IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA—MONROE DIVISION

PHILLIP CALLAIS, LLOYD PRICE, BRUCE ODELL, ELIZABETH ERSOFF, ALBERT CAISSIE, DANIEL WEIR, JOYCE LACOUR, CANDY CARROLL PEAVY, TANYA WHITNEY, MIKE JOHNSON, GROVER JOSEPH REES, ROLFE MCCOLLISTER, *Plaintiffs,* v. NANCY LANDRY, in her official capacity as Secretary of State of Louisiana, *Defendant.*	Case No. 3:24-cv-00122-DCJ-CES-RRS *District Judge David C. Joseph* *Circuit Judge Carl E. Stewart* *District Judge Robert R. Summerhays* *Magistrate Judge Kayla D. McClusky*

THE STATE OF LOUISIANA'S RESPONSE TO *ROBINSON* MOVANTS' MOTION TO RECONSIDER ORDER DENYING INTERVENTION

The State of Louisiana opposes the *Robinson* Movants' Motion to Reconsider Order Denying Intervention. *See* ECF No. 103. The State, however, does not oppose the *Robinson* Movants' request to expedite the briefing on their Motion for Reconsideration, *see ECF* No. 103-2, and therefore submits this opposition in accordance with the *Robinson* Movants' requested briefing schedule.

"While the court has broad discretion to decide a Rule 54(b) motion to reconsider and the standard imposed is less exacting, courts consider factors that inform the Rule 59 and Rule 60 analysis." *Adams v. United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. of the United States & Canada, Local 198*, 495 F. Supp. 3d 392, 395 (M.D. La. 2020). Those factors include whether (1) "the judgment is based upon a manifest error of fact or law"; (2) "newly discovered or previously unavailable

evidence exists"; (3) "the initial decision was manifestly unjust"; (4) "counsel engaged in serious misconduct"; and (5) "an intervening change in law alters the appropriate outcome." *Id.*

Because "a motion for reconsideration is an extraordinary remedy [that] should be used sparingly in the interest of finality and conservation of judicial resources[,] . . . 'rulings should only be reconsidered where the moving party has presented substantial reasons for reconsideration.'" *Id.* at 395 (quoting *Broyles v. Cantor Fitzgerald & Co.*, No. 10-854, 2015 U.S. Dist. LEXIS 13803, at *7 (M.D. La. Feb. 5, 2015)).

The *Robinson* Movants have presented no substantial reasons for reconsideration here. In their Motion for Reconsideration, the *Robinson* Movants ostensibly request relief under Rule 24(a)(2) (intervention by right) and Rule 24(b) (permissive intervention), but they only brief Rule 24(a)(2). *See generally* ECF No. 103-1. The *Robinson* Movants' failure to raise any new arguments under Rule 24(b) warrants automatic denial of their request for permissive intervention. *See Adams*, 495 F. Supp. 3d at 396 ("The court should deny a motion for reconsideration when the movant rehashes legal theories and arguments that were raised or could have been raised before the entry of the judgment.").

Under Rule 24(a)(2), a party is entitled to intervene if (1) the "application for intervention [is] timely;" (2) the applicant has "an interest relating to the property or transaction which is the subject of the action;" (3) the applicant is "situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest;" and (4) the applicant's interests are "inadequately represented by the existing parties to the suit." *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 305 (5th Cir. 2022) (citation omitted). Because the Court previously ruled against the *Robinson*

Movants on the fourth factor, *see* ECF No. 79 at 4–7, the *Robinson* Movants now ask the Court to reconsider whether the State can adequately represent the *Robinson* Movants' interests, *see* ECF No. 103 at 8.

The Court should deny their Motion for Reconsideration because the State adequately represents the interests of the *Robinson* Movants at the liability stage. As this Court explained when it denied the *Robinson* Movants' Motion to Intervene, the State has a constitutional obligation to defend its laws. *See* ECF No. 79 at 5. And the Court correctly found that the *Robinson* Movants and the State have the "same ultimate objective." *See id.* at 4–5 (citing *Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014)).

