

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DR. DOROTHY NAIRNE, JARRETT
LOFTON, REV. CLEE EARNEST LOWE,
DR. ALICE WASHINGTON, STEVEN
HARRIS, ALEXIS CALHOUN, BLACK
VOTERS MATTER CAPACITY BUILDING
INSTITUTE, and THE LOUISIANA STATE
CONFERENCE OF THE NAACP,

Plaintiffs,

v.

R. KYLE ARDOIN, in his official capacity as
Secretary of State of Louisiana, *et al.*

Defendants.

Case No. 3:22-cv-00178-SDD-SDJ

Chief Judge Shelly D. Dick

Magistrate Judge Scott D. Johnson

**DEFENDANTS' JOINT MOTION FOR
CONTINUANCE OF THE NOVEMBER 27, 2023, TRIAL DATE**

Defendants jointly submit this Motion for Continuance of the November 27, 2023, trial date and in support hereof would show the Court as follows. Plaintiffs have taken the hardline position that election data from this Fall's October and November legislative elections cannot be used at the November 27, 2023, trial because there will not be sufficient time to analyze it. These endogenous elections—both contemporary and in the districts challenged—are highly probative for the type of analysis this Court must undertake in a Voting Rights Act Section 2 case. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1020–21 (8th Cir. 2006); *Uno v. City of Holyoke*, 72 F.3d 973, 990 (1st Cir. 1995). This evidence is so probative and of such value that circuit courts have found that a district court errs when it fails to consider recent endogenous elections. *See, e.g., Westwego Citizens for Better Gov't v. City of Westwego*, 906 F.2d 1042, 1045 (5th Cir. 1990) (holding the

“district court erred in refusing to consider” the “highly relevant evidence” of election results occurring in the challenged election system *subsequent* to trial); *see also Levy v. Lexington Cnty.*, *S.C.*, 589 F.3d 708, 714–15 (4th Cir. 2009) (failure to reopen evidence to consider results of elections in the challenged districts that occurred after trial but before judgment was an abuse of discretion warranting reversal). This Court should continue the trial date until a time when the parties may provide the Court with analyses of these endogenous elections.

I. BACKGROUND

On June 21, 2023, this Court held a telephone conference to discuss, among other things, a date for trial. During the telephone conference, the Court suggested starting trial on either November 6, 2023, or November 27, 2023. No trial date was selected during the telephone conference. Rather, Defendants requested time to consider the two options.

Later that same day, Defendants filed their Joint Notice Regarding Trial Dates. Doc. 92. The Joint Notice set forth reasons why Defendants believed a trial in November 2023 was unworkable, unnecessary and ill-advised, including that there is no need to rush the trial of this case because there is no realistic prospect of Plaintiffs’ requested remedy of a special election before the next scheduled election in 2027. Doc 92 at 2; *see North Carolina v. Covington*, 581 U.S. 486, 486–87 & n.* (2017) (rejecting unanimously a three-judge court’s order mandating a special election cutting legislators’ term lengths short even where dozens of legislative districts were found to have been configured with invidious discriminatory intent). Defendants also explained that Louisiana’s Gubernatorial and Legislative Primary elections are scheduled for October 14, 2023, and the Gubernatorial and Legislative General elections are scheduled for November 18, 2023, and that preparing for a trial during this election period will interfere with the

Secretary of State and Attorney General’s statutory obligations related to the election and their ability to prepare for and participate in the trial. Doc. 92 at 2-5.

Finally, Defendants pointed out that a November trial setting might not yield the beneficial results the Court expects. The United States Supreme Court has indicated that results of elections that occur while a voting case is pending can be useful in reaching the correct legal decision by the Court. *See Purcell v. Gonzalez*, 549 U.S. 1, 8 (2006). Particularly, Justice Stevens noted in his concurrence that “[a]llowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality” and “will enhance the likelihood that [the legal issues] will be resolved correctly on the basis of historical facts rather than speculation.” *Id.* (Stevens, J., concurring); Doc. 92 at 5.

