

KEITH KISHBAUGH

\* 15<sup>TH</sup> JUDICIAL DISTRICT COURT

\*

VERSUS

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THE CITY OF LAFAYETTE  
GOVERNMENT, LAFAYETTE PARISH  
GOVERNMENT, AND LAFAYETTE  
CITY-PARISH CONSOLIDATED  
GOVERNMENT

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\* DOCKET NO.: 20192137 – A

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\* LAFAYETTE PARISH, LOUISIANA

**EXCEPTION OF PEREMPTION,  
AND IN THE ALTERNATIVE, EXCEPTION OF PRESCRIPTION**

NOW INTO COURT, through undersigned counsel, come LAFAYETTE CITY-PARISH CONSOLIDATED GOVERNMENT (described in Plaintiff’s Petition as “The Former Lafayette City-Parish Consolidated Government”), the CITY OF LAFAYETTE (described in Plaintiff’s Petition as “The City of Lafayette Government”), and the PARISH OF LAFAYETTE (described in Plaintiff’s Petition as “Lafayette Parish Government”), who except to the Petition, as amended, of Plaintiff, KEITH KISHBAUGH, and to the Petition of Intervention of Intervenor, KYLE ARDOIN, in his capacity as Secretary of State, on the grounds that their purported challenge to Lafayette City-Parish Council Ordinance O-042-2019, and the relief requested by Plaintiff and Intervenor, are collateral attacks upon the validly and legally held December 8, 2018 election which ratified amendments to the Lafayette City-Parish Consolidated Government Home Rule Charter, and as such, are barred by peremption and/or prescription for reasons more fully discussed in the attached memorandum in support.

WHEREFORE, considering the foregoing, LAFAYETTE CITY-PARISH CONSOLIDATED GOVERNMENT, the CITY OF LAFAYETTE, and the PARISH OF LAFAYETTE pray that their Exception of Peremption, or in the Alternative, Exception of Prescription be granted, and all claims of Plaintiff, KEITH KISHBAUGH, and of Plaintiff-in-Intervention, KYLE ARDOIN, in his official capacity as Secretary of State of the State of Louisiana, be dismissed with prejudice.

*{signature and certificate of service on following page}*


Respectfully submitted,

PAUL D. ESCOTT (18886)  
LAFAYETTE CITY-PARISH  
ATTORNEY

and

BECKER & HEBERT, LLC


By:

  
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PARISH OF LAFAYETTE  
GOVERNMENT, AND FORMER  
LAFAYETTE CITY-PARISH  
CONSOLIDATED GOVERNMENT

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been faxed, electronically mailed, and/or mailed via United States mail, properly addressed and postage prepaid, to all counsel of record and/or unrepresented parties in these proceedings this 18th day of April, 2019.

  
MICHAEL D. HEBERT

KEITH KISHBAUGH

VERSUS

THE CITY OF LAFAYETTE  
GOVERNMENT, LAFAYETTE PARISH  
GOVERNMENT, AND LAFAYETTE  
CITY-PARISH CONSOLIDATED  
GOVERNMENT

\* 15<sup>TH</sup> JUDICIAL DISTRICT COURT  
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\* DOCKET NO.: 20192137 – A  
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\* LAFAYETTE PARISH, LOUISIANA

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**MEMORANDUM IN SUPPORT OF EXCEPTION OF PEREMPTION,  
AND IN THE ALTERNATIVE, EXCEPTION OF PRESCRIPTION**

NOW INTO COURT, through undersigned counsel, come Defendants, LAFAYETTE CITY-PARISH CONSOLIDATED GOVERNMENT (described in Plaintiff’s Petition as “The Former Lafayette City-Parish Consolidated Government”), the CITY OF LAFAYETTE (described in Plaintiff’s Petition as “The City of Lafayette Government”), and the PARISH OF LAFAYETTE (described in Plaintiff’s Petition as “Lafayette Parish Government”), who submit this memorandum in support of their Exception of Peremption, and in the alternative, Exception of Prescription to the Petition, as amended, of Plaintiff, KEITH KISHBAUGH, and to the Petition of Intervention of Intervenor, KYLE ARDOIN, in his capacity as Secretary of State, on the grounds that their purported challenge to Lafayette City-Parish Council Ordinance O-042-2019, and the relief requested by Plaintiff and Intervenor, are collateral attacks upon the validly and legally held December 8, 2018 election which ratified amendments to the Lafayette City-Parish Consolidated Government Home Rule Charter (the “Amended Charter”), and as such, are barred by peremption and/or prescription.

