

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

**JENNIFER HARDING, JASMINE POGUE,
OMEGA TAYLOR, LOUISIANA STATE
CONFERENCE OF THE NAACP, and
POWER COALITION FOR EQUITY AND
JUSTICE**

CIVIL ACTION NUMBER 3:20-cv-00495

DISTRICT JUDGE SHELLY D. DICK

VERSUS

**MAGISTRATE JUDGE RICHARD L.
BOURGEOIS, JR.**

**JOHN BEL EDWARDS, IN HIS OFFICIAL
CAPACITY AS GOVERNOR OF
LOUISIANA, AND KYLE ARDOIN, IN
HIS OFFICIAL CAPACITY AS
SECRETARY OF STATE OF LOUISIANA**

**GOVERNOR JOHN BEL EDWARDS’S RESPONSE
TO PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUNCTION
AND REQUEST FOR EXPEDITED CONSIDERATION**

NOW INTO COURT, through undersigned counsel, comes Defendant, **JOHN BEL EDWARDS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF LOUISIANA**, who joins in part Plaintiffs’ Request for Preliminary Injunction and Request for Expedited Consideration.

Governor Edwards joins in Plaintiffs’ request that this court “enjoin the maintenance of statutory limitations on who can vote absentee by mail and the reduction of the early voting period for the November and December 2020 elections,” to “extend the ability to vote by mail to voters with underlying conditions that make them acutely vulnerable to serious illness or death as a result of COVID 19,” and order that the “limited protections provided in the emergency plan that governed the July and August 2020 elections (July/August Emergency Plan)” be extended to the upcoming elections to preserve the minimum constitutional safeguards, which that plan provided.¹

¹ See Plaintiffs’ Request for Preliminary Injunction and Request for Expedited Consideration [Rec. Doc. 31].

I. The Governor's Authority over Election Planning

The Governor's statutory authority over the conducting of elections in the State of Louisiana is limited to the narrow grants of authority provided by La. R.S. 18:401.3. The Governor's authority under the emergency election plan statute is limited to three actions: 1) the initial declaration of a state of emergency, 2) issuing a concurrence in the Secretary of State's certification that the emergency will impair elections, and 3) approving, or disapproving, the emergency plan as developed by the Secretary of State. The Governor does not have the statutory authority to present or alter the election plan in current law or a proposed emergency election plan.

La. R.S. 18:401.3(B)(1) states that a gubernatorial declared disaster is the first prerequisite to the establishment of an emergency election plan. On March 11, 2020, Governor Edwards declared a state of public health emergency in response to the COVID-19 emergency.² This declaration of emergency has been continued into the present and will likely be renewed, in some form, for the foreseeable future.³ To initiate an emergency election plan, the Secretary of State must send a certification to the Governor, the Senate Committee on Senate and Governmental Affairs, and the House Committee on House and Governmental Affairs that this emergency will impair the election. On August 13, 2020, Secretary of State Kyle Ardoin submitted such a certification to the Governor, and on August 18, 2020, Governor Edwards certified that there was indeed an emergency for the November and December elections.⁴ On August 17, 2020, Secretary Ardoin presented to the Governor the emergency plan he developed to address the emergency.⁵

² Exhibit 1 - Proclamation Number 25 JBE 2020 (March 11, 2020).

³ Exhibit 2 - Proclamation Number 110 JBE 2020 (August 26, 2020).

⁴ Exhibit 3 - Proclamation Number 104 JBE 2020 (August 18, 2020).

⁵ Exhibit 4 - La. Secretary of State, "Emergency Election Plan for the November 3, 2020 and December 5, 2020 Elections in the State of Louisiana" (August 17, 2020).

While this was the first time the Governor saw the actual proposed election plan, it followed several days of conversations between Governor Edwards and Secretary Ardoin wherein the Secretary informed the Governor of the likely contents of the plan. In each of those conversations, the Governor informed Secretary Ardoin that the plan was wholly inadequate and in conflict with the recommendations of the Centers for Disease Control.⁶ On August 20, 2020, the Governor formally notified Secretary Ardoin by letter that he would not approve the emergency election as presented.⁷

II. The Governor Joins Plaintiffs' Request for an Election Plan that Meets the Minimum Constitutional Standard

The Governor's August 20, 2020 letter to Secretary Ardoin noted that he found the Secretary's August 17, 2020 Emergency Election Plan "particularly disappointing because the plan [the Secretary] submitted for the most recent elections in July and August did, at a minimum, protect the right to vote for those most at risk for complications from COVID-19 while also providing protections for fellow voters and poll workers."⁸ Further, he recognized that "the July/August plan, though constitutionally sufficient, did not go as far as most of the other states in protecting the right to vote during this pandemic."⁹ For example, Kentucky and Alabama, in response to this pandemic, developed plans to allow anyone concerned about contracting or spreading COVID-19 to request an absentee ballot.¹⁰ In fact, even under the Secretary's plan,

⁶ In the first conversation Secretary Ardoin had with the Governor about the emergency plan, it was clear that Secretary Ardoin had already decided what he was going to submit and that he already had an agreement with some legislative members that they would support his plan (and no other plan).