Plaintiffs filed a response on June 22, 2023, urging the Court to proceed with a trial on November 27, 2023. *See* Doc. 94. While Plaintiffs noted in passing that it was “not clear that it would even be possible” to analyze Fall 2023 election data before a January 2024 trial date, *id.* at 4, they did not tell the Court that those results could and should not be used at trial.

On June 22, 2023, the Court set this case for trial on November 27, 2023, and referred the scheduling issues to Magistrate Judge Johnson. Magistrate Judge Johnson set a scheduling conference for June 29, 2023. During the meet and confer process prior to this scheduling conference, Defendants raised the issue of the use of the election data from this Fall’s elections. On June 28, 2023, counsel to Defendants wrote to Plaintiffs’ counsel and listed as one of the issues to be discussed:

Fall 2023 Election Data: we expect that Parties may want to make use of election data from October 14 and November 18 elections and we would like to protect the Parties’ right to do so to the extent possible given the tight timeframe.

(See Jun. 29, 2023, Email from Plaintiffs' Counsel at 6, attached as Exhibit A). The parties discussed the use of data from the October and November 2023 elections later that day during their meet and confer, and the next day, on June 29, 2023 (the day of the scheduling conference), Plaintiffs' counsel responded:

Additionally, Plaintiffs have considered Defendants' proposal that the parties be allowed to supplement expert reports with data from the October 14, 2023 and Nov. 18, 2023 elections. Plaintiffs opposed this request. This would be weeks, if not well over a month, after the close of expert discovery, which under the Defendants proposed schedule would be Sept. 29, 2023. And in the case of the Nov. 18, 2023 election, less than ten days before trial. Plaintiffs do not think it is feasible in this time period for the data to be made available, analyzed and appropriately disclosed to opposing counsel before trial. Furthermore, this additional data is not necessary. There is other recent election data available currently to all parties. This is also something we should discuss with the Magistrate.

(See Exhibit A at 1).

The issue with the use of this Fall's election data was raised during the scheduling conference with Magistrate Judge Johnson, and Plaintiffs restated their objection to the use of data from the October and November 2023 elections at the November 27, 2023, trial. Magistrate Judge Johnson did not rule on the issue, believing that it was a matter to be addressed by the District Judge.

II. ARGUMENT

Plaintiffs now object to the use of the evidence that will be available this Fall—election data for the actual legislative districts at issue—because they do not believe there is sufficient time to analyze the data prior to the November trial date. A later trial date, presumably in early 2024, would allow time for the election results from October and November of 2023 to be used in the analyses required by *Thornburg v. Gingles*, 478 U.S. 30 (1986), including whether there is

evidence of district-specific legally significant racially polarized voting in the enacted districts and Plaintiffs' Illustrative Districts.

The election data from the October and November 2023 elections are highly probative and relevant evidence available to the Court. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1020–21 (8th Cir. 2006) (“Endogenous and interracial elections are the best indicators of whether the white majority usually defeats the minority candidate. The more recent an election, the higher its probative value.”) (internal citations removed); *Uno v. City of Holyoke*, 72 F.3d 973, 990 (1st Cir. 1995) (“a court has a duty to ponder all available evidence concerning racially polarized voting that promises to cast light on the factors at work in a particular electoral scheme.”).

Failure to consider this data merits reversal. *See Westwego Citizens*, 906 F.2d at 1045; *Levy*, 589 at 714–15. In *Westwego*, the Fifth Circuit held that even elections occurring *after* trial were so “highly relevant” to the district court’s analysis that the case was remanded for further proceedings to adduce that evidence. *Westwego Citizens*, 906 F.2d at 1045. In *Levy*, the Fourth Circuit held similarly: the district court erred in not considering election results that occurred shortly after trial. *Levy*, 589 at 714–15.

A later trial date would allow this Court to rely on fulsome election data in the first case at trial, not post-hoc as in *Westwego* and *Levy*, to analyze the claims and defenses in this case.¹

In the alternative, and only if this Court denies this Motion, Defendants request that this Court enter an order expressly allowing evidence and expert testimony relating to the October and November 2023 legislative elections.