This suit and the Intervention of the Louisiana Secretary of State clearly seek to address an irregularity in the December 8, 2018 election. The essential allegations of Plaintiff’s Petition and the Secretary of State’s Intervention are that there is a defect in the Amended Charter adopted by the voters on December 8, 2018, and that a new election is required to remedy the defect. This is clearly an impermissible collateral attack on the December 8, 2018 election, which is time barred by La. R.S. 18:1405(D).

La. R.S. 18:1405(D) specifically provides that an action contesting an election submitting a proposition to the voters must be instituted not later than 4:30 P.M. of the thirtieth day after the official promulgation of the results of the election. The election to ratify the Amended Charter that contains the Lafayette City Council and Lafayette Parish Council districts at issue herein was held on December 8, 2018, and the results of that election were promulgated on December

18, 2018. Suit herein was not filed until April 5, 2019, more than thirty days after promulgation of the election results.

A similar situation involving these very defendants was faced by the Third Circuit in *Hebert v. Lafayette City Council*, 96-1341 (La. App. 3<sup>rd</sup> Cir. 4/9/97), 692 So.2d 750. In that case, long after the time period of La. R.S. 18:1405(D) had run on the election adopting the original Lafayette City-Parish Consolidated Government Home Rule Charter, a suit was filed challenging the ability of the Lafayette Parish Council to call the election for the new City-Parish Council seats created by the adopted charter. In spite of the fact that the plaintiff in *Hebert* attempted to characterize his suit as a challenge to the authority of the Lafayette Parish Council and not as a challenge to the election adopting the subject charter, the Third Circuit had no trouble characterizing the true nature of the plaintiff's complaint as an election challenge. As such, the challenge was preempted by La. R.S. 18:1405.

In so ruling, the Third Circuit recognized the well-established principle that “time is of the essence in election cases.”<sup>1</sup> The court further noted that “[t]here is a need for finality in these matters, which the legislature has recognized by its decision to strictly limit the time delays provided for in election contest cases.”<sup>2</sup> As in *Hebert*, the public's need for stability in its government far outweighs Kishbaugh's and the Secretary of State's efforts to litigate this matter after the preemptive period provided in La. R.S. 18:1405(D) has expired. In the words of the Third Circuit, “we shall not frustrate the public will...”<sup>3</sup>

*Hebert* makes it clear that the limitations period of La. R.S. 18:1405(D) is not limited to direct attacks upon an election, but includes collateral attacks as well. The relief sought by the Plaintiff and Intervenor herein would implicate the finality of the December 8, 2018 election. The claim for that relief, regardless of how it is styled, constitutes an election challenge and is preempted.

Any argument that the present action is not a challenge to the December 8, 2018 election swiftly fails when one considers the result of granting any of the relief sought by Kishbaugh and the Secretary of State. Under similar facts, the Supreme Court of Alaska in *Braun v. Borough*

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<sup>1</sup> *Hebert v. Lafayette City Council*, 96-1341 (La. App. 3<sup>rd</sup> Cir. 4/9/97), 692 So. 2d 750, 753, writ denied, 97-1265 (La. 6/13/97), 695 So. 2d 978, and writ denied, 97-1075 (La. 6/13/97), 695 So. 2d 983; see also *State ex rel. Vullo v. Plaquemines Parish Police Jury*, 238 La. 328, 115 So. 2d 368 (1959); and *Small v. Desselle*, 520 So.2d 1167, 1169 (La. App. 3<sup>rd</sup> Cir.1987).

<sup>2</sup> *Id.* (citing La. R.S. 18:1405).