Because the Court found that the *Robinson* Movants and the State share the "same ultimate objective," it ruled that the *Robinson* Movants "must establish adversity of interest, collusion, or nonfeasance on the part of the existing party." *Id.* at 4–5 (citation omitted) (internal quotation marks omitted). But the Court explained that "[d]ifferences of opinion regarding an existing party's litigation strategy or tactics used in pursuit thereof, without more, do not rise to an adversity of interest." *Id.* at 5 (citing *Lamar v. Lynaugh*, No. 92-2848, 1993 U.S. App. LEXIS 38355, at *2 n.4 (5th Cir. Dec. 20, 1993)); *accord SEC v. LBRY, Inc.*, 26 F.4th 96, 99–100 (1st Cir. 2022) ("A proposed intervenor's desire to present an additional argument or a variation on an argument does not establish inadequate representation.").

The *Robinson* Movants do not argue that the State has not defended SB 8; instead they take issue with *how* the State is choosing to defend it.[1] *See, e.g.*, ECF No. 103-1 at

[1] It must be noted that the State's defense strategy is not yet finalized in this fast-moving litigation and, to the extent it is finalized, counsel for the State is under no duty—in fact quite the opposite—to share such strategy with the proposed intervenors or the Court. Therefore, nothing in this brief should be construed as a waiver of any defense, affirmative or otherwise, with respect to Plaintiffs' claims.

5 (arguing that the Court was wrong in its assumption that the State would adequately represent the *Robinson* Movants based on the State's Response to Plaintiffs' preliminary injunction motion). The *Robinson* Movants allege the State "begrudgingly," "nominally," and "half-hearted[ly]" defends SB 8. *Id.* at 5, 11. In essence, the *Robinson* Movants are not satisfied with the State's argument that the motivations behind SB 8 satisfy strict scrutiny. They contend the State should have argued race was not the predominant factor in the passage of SB 8. *See* ECF No. 103-1 at 11.

That concern, however, amounts to nothing more than a difference in litigation strategy. There is no evidence that the State has abandoned its duty to defend SB 8 or colluded with Plaintiffs or committed nonfeasance. There is no divergence between the *Robinson* Movants' and the State's interest in defending SB 8. Regardless of whether the Court rules that race did not predominate in the implementation of SB 8 or that the map survives strict scrutiny review, the result is the same—SB 8 will be upheld. The State must be allowed to try its case as it sees fit, irrespective of the *Robinson* Movants' opinions of its strategy, motivations, or length of its response. *See* ECF No. 79 at 5 (citing *Lamar*, 1993 U.S. App. LEXIS 38355, at *2 n.4).

The *Robinson* Movants' argument that the Court could conclude that race did not predominate in any proposed remedial map is a red herring. *See* ECF No. 103-1 at 9–11. This case is about whether SB 8 passes constitutional muster, and both the State and the *Robinson* Movants argue that it does.

Moreover, the *Robinson* Movants' protestations about Dr. Hefner strain credulity. *See* ECF No. 103-1 at 13 (insinuating that the State is somehow protecting Dr. Hefner at the expense of the State's defense just because he served as an expert for the State in

Robinson). What the *Robinson* Movants fail to explain is how little the State relied on Dr. Hefner in the *Robinson* litigation. The State cited Dr. Hefner a total of five times in its opposition to a preliminary injunction request. *See generally Robinson v. Ardoin*, No. 3:22-cv-211 (M.D. La. Apr. 29, 2022), ECF No. 108.

What's more, the State did not "call Hefner as a witness at the [preliminary injunction] hearing"; his "report[] w[as] not offered as substantive evidence at the hearing"; and because of that, the court concluded that his report was "hearsay, and there was no opportunity for cross-examination," so "the Court did not consider" it. *Robinson*, No. 3:22-cv-211 (M.D. La. June 6, 2022), ECF No. 173 at 79. Indeed, the State never utilized Dr. Hefner for the remainder of the *Robinson* litigation. His involvement began and ended with a handful of citations to his expert report in preliminary injunction briefing. Put simply, there were numerous experts upon which the State extensively relied in *Robinson*—from the preliminary injunction stage, to the remedial phase, to preparing for a trial on the merits—but Dr. Hefner was not one of them.