¹ Defendants note that if this case is continued, the November 27, 2023, trial date could be used to try the *Robinson/Galmon* cases, Case Nos. 3:22-cv-211 and 3:22-cv-214, involving Louisiana’s congressional districts. That case should take priority because of the 2024 Congressional elections.

WHEREFORE, Defendants request that this Court grant their motion for continuance and reset this case for trial at a time sufficient to allow the use of evidence from the October and November 2023 elections, or in the alternative to enter an order expressly allowing the introduction of evidence and expert testimony relating to the October and November 2023 elections and for such other and further relief to which Defendants show themselves justly entitled.

Respectfully submitted,

/s/ Michael W. Mengis

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Counsel for Legislative Intervenors, Clay Schexnayder, in his Official Capacity as Speaker of the Louisiana House of Representatives, and of Patrick Page Cortez, in his Official Capacity as President of the Louisiana Senate

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CERTIFICATE OF SERVICE

I certify that on July 12, 2023, this document was filed electronically on the Court's electronic case filing system. Notice of the filing will be served on all counsel of record through the Court's system. Copies of the filing are available on the Court's system.

/s/ Erika Dackin Prouty

Erika Dackin Prouty (admitted pro hac vice)
BAKERHOSTETLER LLP

Counsel for Legislative Intervenors, Clay Schexnayder, in his Official Capacity as Speaker of the Louisiana House of Representatives, and of Patrick Page Cortez, in his Official Capacity as President of the Louisiana Senate

Prouty, Erika Dackin

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Sent: Thursday, June 29, 2023 2:31 PM
To: McKnight, Katherine L.; Phil Gordon; Thomas-Lundborg, Alora; Stanko, Andrew; Knehans, Dakota; Margulis, David; Dayle Chung; Dayton Campbell-Harris; McDonald, Hallie; Jared Evans; Erickson, Jessica; External - John Adcock; Bahn, Josephine M.; Luis Manuel Rico Román; Megan Keenan; mdeleeuw@cozen.com; Engle-Hardy, Noelle; Nora Ahmed; rsoloman@cozen.com; Ron Wilson; Greenwood, Ruth; Ruth Greenwood; Sara Rohani; Stuart Naifeh; Victoria Wenger; Greenwood, Ruth
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Subject: Re: Nairne, et al. v. Ardoin, et al., No. 22-cv-178 - Proposed Pre-Trial Schedule

Sorry to not get back to you sooner. You should go ahead and submit your filing. We are not going to come to an agreement and we plan to submit our own filing shortly.

We appreciate the Defendants proposed adjustments to the schedule in this matter. But we still think the 6 weeks that Defendants are now requesting to prepare their expert reports is too long and unnecessary. And therefore, we think we will need to take this issue up with the Magistrate today.

As to the election data, assumed we were discussing election data as opposed to just election results – it is my understanding that just the election results have very little relevancy in this matter. Additionally, Plaintiffs have considered Defendants’ proposal that the parties be allowed to supplemental expert reports with data from the October 14, 2023 and Nov. 18, 2023 elections. Plaintiffs opposed this request. This would be weeks, if not well over a month, after the close of expert discovery, which under the Defendants proposed schedule would be Sept. 29, 2023. And in the case of the Nov. 18, 2023 election, less than ten days before trial. Plaintiffs do not think it is feasible in this time period for the data to be made available, analyzed and appropriately disclosed to opposing counsel before trial. Furthermore, this additional data is not necessary. There is other recent election data available currently to all parties. This is also something we should discuss with the Magistrate.

thanks
Sarah

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Subject: Re: Nairne, et al. v. Ardoin, et al., No. 22-cv-178 - Proposed Pre-Trial Schedule

We are conferring now and should be able to get back to you shortly.

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Sent: Thursday, June 29, 2023 1:50 PM

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Subject: RE: Nairne, et al. v. Ardoin, et al., No. 22-cv-178 - Proposed Pre-Trial Schedule

Counsel,

We write to follow up regarding our e-mail this morning about a proposed schedule in the Nairne matter. We have not yet heard from you and appreciate that coordination takes time but believe it would be helpful to the Court to have a proposal before the conference this afternoon. We intend to file the attached by 1:30pm Central to put forward Defendants' proposal for the Court's consideration. We have included Plaintiffs' June 27 proposed dates in this filing so that the Court can have both proposals before it. However, if you prefer that we remove Plaintiffs' June 27 proposed dates or edit them in any way to reflect an updated proposal we are happy to do so.

