

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

PRESS ROBINSON, et al.,

Plaintiffs,

v.

KYLE ARDOIN, in his official capacity as
Secretary of State for Louisiana,

Defendant.

Civil Action No. 3:22-cv-00211-SDD-SDJ

Chief Judge Shelly D. Dick

Magistrate Judge Scott D. Johnson

EDWARD GALMON, SR., et al.,

Plaintiffs,

v.

R. KYLE ARDOIN, in his official capacity as
Secretary of State for Louisiana,

Defendant.

Consolidated with

Civil Action No. 3:22-cv-00214-SDD-SDJ

**DEFENDANTS’ MEMORANDUM IN RESPONSE TO
PLAINTIFFS’ JOINT MOTION FOR STATUS CONFERENCE
AND JOINT NOTICE REGARDING STATUS CONFERENCE**

Plaintiffs’ Joint Motion for Status Conference, Doc. 240, asked the Court to hold a status conference “to establish a timeline for resuming the process for establishing the remedial maps, including but not limited to (i) entering a schedule for supplemental briefing and remedial maps; and (ii) setting forth a date for an evidentiary hearing to resume consideration of the maps.” Doc. 240. This morning, Plaintiffs filed a joint notice regarding status conference asking the Court to restart preliminary injunction proceedings. Doc. 242 at 3 (asking the Court to accept “weeks” of new briefing, new maps, and a new evidentiary hearing). Defendants and Intervenors (collectively, “Defendants”) oppose such a “remedial phase” and oppose restarting the preliminary

injunction proceedings because it would only inject unnecessary delay into this matter. Defendants further oppose the imposition of a new congressional districting plan on the basis of a preliminary injunction when there is time for a trial on the merits before the 2024 elections. The Court should set this matter for trial on the merits as soon as possible.

While counsel for the defense side of this case will be prepared to more fully explain Defendants' position during the July 12, 2023, telephone status conference, Doc. 241, this memorandum is intended to provide background they believe will be helpful to the Court.

1. As Defendants recently detailed to the Fifth Circuit, this Court should conduct a trial on the merits and reach a final judgment promptly to allow this case to be resolved before the November 2024 elections. *See* Appellants' July 6, 2023 Ltr., *Robinson v. Ardoin*, No. 22-30333, Doc. 246. This Court's June 6, 2022, preliminary injunction and remedial schedule, *see* Docs. 173, 206, sought to impose a remedy in advance of the November 2022 congressional elections. Those elections have passed, and Plaintiffs no longer need a preliminary injunction and temporary remedy based on a limited record when the next elections to be conducted under the enjoined congressional plan are nearly 16 months away (rather than four months away, as they were when this case was stayed in 2022).

There is sufficient time for a trial on the merits before the end of 2023,¹ with a reasonable pre-trial schedule for fact discovery and additional expert discovery, if the Court acts now to schedule that trial. Plaintiffs cannot argue otherwise. In the related case of *Nairne v. Ardoin* involving Louisiana's legislative plans, the plaintiffs and their counsel—including many of the

¹ Indeed, it is possible that a trial as late as January or February 2024 will provide sufficient time for resolution prior to congressional elections in November 2024, but Defendants appreciate the Court's point in *Nairne v. Ardoin* that it wants to work to avoid potential timing issues and try these matters as soon as possible.

same counsel here—urged this Court to set an expedited trial schedule “to allow for potential relief of a special election in November 2024.” Case No. 22-cv-00178, Doc. 89 at 3. Setting aside whether a special election is available to Plaintiffs in the *Nairne* matter (it is not), there *is* a scheduled election for Louisiana’s congressional districts on November 5, 2024. The *Nairne* plaintiffs initially advocated for a trial in January 2024, showing they believed it is feasible to hold a trial on the merits 10 months in advance of the November 2024 elections.

The imposition of a preliminary remedial plan now, rather than trying this case before the end of 2023, would be problematic and counterproductive for multiple reasons. First, the Court would impose dramatic mandatory injunctive relief on a preliminary basis (imposing a judicially created congressional district plan on the state) despite a significant change in circumstances since the Court entered its order in June 2022: we now have 16 months before the next election rather than the four months between when this case was stayed and the November 2022 congressional elections.

Second, if the Court were to implement a preliminary remedial plan based on the preliminary injunction and accede to Plaintiffs’ wishes to restart the preliminary injunction phase and not try this case before the end of 2023, there likely will not be sufficient time to reach a final judgment and conduct *another* remedial phase in advance of the November 2024 congressional elections. That approach would mark a significant duplication of effort and ensuing waste of resources by both counsel and the Court let alone a sharp departure from this Court’s recently expressed wishes in *Nairne* to proceed promptly in order to avoid potential *Purcell* issues. *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

Third, Plaintiffs’ proposal risks exposing voters to as many as three different congressional plans in three elections (the 2022 elections under the enacted plan, the 2024 elections under a

preliminary remedial plan, and the 2026 elections under potentially yet a third plan), which would work a “needlessly chaotic and disruptive effect upon the electoral process.” *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (citing *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976)).

Fourth, the status quo here is the challenged plan which was used in the November 2022 election and which governs congressional representation in Louisiana today. “The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The Supreme Court “has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Here, adequate legal remedies exist for Plaintiffs: they can try the case to conclusion and establish their claim that this status quo should be altered prior to the November 2024 election.