⁷ Exhibit 5 - Letter to Secretary of State Kyle Ardoin (August 20, 2020).

⁸ *Id.* at paragraph 2.

⁹ *Id.*

¹⁰ *Id.*

Louisiana would have been on a very small island of only six states that require something more than a fear of contracting COVID-19 to obtain an absentee ballot.¹¹

The emergency election plan submitted to the Governor, which he did not approve, as well as the current *status quo ante* without any mitigative measures to address the COVID-19 pandemic, would place severe undue burdens on the constitutional rights to vote for many voters in Louisiana. The plan as drafted is contrary to recommendations from the Centers for Disease Control, and it is contrary to logical common sense. The Governor asks this Court to protect the right to vote—and just as importantly, the health and safety of the people of Louisiana—by ordering the implementation of an election plan that sensibly addresses the current pandemic and safeguards constitutional rights.

III. The August 17, 2020 Proposed Emergency Election Plan Would Have Inadequately Protected Life and Unduly Burdened Citizens' Right to Vote

The July/August plan provided for numerous commonsense and expertly advised solutions that provided adequate mitigations to the risk of contracting COVID-19 in the context of voting. Many of these safeguards, such as the increased excuses for absentee by mail voting, were absent from the August 17, 2020 proposed plan. The following are not the only deficiencies in the Secretary's plan, but they are the most flagrant violations of clear guidance from the CDC.

- A. The proposed plan would have required anyone who has not tested positive for COVID-19 to vote in person, even if symptomatic or under quarantine or isolation.

This is contrary to CDC advice, as well as common sense.¹² The current CDC

¹¹ The other states are Indiana, Texas, Tennessee, South Carolina, and Mississippi.

¹² Exhibit 6 - Centers for Disease Control, "When You Can Be Around Others After You Had or Likely Had COVID-19," <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html> (August 16, 2020), last accessed September 1, 2020.

guidance advises that someone who has had close contact with someone with COVID-19 “should stay home for 14 days after their last exposure to that person.”¹³ If symptomatic, the individual should isolate for “10 days since symptoms first appeared, [experiencing] 24 hours with no fever without the use of fever-reducing medications, and [if] other symptoms of COVID-19 are improving.”¹⁴ While it is true that someone who is symptomatic could get tested and receive a positive test, they should not be required to go out to be tested just to be able to vote absentee. Such a requirement would force these individuals, likely infected but yet to test positive, to defy this guidance and vote in person. This will endanger them and likely others, potentially further spreading COVID-19.

- B. The language of the proposed plan vaguely states that “any registered voter testing positive for COVID-19 during or after early voting but before election day may . . . request an absentee ballot.” This language does not provide the clarity necessary for registrars of voters to determine who meets this standard. For example, would it apply to someone who received a positive test result *prior to* early voting, but is still within the quarantine window during the early voting period? Would it apply to someone who took a test before early voting but receives a positive test result during early voting? This could likely create inconsistencies between different parishes.

¹³ Exhibit 7 - Centers for Disease Control, “When to Quarantine – Stay home if you might have been exposed to COVID-19,” <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html>, (August 16, 2020), last accessed September 1, 2020.

¹⁴ Exhibit 6 - Centers for Disease Control, “When You Can Be Around Others After You Had or Likely Had COVID-19,” <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html> (August 16, 2020), last accessed September 1, 2020.

- C. The proposed plan made no accommodations for those at most risk from COVID-19. The official current recommendation from the CDC for those with underlying health conditions is to “limit your interactions with other people as much as possible and to take precautions to prevent getting COVID-19 when you do interact with others.”¹⁵ Without any mitigative accommodations, high-risk individuals would be forced to make an impossible choice—to vote, and potentially risk severe illness or death, or to be disenfranchised. To force such a choice on a voter, when reasonable measures would be relatively easy for the state to facilitate, is itself an impermissible burden on citizens’ right to vote.
- D. The proposed plan gave no consideration to those who are caring for individuals who are sick or at risk. The CDC guidance specifically provides that caretakers should also protect themselves from unnecessary exposure.¹⁶

Simply put, Secretary Ardoin’s plan for the November and December elections does not adequately protect the constitutional right to vote. In the event it is proposed to this Court as a remedy, the Governor requests that the Court determine, as he has, that it is woefully inadequate.

¹⁵ Exhibit 7 - Centers for Disease Control, “People with Certain Medical Conditions,” <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (August 14, 2020), last accessed September 1, 2020.