Could you please let us know what you prefer? If we do not hear from you, we will plan to file this as is.

Thanks very much,

Kate

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From: McKnight, Katherine L.

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Subject: RE: Nairne, et al. v. Ardoin, et al., No. 22-cv-178 - Proposed Pre-Trial Schedule

Counsel,

Thank you for your time yesterday afternoon. Following are updates on Defendants' positions on two items.

First: Proposed Schedule. We heard your concerns about timing and have adjusted dates in the following proposal to address concerns raised by Plaintiffs (see column titled Defendants' Meet and Confer Proposal). This adjusted proposal allows more time to conduct expert depositions than the original scheduling order and also ensures the same amount of time to depose fact witnesses (3 weeks). This also builds in time in October between the end of expert discovery and pre-trial deadlines. We made the following adjustments:

1. Moved Defendants' expert disclosure and reports a week earlier, respectively.
2. Delayed the exchange of witness lists by a few days so it post-dates the exchange of Defendants' expert reports and limited it to "Fact Witnesses." We added an additional date for Expert Witness lists due on the same date as the final expert witness reports are exchanged; an Expert Witness List may not be necessary but we wanted to accommodate what we understood to be your interest in exhibit list exchanges prior to the time for depositions.
3. Matched Plaintiffs' proposals for the last three dates leading up to trial.
4. Combined the due date for expert-related motions with the due date for Daubert motions.

Please let us know your position on this proposal so we can determine whether further narrowing is possible and to prepare for this afternoon's conference with the Court.

Event	Before Stay	Time Between Events in First Scheduling Order	Plaintiffs' 6/27 Proposal	Defendants' Proposal
Plaintiffs' Expert Reports	7/22/2022		6/30/2023	6/30/2023
Defendants Expert Disclosures	9/2/2022	6 weeks after P reports	7/6/2023	8/13/2023
Defendants Expert Reports	9/9/2022	7 weeks after P reports	7/21/2023	8/28/2023
Exchange Fact Witness Lists	No date set		8/10/2023	8/10/2023
Plaintiffs' Rebuttal Expert Disclosures	No date set		7/25/2023	8/2/2023
Plaintiffs' Rebuttal Expert Reports	9/23/2022	2 weeks after D reports	8/4/2023	9/1/2023
Defendants' Sur-Rebuttal Expert Disclosure	No date set		8/8/2023	9/5/2023
Fact discovery close and file related motions	10/17/2022		8/31/2023	8/31/2023
Defendants' Sur-Rebuttal Expert Reports	10/7/2022	2 weeks after P reports	8/11/2023	9/1/2023
Exchange Expert Witness Lists	No date set			
Expert discovery close	10/21/2022	2 weeks after surrebuttals	9/22/2023	9/22/2023
Dispositive & Daubert & Expert-related motions	10/28/2022	1 week later	9/29/2023	10/20/2023
File pre-trial order	No date set		10/20/2023	10/20/2023
Proposed findings of fact & conclusions of law	12/12/2022	5 weeks prior to trial	10/27/2023	10/27/2023
Pre-trial conference	12/19/2022	4 weeks prior to trial	11/2/2023	10/31/2023
Trial briefs	12/23/2022	3 weeks prior to trial	11/13/2023	11/13/2023
Trial scheduled to begin	1/17/2023		11/27/2023	11/27/2023

Second: Rebuttal and sur-rebuttal expert disclosures. We can agree to including these dates under the same parameters as defined in the original scheduling order (Dkt. 66). Specifically:

“Second, the parties discussed at length their positions on the appropriateness, timing, and scope of rebuttal experts. (R. Doc. 52 at 4, 5, 7). Ultimately, the parties agreed that Plaintiffs would be able to “introduce[e] new experts at the rebuttal stage” but only “to rebut expert testimony” offered by Defendant and Intervenors “on topics not covered by Plaintiffs’ initial slate of experts.” (R. Doc. 52 at 7). Defendant and Intervenors can then offer sur-rebuttal expert reports, but any surrebuttal by Defendant and Intervenors would be limited to those experts first identified by Plaintiffs “at the rebuttal stage.” (R. Doc. 52 at 5, 7). Therefore, the Court has included an additional deadline for Defendant and Intervenors to provide sur-rebuttal expert reports.”