Truly, the interests of the State and the interests of the *Robinson* Movants remain aligned: both parties want this Court to uphold SB 8. *See generally* ECF No. 86. Nothing has changed since the Court issued its order denying the *Robinson* Movants' intervention at the merits stage. *See generally* ECF No. 79. The State has defended SB 8 and remains committed to fulfilling its constitutional duty to defend the law. Therefore, the Court should deny the *Robinson* Movants' Motion for Reconsideration.

Furthermore, the *Robinson* Movants' request to participate "fully in the litigation as amici" appears to be another way of saying they would like to be amici in name only. They request permission to put on a case at trial, participate in fact and expert discovery,

take depositions, and receive copies of all documents exchanged by the parties. *See* ECF No. 103-1 at 17.

"While there is no specific rule or statute addressing when a district court may grant leave to a non-party to file an *amicus* brief, district courts often look to Rule 29 of the Federal Rules of Appellate Procedure." *Boudreaux v. Sch. Bd. of St. Mary Par.*, No. 6:65-CV-11351, 2023 U.S. Dist. LEXIS 129325, at *7 (W.D. La. July 24, 2023). Rule 29 provides that a non-governmental amicus "may file a brief only by leave of court" or party consent. Fed. R. App. P. 29(a). "In deciding whether to grant leave to file an *amicus* brief under Rule 29, courts consider factors such as whether the proposed *amicus* has a unique interest in the case, and whether the proposed *amicus* brief is 'timely and useful or otherwise necessary to the administration of justice.'" *Boudreaux*, 2023 U.S. Dist. LEXIS 129325, at *8 (quoting *United States ex rel. Gudur v. Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 927 (S.D. Tex. 2007)). Courts have "cautioned that 'a district court lacking joint consent of the parties should go slow in accepting, and even slower in inviting, an *amicus* brief unless . . . the *amicus* has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance.'" *Id.* at *8–9 (quoting *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970)).

Since the 1960s, courts have sometimes allowed the *federal government* to participate as a "litigating amicus" in school desegregation cases. *See Boudreaux*, 2023 U.S. Dist. LEXIS 129325, at *10 n.31 (collecting cases). But the State is aware of no case in which a court has ever allowed a *private party* to fulfill that role when (a) not invited by the court, (b) opposed by the other parties, and (c) the party lacked professional expertise on the subject matter of the case.

Take, for example, the case that the *Robinson* Movants cite, *Morales v. Turman*, 820 F.2d 728 (5th Cir. 1987), for the contention that such amici involvement would be appropriate here. They are mistaken. First, amici there were *invited* to participate by a party to the litigation because of their unique expertise. *See id.* at 729. Second, *Morales* amici's motions for leave to participate as amici were not opposed by any party. *See id.* at 730. Third, *Morales* amici presented expertise that was both relevant and helpful. The case involved conditions in juvenile facilities, and amici were experts in mental health who wanted "to contribute the aid and expertise of their organizations to the Court's deliberations." *Id.* The *Robinson* Movants are not uniquely qualified to educate the Court on the constitutionality of SB 8. The State did not ask for their expertise in this case. And their intervention is opposed by both Plaintiffs and the State.

The *Robinson* Movants have not shown that they qualify to join this case as "litigating" amici because they do not have subject-matter "expertise" that would give the Court special insight into whether SB 8 complies with the Equal Protection clause that no other party can provide. *See Morales*, 820 F.2d at 730. Quite the opposite—they are ordinary citizens and will hire experts to provide subject-matter expertise just like the State. The State has not and will not oppose any amicus briefs the *Robinson* Movants may want to file in this case. But beyond that, their participation will duplicate the efforts of current parties.

At bottom, the *Robinson* Movants' request is an attempted workaround of this Court's previous holding without explaining why the Court was wrong to deny their intervention in the first place. The State has defended and will continue to defend the

constitutionality of SB 8 and therefore adequately represents the interests of the *Robinson* Movants.

CONCLUSION

For the reasons stated above, the Court should deny the *Robinson* Movants' Motion for Reconsideration.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 12th day of March 2024, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which gives notice of filing to all counsel of record.

/s/ Morgan Brungard
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