirms this interpretation of the law, noting that, in addition to accepting completed absentee ballots at her offices, she "will also accept completed ballots at all five early voting sites during absentee voting," as well as at nursing homes. Wilson Aff. at p. 2.

Mr. Ardoin now apparently acknowledges that such collection is permitted, though his position is equivocal. In his Opposition, he explained that he "never said the registrars cannot accept ballots at early voting sites or at nursing homes." Opp. of Def. R. Kyle Ardoin to Pls. Mot. for Prelim. Inj. at p. 6. But he also noted that his letter "was saying that the registrar can only accept ballots curbside in front of their offices ... that the law only allows return of the ballots to the registrar's office." *Id.*

Mr. Ardoin's focus on the "offices" of the registrar does not salvage his argument. La. R.S. 18:1308 refers to the registrar's office in exactly two places, neither of which concern return of absentee ballots. *First*, if a voter requests a ballot by facsimile, the registrar "shall do so if he has a facsimile machine **in his office.**" La. R.S. 18:1308(A)(1)(b) (emphasis added). *Second*, if a voter requests that the registrar transmit a ballot to her electronically, an immediate family member "may pick up the necessary instructions, certificate, ballot, and envelope **at the registrar's office.**" La. 18:1308(A)(c)(i) (emphasis added). By contrast, La. R.S. 18:1308(B) contains no reference to the registrar's "office." The Legislature's inclusion of the term "office" in the specific subsections cited above underscores its omission in Section 1308(B). If lawmakers intended ballots to be returned to the registrar's "office," they would have said so. That they made no such mention in Section 1308(B) proves fatal to Mr. Ardoin's position.

¹ By way of example, according to the Secretary of State's website, the East Baton Rouge Parish Registrar of Voters has three physical locations. See <https://voterportal.sos.la.gov/registrar> (listing "physical locations" as City Hall, 222 St. Louis St. #201, Baton Rouge, LA 70802; Motor Vehicle Building, 2250 Main Street, Baker, LA 70714; and Fire Station Building 11010 Coursey Boulevard, Baton Rouge, LA 70821). Jefferson Parish's registrar also has three locations; St. James, St. John, St. Landry, St. Mary, St. Tammany, Lafourche, Tangipahoa, and Orleans parishes all have two registrars' offices.

² *Id.*

Section 1308(B)'s purpose is simple: to properly convey ballots to the registrar. "When a statute is clear and unambiguous and its application does not lead to absurd consequences, the provision is applied as written with no further interpretation made in search of the legislature's intent." *In re Succession of Faget*, 2010-0188 (La. 11/30/10), 53 So. 3d 414, 420 (citing *Dejoie v. Medley*, 2008-2223 (La. 5/5/09), 9 So. 23d 826, 829; La. Civ. Code art. 9; La. R.S. 1:4). "In the event the language of a statute is susceptible of different meanings, the interpretation must best conform to the purpose of the law." *Id.* (citing La. Civ. Code art. 10). Applying these principles to Section 1308(B), it is clear that the law requires absentee ballots to be returned to the registrar—but delivery is not restricted to a physical location, be it a single or multiple offices. Under the present circumstances of a coronavirus pandemic, it is only practical that registrars have the flexibility to accept delivery of absentee ballots at alternate sites.

Notably, more than 21 years ago, the then Louisiana Attorney General interpreted the statute in permissive terms, relying on the registrars' custom and a then-pending amendment to the law that explicitly allowed for hand delivery of absentee ballots. The Attorney General said the phrase "application by mail" in La. R.S. 18:1308 was "somewhat confusing," noting that registrars around the state were unsure whether the statute permitted application to vote absentee by mail "through mail delivery only, or whether the registrar is authorized to receive said applications by mail delivery, by hand delivery by the applicant, by hand delivery by a third party or by facsimile transmission." Op. Atty. Gen., No. 99-350, October 11, 1999. The Attorney General noted that state registrars of voters discussed the issue at an annual meeting, and a majority voted "to continue the custom of accepting the applications by the several means discussed herein, and not only through mail delivery." *Id.* Thus, the Attorney General broadly interpreted "application by mail" in Section 1308 to include hand delivery and other means.

Subsequently, the Legislature adopted amendments and passed Act 254 of the 1999 Regular Session, amending La. R.S. 18:1307, "Application by mail," to provide as follows: "An application to vote by mail may be delivered to the registrar **by any means**, including the United States Postal Service, commercial delivery service, hand delivery, or facsimile." La. R.S. 18:1307(B)(1)(a)(i) (emphasis added). This amendment clearly demonstrates the Legislature's intent to expand access to voting by absentee ballot, not to restrict the process to only one specified delivery—*i.e.*, by mail. Reading Section 1307 in *pari materia* with Section 1308, one cannot interpret the statute to require delivery of an absentee ballot to one physical location only.