<sup>3</sup> *Id.*

held that this exact type of determination turns on the remedy sought by the cause of action.<sup>4</sup> There, a citizen challenged the constitutionality of a reapportionment plan ratified by the voters in one action, and further challenged the results of the election in another action. Although the plaintiff claimed that his lawsuit challenging the constitutionality of the reapportionment plan was “ultimately a claim for judicial review of ... the reapportionment plan,” the Court concluded that the remedy he actually sought was “a judgment prohibiting the use of the reapportionment plan.”<sup>5</sup> As a result of its conclusion, the Court held:

The purpose of an election contest is ‘to ascertain whether the alleged impropriety in fact establishes doubt as to the validity of the election result.’ For this reason, ‘[w]hether a cause of action should be deemed an election contest [ ] turns on the remedy sought.’ If the plaintiff’s proposed remedy ‘would defeat the public interest in the stability and finality of election results, it is appropriate to deem the cause of action an election contest and to require compliance with the procedures for such contests.’ A cause of action is deemed not to be an election challenge only if ‘the remedy will not affect the stability and finality of the election result.’<sup>6</sup>

Citing to *Braun*, the Supreme Court of Wyoming in *Rock v. Lankford*<sup>7</sup> applied the same reasoning utilized by the Third Circuit Court of Appeal in *Hebert*. That case concerned two elections occurring a year apart. In the first, the voters ratified a proposition increasing the number of county commission seats from three to five. Before the candidates were qualified, a second election was held whereby the voters ratified a proposition that decreased the seats back to three. Thus, when the time for qualification came, the clerk of court called an election to fill the one open seat on the now-three-person commission. The appellant voters prayed for declaratory relief and a writ of mandamus challenging the implementation of the second proposition and asking the court to “declare that three commission seats ... had to be filled in the 2012 election” in accordance with the first election, rather than filling only one commission seat.<sup>8</sup> Thus, this request, if granted, would undo the will of the voters to decrease the size of the commission. Guided by *Braun*, the Court decided that, because “a lawsuit is an election contest if it seeks a remedy which would ‘defeat the public interest in the stability and finality of election results,’” the appellants’ requested relief would “clearly affect” the election.<sup>9</sup> “The outcome Appellants seek could only result from a declaration that the 2012 special election was void, which is the very essence of an election contest.”<sup>10</sup>

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<sup>4</sup> 193 P.3d 719 (Alaska 2008).

<sup>5</sup> *Id.* at 732.

<sup>6</sup> *Id.* at 731-732.

<sup>7</sup> 301 P.3d 1075 (Wyo. 2013).

<sup>8</sup> *Id.* at 1078-79.

<sup>9</sup> *Id.* at 1084.

<sup>10</sup> *Id.*

Finally, the Supreme Court of Ohio has likewise utilized a similar analysis to determine whether a cause of action is an election challenge by another name. Appellants in *State ex rel. Mackey v. Blackwell* sought a writ of mandamus to prevent a purported disenfranchisement of voters caused by the Ohio Secretary of State's refusal to count certain provisional votes cast in the November 2, 2004 election.<sup>11</sup> The appellants did not assert a direct challenge to the November 2, 2004 election, but instead, they sought an order prohibiting the invalidation of certain provisional ballots cast in that election. The Court affirmed the dismissal of appellants' claims, declaring that the true classification of the mandamus claim was as an election challenge, regardless of the form of the request. Despite appellants' contention that "it was never their objective to change the outcome of any election," the Court found that their true objective would affect certain ballots cast in the November 2, 2004 election.<sup>12</sup> "Moreover, insofar as appellants sought to change any of the November 2, 2004 election results, '[a]n election contest is the specific remedy provided by statute for the correction of all errors, frauds and mistakes which may occur in an election.'"<sup>13</sup>

Faced with strikingly similar circumstances, this Court should compare the clearly expressed will of the Lafayette Parish voters who ratified the Amended Charter on December 8, 2018, with any of the remedies now sought by Kishbaugh and the Secretary of State.

The proposition presented to the voters of Lafayette Parish on December 8, 2018 (the "Proposition") stated as follows (emphasis added):

Shall the Lafayette City-Parish Consolidated Government Home Rule Charter be amended to: ***abolish City-Parish Council, create the Lafayette City Council and Lafayette Parish Council, as governing authority for Lafayette City-Parish Consolidated Government; establish as governing authority, City Council for City of Lafayette and Parish Council for Parish of Lafayette***; apply term limits of current City-Parish Council members to new City Council and Parish Council; abolish Lafayette Public Utilities Authority, establish Lafayette City Council as governing authority of Utilities Department and Lafayette Public Power Authority; establish any proposal for management of substantial part of utility system be approved by vote of electors of City of Lafayette at election called for that purpose by two-thirds vote of Lafayette City Council; grant eligibility to acting Mayor-President or Council member for election to that position; abolish Lafayette City-Parish Planning and Zoning Commission, establish City Planning and Zoning Commission and Parish Planning and Zoning Commission; change method of nomination of prospective appointees to Lafayette Municipal Civil Service Board; change method of counting required percentages of voters for initiative or referendum petition and commencement of recall process; change method of counting number of votes necessary to amend the Lafayette City-Parish Consolidated Government Home Rule Charter?