We look forward to Plaintiffs’ position on election data. To be clear, we view the issue of election data (and whether data can be available for expert analysis in a timely manner) as distinct from election results (identification of which candidate won or lost a specific election). We trust this is in alignment with Plaintiffs’ understanding based on a comment by Sarah during our call but please let us know if not.

Kate

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Partner

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From: McKnight, Katherine L.

Sent: Wednesday, June 28, 2023 1:42 PM

To: Sarah Brannon <sbrannon@aclu.org>; Phil Gordon <pgordon@HoltzmanVogel.com>; Thomas-Lundborg, Alora <tthomaslundborg@law.harvard.edu>; Stanko, Andrew <astanko@cozen.com>; Knehans, Dakota <dknehans@cozen.com>; Margulis, David <dmargulis@cozen.com>; Dayle Chung <dchung@naacpldf.org>; Dayton Campbell-Harris <DCampbell-Harris@aclu.org>; McDonald, Hallie <hmcDonald@cozen.com>; Jared Evans <jevans@naacpldf.org>; Erickson, Jessica <jerickson@cozen.com>; External - John Adcock <jnadcock@gmail.com>; Bahn, Josephine M. <jbahn@cozen.com>; Luis Manuel Rico Román <LRoman@aclu.org>; Megan Keenan <MKeenan@aclu.org>; mdeleeuw@cozen.com; Engle-Hardy, Noelle <nengle-hardy@cozen.com>; Nora Ahmed <Nahmed@laaclu.org>; rsoloman@cozen.com; Ron Wilson <cabral2@aol.com>; Greenwood, Ruth <rgreenwood@law.harvard.edu>; Ruth Greenwood <greenwood@law.harvard.edu>; Sara Rohani <srohani@naacpldf.org>; Stuart Naifeh <snaifeh@naacpldf.org>; Victoria Wenger <vwenger@naacpldf.org>; Greenwood, Ruth <rgreenwood@law.harvard.edu>

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Patrick T. <plewis@bakerlaw.com>; Jason Torchinsky <jtorchinsky@HoltzmanVogel.com>; Andrew Pardue <apardue@HoltzmanVogel.com>

Subject: RE: Nairne, et al. v. Ardoin, et al., No. 22-cv-178 - Proposed Pre-Trial Schedule

Counsel,

We look forward to our meet and confer later today. For now, we wanted to offer the following proposal which aligns with the amount of time afforded the parties in the original scheduling order. We can agree to Plaintiffs' proposed dates related to fact discovery but view the original time between events related to expert discovery as necessary in this case.

In addition to the proposed schedule, we would like discuss the following during our meet and confer:

1. **Fall 2023 Election Data:** we expect that Parties may want to make use of election data from October 14 and November 18 elections and we would like to protect the Parties' right to do so to the extent possible given the tight timeframe.
2. **Supplemental Interrogatories:** we understand your proposal for condensing response deadlines for supplemental interrogatories to 14 days and can agree to this shift as long as it applies to all parties.
3. **Written Discovery Responses by Parties:** the Secretary of State and the Attorney General have outstanding written discovery requests that they served on Plaintiffs last year. At the time the case was stayed, Plaintiffs had 3 days remaining to respond to the SOS written discovery and 11 days to respond to the AG written discovery. We propose that Plaintiffs serve responses to these written discovery requests within 3 and 11 days of tomorrow's Status Conference: Monday, July 3, 2023 (adding a day for next business day), for response to SOS written discovery and Monday, July 11, 2023, for response to AG written discovery.