The statute's text, its purpose, and underlying, permissive intent demonstrate that Mr. Ardoin's argument is wrongheaded. To say the statute "does not allow" drop-off sites is incorrect. It reads a prohibition into the law that does not exist.

II. Mr. Ardoin's obstructive efforts demonstrate attempts at suppression.

Recognizing the public-health threat posed by the coronavirus pandemic, Louisiana Governor John Bel Edwards and Mr. Ardoin declared in August of this year that an emergency exists with respect to the upcoming election. Mr. Ardoin offered the opportunity to vote absentee by mail to "any registered voter testing positive for COVID-19 during and after early voting but before election day."³ Governor Edwards rejected that plan because it was "contrary to guidance from the Centers for Disease Control and the Louisiana Department of Health," and it failed to protect "the right to vote while protecting the health of public."⁴

Concerned that voting in person could jeopardize their health, two Baton Rouge voters sued the Governor and Mr. Ardoin on August 3, 2020, challenging Mr. Ardoin's restrictions on mail-in ballots. Because Plaintiff Jasmine Pogue has asthma and a history of upper-respiratory infections, she is more vulnerable to the virus.⁵ Plaintiff Jennifer Harding feared that her exposure to the virus would endanger her 72-year-old father, 71-year-old mother, and 93-year-old grandmother, for whom she served as a caretaker.⁶ They sought to expand the statutory limitations on who could vote absentee by mail, known as the "excuse requirement." (Under La. R.S. 18:1303, only voters certifying one of the "excuses" enumerated in that statute were eligible to receive an absentee by mail ballot.) Middle District of Louisiana District Court Chief Judge Shelly Dick granted an injunction, finding that the excuse requirement imposed an undue burden on the right to vote, in violation of the First and Fourteenth Amendments of the United States Constitution.⁷ As a result of the judge's Sept. 16, 2020, ruling, voters such as Ms. Pogue and Ms. Harding meet the excuse requirement if they have underlying medical conditions, making them more vulnerable to COVID-19, or care for a person subject to a medically necessary quarantine or isolation order because of COVID-19.

³ *Harding et al. v. John Bel Edwards et al.*, MDLA Civil Action No. 20-495, R. Doc. 31-1 (citing Secretary of State Proposed Emergency Election Plan for the November 3, 2020 and December 5, 2020 Elections in the State of Louisiana (Aug. 17, 2020), formerly available at: <https://www.sos.la.gov/OurOffice/PublishedDocuments/SOSProposedEmergencyElectionPlan.pdf>)

⁴ *Harding et al. v. John Bel Edwards et al.*, MDLA Civil Action No. 20-495, R. Doc. 88 at p. 3.

⁵ *Id.* at 8.

⁶ *Id.* at 7-8.

⁷ *Id.* at 9.

Shortly after that ruling was issued, states around the nation marked National Voter Registration Day on September 22, 2020.⁸ Across the United States, nonprofit organizations, companies, and student groups reached out to their communities to get voters registered. In Louisiana, however, the state’s online voter registration portal, Geauxvote.com, was unexpectedly shut down on that day, making online registration inaccessible.⁹ The website announced that it was undergoing “scheduled maintenance.”¹⁰ The next day, Mr. Ardoin said the blockage was “an unfortunate error for which I take full responsibility.”¹¹ His admission did not temper the ire of critics who viewed the “error” as deliberate voter suppression.¹²

Against this backdrop, Mr. Ardoin’s attempt to prevent additional drop-off sites appears to be part of a pattern. His opposition to additional drop-off sites is not merely a matter of strict statutory interpretation—it represents another purposeful attempt at voter suppression. Rather than making voting more accessible at a time when Louisiana residents legitimately fear the risks to their health that in-person voting poses, Mr. Ardoin instead sought to obstruct access.

III. Mr. Ardoin’s prohibition would affect at-risk minorities the most.

Louisiana’s history of race discrimination in the field of voting rights is thoroughly documented, but it bears brief summary here. Until 1868, the state constitution limited the vote to white males.¹³ In 1898, Louisiana weaponized the Grandfather Clause, which imposed complicated education and property requirements to only those voters whose fathers and grandfathers had not been registered to vote before 1867.¹⁴ Although the U.S. Supreme Court invalidated that restriction in 1915, Louisiana developed an “understanding” clause requiring its residents to give a “reasonable interpretation” of any section of the state or federal constitution to vote; the U.S. Supreme Court struck that down in 1965.¹⁵

Not to be deterred, the state levied poll taxes, created citizenship tests, purged Black residents from registration rolls, and authorized an all-white primary that functionally disenfranchised Black