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<sup>11</sup> *State ex rel. Mackey v. Blackwell*, 106 Ohio St.3d 261, 262; 834 N.E.2d 346, 348 (2005).

<sup>12</sup> *Id.* at 263-264.

<sup>13</sup> *Id.* at 264.

The Proposition asked the voters of Lafayette Parish whether the Home Rule Charter should be amended to “abolish the City-Parish Council, create the Lafayette City Council and Lafayette Parish Council...” The voters answered “Yes.”

This court should be guided by the will of the voters of Lafayette Parish. “[I]t is the understanding that can be reasonably ascribed to that voting population as a whole that controls.”<sup>14</sup> While Louisiana courts have had limited opportunities to rule on proper interpretation of election propositions for amendments to home rule charters, the Louisiana Supreme Court has had numerous occasions to rule on the analogous issue of the proper interpretation of election propositions to amend the Louisiana Constitution. In such cases, the Louisiana Supreme Court has consistently instructed that “effect should be given to the purpose indicated by a fair interpretation of the language employed, and the construction which effectuates, rather than that which destroys a plain intent or purpose of the constitutional provision.”<sup>15</sup> There is no logical reason, in public policy or otherwise, to interpret a proposition to amend a home rule charter any differently.

Viewed from this perspective, it becomes all the more apparent that Plaintiff’s and Intervenor’s petitions are election challenges. There is no remedy requested by either Plaintiff or Intervenor that does not place the results of the preempted December 8, 2018 election at risk. In some cases, as will be shown, several of the requested remedies of Plaintiff and Intervenor are actually direct attacks upon the December 8, 2018 election rather than a collateral attack.

In the instant suit, Kishbaugh prays that “there be judgment herein declaring that the proposed Ordinance, #O-042-2019....be declared illegal and that passage of such and enforcement of such be restrained as illegal.”

If the Court were to grant the relief sought by Kishbaugh, the Amended Charter ratified on December 8, 2018 would be without effect, and the obvious intent of the voters would be vitiated.

Similarly, the Secretary of State’s first remedy sought in the instant suit is that “Ordinance No. O-042-2019 of the Lafayette City-Parish Council be declared null and void and without legal effect.” Likewise, the relief sought vitiates the implementation of the December 8, 2018 election.

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<sup>14</sup> *Radiofone, Inc. v. City of New Orleans*, 93-0962 (La. 1/14/94), 630 So.2d 694, 698, and authorities cited therein.

<sup>15</sup> *Bd. of Comm'rs of Orleans Levee Dist. v. Dep't of Nat. Res.*, 496 So. 2d 281, 298 (La. 1986); *In re Office of Chief Justice, Louisiana Supreme Court*, 2012-1342 (La. 10/16/12), 101 So.3d 9, 15.

The Secretary of State's second remedy sought is for "the infirm provisions of the amended charter and/or the charter amendment in its entirety be declared null and void and without legal effect." This prayer for relief directly asserts an election challenge.

The Secretary of State's third remedy sought is for preliminary injunctive relief "enjoining the election of members of the City Council of Lafayette and the Parish Council of the Parish of Lafayette pursuant to the amended charter of the Lafayette City-Parish Consolidated Government ratified December 8, 2018 and promulgated December 18, 2018." Again, this prayer for relief directly asserts an election challenge.

The Secretary of State's fourth remedy sought is for preliminary injunctive relief "enjoining the election of members of the City Council of Lafayette and the Parish Council of the Parish of Lafayette pursuant to No. O-042-2019 of the Lafayette City-Parish Council." As in his first prayer for relief, the Secretary of State again asks this Honorable Court to vitiate the intent of the voters and nullify the implementation of the December 8, 2018 election.

Finally, in his fifth remedy sought, the Secretary of State prays that "the court grant permanent injunctions in the form and substance of the preliminary injunctions..." If granted, this relief would clearly result in the invalidation of the will of the voters to create and elect a new Lafayette City Council and a new Lafayette Parish Council.