Event	Before Stay	Time Between Events in First Scheduling Order	Plaintiffs' 6/27 Proposal	Defendants' 6/28 Proposal	Time Between Defendants' 6/28 Proposal and 6/27 Proposal
Expert Reports	7/22/2022		6/30/2023	6/30/2023	
Witness Lists	No date set		8/10/2023	8/10/2023	21 days before d
Expert Disclosures	9/2/2022	6 weeks after P reports	7/6/2023	8/11/2023	6 weeks after P r
Expert Reports	9/9/2022	7 weeks after P reports	7/21/2023	8/18/2023	7 weeks after P r
Submittal Expert Disclosures	No date set		7/25/2023	8/22/2023	
Discovery close and file related motions	10/17/2022		8/31/2023	8/31/2023	
Submittal Expert Reports	9/23/2022	2 weeks after D reports	8/4/2023	9/1/2023	2 weeks after D r
Sur-Rebuttal Expert Disclosure	No date set		8/8/2023	9/5/2023	
Sur-Rebuttal Expert Reports	10/7/2022	2 weeks after P reports	8/11/2023	9/15/2023	2 weeks after P r
Discovery close and file related motions	10/21/2022	2 weeks after surrebuttals	9/22/2023	9/29/2023	2 weeks after su
Daubert motions	10/28/2022	1 week later	9/29/2023	10/6/2023	1 week later
Pre-trial order	No date set		10/20/2023	10/20/2023	
Findings of fact & conclusions of law	12/12/2022	5 weeks prior to trial	10/27/2023	10/23/2023	5 weeks prior to
Status Conference	12/19/2022	4 weeks prior to trial	11/2/2023	10/30/2023	4 weeks prior to
	12/23/2022	3 weeks prior to trial	11/13/2023	11/6/2023	3 weeks prior to
Case to begin	1/17/2023		11/27/2023	11/27/2023	

We look forward to discussing.

Kate

Katherine L. McKnight
Partner

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From: McKnight, Katherine L.

Sent: Wednesday, June 28, 2023 9:04 AM

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Subject: RE: Nairne, et al. v. Ardoin, et al., No. 22-cv-178 - Proposed Pre-Trial Schedule

Sarah,

Thank you for your e-mail. Counsel for Defendants will be available to meet and confer this afternoon between 2pm and 4pm (Central)/3pm and 5pm (Eastern) and will look to circulate a proposal before we talk.

Would you pick a time in that window that works for your team and circulate a dial in?

Thanks,

Kate

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Partner

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From: Sarah Brannon <sbrannon@aclu.org>
Sent: Tuesday, June 27, 2023 12:08 PM
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Subject: Re: Nairne, et al. v. Ardoin, et al., No. 22-cv-178 - Proposed Pre-Trial Schedule

[External Email: Use caution when clicking on links or opening attachments.]

Counsel,

As you are aware, we have a scheduling conference in this matter set now for Thursday, June 29, 2023 at 3:00 pm CT before Magistrate Judge Scott D. Johnson. In anticipation of that conference and to facilitate productive conversations about the schedule in this case, we have drafted a proposed schedule, which is attached here. And we request to meet and confer with you all to discuss our proposal before the conference with Magistrate Judge Johnson. Plaintiffs' counsel can be available on Weds, June 28th for a meet and confer. Please let us know what time would work best for you all.

Thank-you,
Sarah

From: Sarah Brannon <sbrannon@aclu.org>

Sent: Tuesday, June 20, 2023 11:57 AM

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Subject: Re: Nairne, et al. v. Ardoin, et al., No. 22-cv-178

Sorry for the oversight. We will make sure to include these individuals in all future correspondence.

Sarah

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<jtorchinsky@HoltzmanVogel.com>; Andrew Pardue <apardue@HoltzmanVogel.com>

Subject: Nairne, et al. v. Ardoin, et al., No. 22-cv-178

Counsel,

Good morning.

It has come to my attention that there has been correspondence from Plaintiffs in the above captioned matter that omits a number of counsel for the State. Please add me, Jason Torchinsky, and Andrew Pardue to all future correspondence regarding this matter.

Thank you,

Phil Gordon



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