⁸ See <https://nationalvoterregistrationday.org/>

⁹ Jake Clapp, *Louisiana Secretary of State Kyle Ardoin calls voter registration site going offline ‘unfortunate error,’* GAMBIT, Sept. 23, 2020, available at: https://www.nola.com/gambit/news/the_latest/article_a9322182-fdbe-11ea-8d62-8b12c54fb200.html

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*; see also Rachel Thomas, *Democrats accuse Ardoin of ‘voter suppression, gross incompetence’ over website outage; Ardoin says it was maintenance*, FOX8/WAFB, September 23, 2020, available at: <https://www.fox8live.com/2020/09/23/democrats-accuse-ardoin-voter-suppression-gross-incompetence-over-website-outage-ardoin-says-it-was-maintenance/>

¹³ Debo P. Adegbile, *Voting Rights in Louisiana: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 413, 416 (2008).

¹⁴ *Id.* at 416-417.

¹⁵ *Id.* at 417.

residents.¹⁶ “Every discriminatory, disfranchising technique developed by Louisiana remained in practice, except for the few specifically condemned by the Supreme Court, until Congress banned them expressly or made them subject to meaningful legal review” through the passage of the Voting Rights Act (“VRA”) in 1965.¹⁷

It was only in 2013 that the U.S. Supreme Court invalidated Section 4(b) of the VRA in *Shelby County v. Holder*.¹⁸ To study the impact of that decision, the Louisiana Advisory Committee for the United States Commission on Voting Rights held hearings, took testimony, and invited public comment in November and December 2017. The Commission found evidence of barriers to early voting across the state, and those barriers “included the locations available for early voting, the periods of time allocated to early voting, and the accessibility of early voting.”¹⁹ Specifically, the Commission found barriers to early voting for disabled residents, but it also noted that consolidation of polling locations has caused significant barriers to voting. “... [T]here are fewer polling locations per voter in a geographical area if that area has more black residents,” the report states.²⁰ “This in turn implies that black residents face longer travel distances to reach a polling location.”²¹

Against this troubling background of racial discrimination comes the coronavirus, which disproportionately affects Black residents. According to epidemiologist Camara Phyllis Jones, who submitted a declaration in the *Harding* case, racial disparities in health outcomes have been documented across organ systems (such as heart disease, stroke, cancer, diabetes, asthma, and kidney disease) and age groups.²² In the United States, Black people have higher rates than white people of obesity, high blood pressure, heart disease, kidney disease, diabetes, and asthma.²³ Black Americans are both disproportionately infected by coronavirus and dying from COVID-19.²⁴ In Louisiana, Black residents are more likely than white residents to die from COVID-19; although Black people represent 33 percent of the population, they account for 50 percent of the deaths,

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 570 U.S. 2 (2013).

¹⁹ *Barriers to Voting in Louisiana: A Briefing Paper by the Louisiana Advisory Committee for the United States Commission on Civil Rights*, p. 13 (June 2018), available at: <https://www.usccr.gov/pubs/2018/08-20-LA-Voting-Barriers.pdf>

²⁰ *Id.* at p. 12.

²¹ *Id.* See also p. 30 (“... census tracts with a higher percentage of blacks have fewer polling locations[.]”).

²² *Harding et al. v. John Bel Edwards et al.*, MDLA Civil Action No. 20-495, R. Doc. 88 at p. 3.

²³ *Id.*

²⁴ *Id.* at 9.

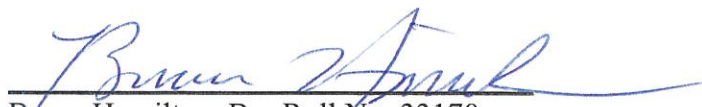
compared to 63 percent of the population for white people, who account for 48 percent of the deaths.²⁵

Because of this disproportionate impact, it necessarily follows that Mr. Ardoin's attempt to impose restrictions on absentee voting would affect Black residents most severely. Because they are more likely to suffer from underlying health conditions and they are more likely to contract the virus, Black residents are more at risk when they face potential exposure in public, as by standing in line to vote at a polling place. Consequently, Mr. Ardoin's interpretation of La. 18:1308(B) not only represents an attempt at voter suppression, but it would also have a racially discriminatory impact if it were permitted to stand.

CONCLUSION

Not only are Mr. Ardoin's legal arguments groundless, sound policy considerations militate in favor of expanded access to voting, such as through additional absentee ballot drop-off sites. For the foregoing reasons, the American Civil Liberties Union Foundation of Louisiana prays that this Court grant judgment in favor of Plaintiffs and against the Defendants, and grant the declaratory relief requested.

Respectfully submitted this 22nd day of October, 2020,


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CERTIFICATE OF SERVICE

I hereby certify a copy of the above and foregoing has been served upon all counsel of record, indicated below, via electronic mail this 22nd day of October, 2020.

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²⁵ *Id.* at 9.

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