Using the controlling guidance of *Hebert* and the logic and reasoning of the *Braun*, *Rock*, and *Mackey* courts, this Court should look to the remedies sought by Kishbaugh and the Secretary of State and analyze the instant action for what it is. If *any* of the relief sought is granted, the stability and finality of the December 8, 2018 election would be destroyed.

Louisiana case law is unclear whether the periods of limitations of La. R.S. 18:1405 are peremptive or prescriptive.<sup>16</sup> For this reason, out of an abundance of caution, Defendants simultaneously assert both an Exception of Peremption and an Exception of Prescription in the alternative. In this case, the ultimate outcome is the same – the thinly-veiled challenges of Plaintiff and Intervenor to the December 8, 2018 election are time-barred.

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<sup>16</sup> See, e.g., *Hebert* supra, 96-1341 (La. App. 3rd Cir. 4/9/97), 692 So.2d 750, 751 (indicating that the period of La. 18:1405(D) is peremptive, but also mentioning prescription); *In re Declaratory Judgment for City of Harahan*, 01-928 (La. App. 5th Cir. 1/15/02), 807 So.2d 997, 999 (indicating that the period of La. R.S. 18:1405(D) is prescriptive); *City of Donaldsonville v. State*, 1999-1582 (La. App. 1st Cir. 6/23/00), 764 So.2d 339, 344 (indicating that the period of La. R.S. 18:1405(D) is prescriptive); *Jackson v. Myer*, 2010-2108 (La. App. 1st Cir. 11/19/10) 52 So.3d 271, 273 (indicating that the period of La. R.S. 18:1405(A) is peremptive); *Hunter v. Jindal*, 45-130 (La. App. 2nd Cir. 10/13/09), 20 So.3d 592, 596 (indicating that the time period of La. R.S. 18:1405(F) is peremptive).



Respectfully submitted,

PAUL D. ESCOTT (18886)  
LAFAYETTE CITY-PARISH  
ATTORNEY

and

BECKER & HEBERT, LLC


By: 

MICHAEL D. HEBERT (17297)  
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LAFAYETTE CITY-PARISH  
CONSOLIDATED GOVERNMENT,  
CITY OF LAFAYETTE, and PARISH  
OF LAFAYETTE

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been faxed, electronically mailed, and/or mailed via United States mail, properly addressed and postage prepaid, to all counsel of record and/or unrepresented parties in these proceedings this 18th day of April, 2019.

  
\_\_\_\_\_  
MICHAEL D. HEBERT

KEITH KISHBAUGH

\* 15<sup>TH</sup> JUDICIAL DISTRICT COURT

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VERSUS

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\*

THE CITY OF LAFAYETTE  
GOVERNMENT, LAFAYETTE PARISH  
GOVERNMENT, AND LAFAYETTE  
CITY-PARISH CONSOLIDATED  
GOVERNMENT

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\* LAFAYETTE PARISH, LOUISIANA

**ORDER**

Considering the Exception of Peremption, and in the Alternative, Exception of Prescription filed on behalf of LAFAYETTE CITY-PARISH CONSOLIDATED GOVERNMENT, the CITY OF LAFAYETTE, and the PARISH OF LAFAYETTE:

IT IS ORDERED that KEITH KISHBAUGH and KYLE ARDOIN appear and show cause on the 29<sup>th</sup> day of April, 2019, at 10:00 a.m. why the Exception of Peremption, and in the Alternative, Exception of Prescription filed on behalf of LAFAYETTE CITY-PARISH CONSOLIDATED GOVERNMENT, the CITY OF LAFAYETTE, and the PARISH OF LAFAYETTE should not be granted, and the claims of KEITH KISHBAUGH and KYLE ARDOIN be dismissed with prejudice at their cost.

THUS DONE AND SIGNED in \_\_\_\_\_, Louisiana, on this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

\_\_\_\_\_  
HON. JOHN D. TRAHAN  
15<sup>TH</sup> JUDICIAL DISTRICT JUDGE

*{service instructions on following page}*

**PLEASE SERVE:**

**KEITH KISHBAUGH**

*through his counsel of record*

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**KYLE ARDOIN**

Louisiana Secretary of State

*through his counsel of record*

Carey Tom Jones

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