Plaintiffs’ reliance on *Canal Auth. of State of Fla. v. Callaway* for the position that a preliminary injunction remedial plan is necessary in this case, some 16 months prior to the next election, ignores that case’s rule. Pls’ J. Notice at 5; 489 F.2d 567 (5th Cir. 1974). In *Canal Authority of Florida*, the Fifth Circuit applied a rule of necessity that cannot be satisfied here where there is no need for a status quo-altering remedial injunction pending trial because there is sufficient time to try this case before the next election. *Id.* at 576.

Finally, such an approach would be inconsistent with the Supreme Court’s directive that “the matter proceed before the Court of Appeals for the Fifth Circuit for review in the ordinary course and in advance of the 2024 congressional elections in Louisiana.” Summary Dispositions, *Ardoin v. Robinson*, No. 21-1596 (June 26, 2023). The ordinary course in this scenario—nearly 16 months prior to the next election—is to try the case, not to languish in a preliminary-injunction

phase that is simultaneously moot (the November 2022 elections are past) and unripe (the November 2024 election is not yet an imminent emergency).

2. This Court need not wait to schedule a trial on the merits while the Fifth Circuit considers Defendants' appeal of the preliminary injunction order. While this Court does not have jurisdiction over matters on appeal, it does have jurisdiction over the merits of this action. *Farmhand, Inc. v. Anel Eng'g Indus., Inc.*, 693 F.2d 1140, 1145–46 (5th Cir. 1982) (“Generally, when an appeal is noticed the district court is divested of jurisdiction; the matter is transferred immediately to the appellate court. The rule, however, is not absolute. The district court maintains jurisdiction as to matters not involved in the appeal, *such as the merits of an action when appeal from a preliminary injunction is taken*, or in aid of the appeal, as by making clerical corrections.”) (emphasis added).

3. In order to try this case on the merits before the end of 2023 while also allowing sufficient time for additional expert and fact discovery, Defendants request that the Court schedule this matter for trial on November 27, 2023.² This date is currently reserved for the *Nairne* trial, *see Nairne* Doc. 97, but trying this case should take priority over trying *Nairne* for a number of reasons.

First, the next elections to be conducted under the congressional plan challenged in this action will occur in November 2024, well before any elections that could be impacted by the *Nairne* litigation. The *Nairne* plaintiffs were unsuccessful in their attempt to seek relief for the

² Defendants maintain their previous arguments that trying any case in November 2023 will be exceedingly difficult for elected officials in light of the upcoming Gubernatorial Primary and General Elections. *See* Doc. 92 at 2–5. Defendants' proposal is based on the Court's prior direction in *Nairne* regarding its availability for trial in the fall of 2023. But to be clear, Defendants would oppose trying both *Nairne* and *Robinson* in November 2023—preparing for and participating in two trials during the election period would be untenable for the Secretary of State, Attorney General, and their staff who have statutory obligations to administer the election and advise election officials throughout every stage of the election process.

2023 elections, *see Nairne* Doc. 96, and the plaintiffs’ insistence on an expedited trial date in that case is based on the legally erroneous contention that they could seek special elections in November 2024. *See Nairne* Doc. 92 (explaining that Supreme Court precedent “effectively foreclose[s]” such a remedy). This Court should prioritize trying this action for elections that must occur in November 2024 over an action where the next elections that could be impacted will not occur for four years.

Second, this action is more amenable to an expedited discovery schedule and trial in November than *Nairne*. The congressional plan challenged here contains just six districts, and Plaintiffs seek the creation of just one additional majority-Black district. The *Nairne* plaintiffs, in contrast, challenge two different redistricting plans containing 144 districts, and seek numerous additional majority-Black districts across the state.

Third, and importantly, elections will occur under the districts challenged in *Nairne* in October and November 2023, offering this Court the most probative election data for its analysis. It is imperative that the parties have an opportunity to obtain and analyze the final election results in those districts before trial. *See Nairne* Doc. 92 at 5.³ As the United States Supreme Court has intimated, a trial should be held after there is evidence of how the challenged law operates in an actual election as opposed to hypothetical, expert witness driven speculation that could later turn out to be incorrect. *Purcell*, 549 U.S. at 5 (“Allowing 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] the Court wisely takes action that will enhance the likelihood that [the legal

³ Moving the *Nairne* trial to January 2024 or later is also necessary in light of the *Nairne* plaintiffs’ position that 2023 election results could not be admitted at a November 27, 2023, trial because there would be insufficient time for those results to be finalized and analyzed. *See* Jun. 29, 2023 Email from Plaintiffs’ Counsel at 6, attached as Exhibit A.

issues] will be resolved correctly on the basis of historical facts rather than speculation.”) (Stevens, J., concurring). While the record in this action needs to be more fully developed, that can occur more quickly than in a case where dozens of districts are at issue and where the most probative elections for a Section 2 analysis—endogenous elections—will be held in the weeks prior to trial.

Defendants respectfully ask the Court to reject Plaintiffs’ request to proceed with a remedial process and to instead schedule this matter for trial on the merits for November 27, 2023.

Respectfully submitted,

/s/ Michael W. Mengis

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/s/ John C. Walsh

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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

From: Sarah Brannon <sbrannon@aclu.org>
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.

From: McKnight, Katherine L. <kmcknight@bakerlaw.com>

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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Partner

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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	8/13/2023
Exchange Fact Witness Lists	No date set		8/10/2023	8/13/2023
Plaintiffs' Rebuttal Expert Disclosures	No date set		7/25/2023	8/20/2023
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	9/1/2023
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

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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
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
Trial to begin	1/17/2023		11/27/2023	11/27/2023	

We look forward to discussing.

Kate

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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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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

From: Phil Gordon <pgordon@HoltzmanVogel.com>

Sent: Tuesday, June 20, 2023 11:32 AM

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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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