¹⁶ Exhibit 8 - Centers for Disease Control, “Caring for Someone Sick at Home,” <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/care-for-someone.html> (May 8, 2020), last accessed September 1, 2020.

IV. Enforcing the Current Status Quo Without Reasonable Mitigation Measures Would Inadequately Protect Life and Unduly Burden Citizens' Right to Vote

The Louisiana Election Code, La. R.S. 18:1, *et seq.*, along with its emergency provisions, was simply not crafted with a contagious pandemic in mind. Indeed, in testimony before the House and Senate committees, Secretary Ardoin took great pains to emphasize this point. The Election Code lacks constitutionally sufficient safeguards to protect the lives and wellbeing of citizens in the face of this historic, and horrific, pandemic. However, by providing for the development of an emergency election plan, the Louisiana Legislature did recognize that the current law might be inadequate in times of an emergency. Surely, the COVID-19 pandemic meets any standard set to show that the election procedures in current law are just not good enough. The provisions for absentee by mail voting provide for exceptions for the convenience of voters, which could reasonably be extended to fit the circumstances of this pandemic without any great expense or burden to the state. Further, such extension would in no way undermine the security of the election.

For example, La. R.S. 18:1303(B) lists several types of persons who may vote absentee by mail if they meet the standard requirements to vote in person. These are excuses that a voter may check on their absentee ballot that would qualify their ballot to be counted in an election. Notably, this includes “a person who is or who expects to be temporarily outside the territorial limits of the state or absent from the parish in which he is qualified to vote during the early voting period and on election day.”¹⁷ Using this provision, a duck hunter residing in East Baton Rouge Parish could cross the Mississippi River to his hunting camp in West Baton Rouge Parish, leaving him absent (though not far) from his parish of residence on early voting days and election day. He would then be able to vote, by mail, absentee. However, without intervention by this court, someone with

¹⁷ La. R.S. 18:1303(B)(4).

COVID-19 receives no such accommodation. Neither does the person who suffers from diabetes or hypertension, conditions recognized by the CDC that increase the risk of significant illness due to COVID-19. Neither does the person who has been exposed to COVID-19 or is symptomatic, but who has yet to obtain a positive test. The accommodation afforded to the duck hunter is also not afforded to the person who is a caretaker for elderly parents or a disabled child. The July/August election plan did afford the same accommodation to these voters, and it should, at the very minimum, be in place for the presidential election.

As if to provide the best example of the absurdity of the current regime in the context of the COVID-19 threat, the Attorney General, by his own volition now a party to this case, offered an opinion just this week on this very issue.¹⁸ This astounding opinion, apparently in response to a question from the Tangipahoa Registrar of Voters, concludes that, under La. R.S. 18:1303(l) “a voter who is diagnosed with COVID-19 or is subject to a quarantine order while awaiting a COVID-19 diagnosis would qualify to vote absentee so long as a medical professional certifies that the voter is *disabled* (emphasis added).” This opinion by itself demonstrates the constitutional inadequacy of the election plan in current law. First, the Attorney General suggests that a voter would have to pay to go to a doctor and get a doctor’s note, just to safely exercise his right to vote. No such proof of eligibility to vote absentee is required of the duck hunter, but it would be required for someone critically ill with COVID-19. This is the very definition of disparate treatment. Secondly, the Attorney General is essentially requiring that the voter – and likely the medical professional too – commit fraud. No reasonable medical professional would declare someone to be disabled just so the patient could vote absentee. That the Attorney General would have to resort

¹⁸ Exhibit 9 - Opinion 20-0104.

to such legal gymnastics just to develop a possible way for a symptomatic person to avoid standing in a lengthy line on election day demonstrates the need for an election plan that adequately protects the people of Louisiana and their right to vote.

The public interest would be best served by granting the Plaintiffs' request to order the implementation of commonsense mitigative measures in the state's upcoming elections, as provided for by the previous July/August Emergency election plan.

CONCLUSION

For the foregoing reasons, and based upon the evidence that will be presented at the hearing on September 8, 2020 and September 9, 2020, the Governor prays that the Court partially grant the relief sought by the Plaintiffs against the Secretary of State, and order him to put in place the measures contained in the July/August 2020 election plan for the November 3, 2020 and December 5, 2020 elections.

Respectfully Submitted:

s/Matthew F. Block

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***Attorneys for Defendant, John Bel Edwards, in his
official capacity as Governor of Louisiana***

CERTIFICATE

I hereby certify that a copy of the above and foregoing pleading has been filed this 2nd day of September, 2020 with the Clerk using the Court's CM/ECF system, which will provide notice to all counsel of record.

s/Matthew F. Block
MATTHEW F. BLOCK