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 for Louisiana, *Defendant*.	Civil Action No. 3:24-cv-00122 Judge David C. Joseph Circuit Judge Carl E. Stewart Judge Robert R. Summerhays

***ROBINSON* MOVANTS' REPLY IN SUPPORT OF THEIR MOTION TO RECONSIDER INTERVENTION ORDER**

Press Robinson, Edgar Cage, Dorothy Nairne, Edwin Rene Soule, Alice Washington, Clee Earnest Lowe, Davante Lewis, Martha Davis, Ambrose Sims, the National Association for the Advancement of Colored People Louisiana State Conference, and the Power Coalition for Equity and Justice (collectively, the "*Robinson* Movants") hereby reply in support of their motion to reconsider this Court's order, ECF No. 79, denying intervention during the liability phase of the case. Plaintiffs' and Defendant-Intervenor the State of Louisiana's responses mischaracterize or fail to address the *Robinson* Movants' compelling reasons for intervention and only highlight the State's inadequate representation of Movants' interests and unexplained and unjustified failure to challenge core (and highly vulnerable) parts of Plaintiffs' case.

It comes as no surprise that Plaintiffs do not want intervention. But the very fact that the State is so aggressively opposing intervention by the *Robinson* and *Galmon* Movants in this case, whose interests the State is ostensibly aligned with and claims to represent, itself evidences the State's divergent interests. The State does not even try to show that its position would be prejudiced by allowing the Movants to intervene. Yet it has now devoted more pages of briefs to opposing the *Robinson* and *Galmon* efforts to intervene than it devoted to challenging Plaintiffs' likelihood of success on the merits of their claims in opposing Plaintiffs' preliminary motion. This Court should grant the motion for reconsideration and permit the *Robinson* Movants to intervene during the liability phase.

ARGUMENT

As the Court recognized, the burden of demonstrating the inadequacy of the State's representation of the *Robinson* Movants' interests is "minimal." ECF No. 79, Order at 4; *see also id.* ("The applicant's burden is satisfied if he shows that the existing representation '*may* be inadequate;' the showing 'need not amount to certainty.'" (internal citation omitted) (emphasis added)). In addition, courts have "broad discretion" to "reconsider, rescind, or modify an

interlocutory order for cause seen by [them] to be sufficient." *Terrell* v. *Richardson*, 2022 WL 1597841, at *1 (W.D. La. May 18, 2022). They may look to whether there are "manifest errors of law or fact upon which judgment is based," whether "new evidence" is available, whether there is a need "to prevent manifest injustice," or whether there has been "an intervening change in controlling law." *See Warner* v. *Talos ERT LLC*, No. 2:18-CV-01435, 2022 WL 19002352, at *2 (W.D. La. Dec. 15, 2022) (citation omitted). A court is "free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *Id.* (quoting *Saqui* v. *Pride Cent. Am., LLC*, 595 F.3d 206, 210 (5th Cir. 2010)).

Here, the Court explicitly invited Movants to seek reconsideration if Defendants' interests and objectives diverge from their own. Order at 7. That divergence was confirmed by Defendants' subsequent submissions in response to Plaintiffs' preliminary injunction motion and Plaintiffs' reply, none of which was available at the time that the Court issued its Order. It is clear from these submissions—indeed, it is clear even from the responses by the State and Plaintiffs to the present motion—that Defendants will not be able to adequately represent Movants' interests. That fact alone warrants reconsideration of the Court's initial Order and the grant of intervention by the Movants during the liability phase of the case.

I. The Oppositions Demonstrate There is Little or No Adversity Between the State and Plaintiffs on the Key Issue of Racial Predominance.

The State repeats in its response the mantra that it has a "constitutional obligation to defend its laws," arguing that that there "is no evidence that the State has abandoned its duty to defend SB 8." ECF No. 107, State Opp. at 3-4. That language is also parroted by the Plaintiffs. ECF No. 111-1, Pls. Opp. at 5 (referencing the State's "obligation to represent the State of Louisiana and its laws, including SB8"). But that is not the test. Instead, intervention should be granted when the

requisite adversity of interest is demonstrated, as when a proposed intervenor's interests "diverge from the putative representative's interests in a manner germane to the case." Order at 5 (quoting *Guenther* v. *BP Ret. Accumulation Plan*, 50 F.4th 535, 543 (5th Cir. 2022)). The *Robinson* Movants' motion for reconsideration showed in detail that the responses by the State and the Secretary of State to the Plaintiffs' request for a preliminary injunction did not address key substantive points—not because of a difference in litigation strategy but because of a divergence in interests that have led the State to abandon meritorious legal arguments in support of SB8 that it disagrees with and has opposed in the *Robinson* litigation—and that the Plaintiffs' reply seeks to take full litigation advantage of the State's failure to contest these key points.

Neither the State nor the Plaintiffs grapple with these arguments. And both ignore wholesale the cases cited by the *Robinson* Movants where a divergence between a government defendant's interests and a private party's interests resulted in the grant of intervention. *See, e.g.*, ECF No. 103-1, Robinson Br. at 5 (citing *Wal-Mart Stores, Inc.* v. *Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 569 (5th Cir. 2016)); *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 538–39 (1972)); *see also id.* at 8 (citing *La Union del Pueblo Entero* v. *Abbott*, 29 F.4th 299, 308–09 (5th Cir. 2022)); *id.* at 9 (citing *Brumfield* v. *Dodd*, 749 F.3d 339, 346 (5th Cir. 2014); *Clark* v. *Putnam Cnty.*, 168 F.3d 458, 461–62 (11th Cir. 1999)).

Indeed, the responses are instructive in light of what they do *not* choose to address. The State does not offer an explanation as to *why* it did not argue that race did not predominate. Nor does it identify any supposed "litigation strategy" that would be furthered by allowing Plaintiffs' misleading summary of the legislative record to go unrebutted. Instead, the State asserts that it "must be allowed to try its case as it sees fit, irrespective of the *Robinson* Movants' opinions." State Opp. at 4. This answer misses the point. *Robinson* Movants do not wish to opine on or

interfere with the State's case. Movants contend that the State's case fails to address fundamental legal issues that Plaintiffs move to capitalize on and that implicate the *Robinson* Movants' interests, a reality which necessitates intervention by the Movants in order to protect those interests. This includes the question of racial predominance, which neither Defendant addresses and which Plaintiffs characterize in their preliminary injunction reply brief as "concede[d]" by the State. ECF. No. 101, at 1.

The State studiously avoids discussing the motivations, political or otherwise, of those who enacted SB8, as reflected in the extensive legislative record. The reasons for this refusal are plain: taking any position on the question of racial predominance in opposition to the preliminary injunction would either undermine the State's defense of SB8 (if it expressly conceded racial predominance) or would undermine its position in *Robinson* (if it argued that race did not predominate in a map that contained a second majority-Black district). The end result is that the State is unable to fully ventilate the arguments against Plaintiffs' request for preliminary injunction, including the key argument that race did *not* predominate in the passage of SB8.[1]

[1] The few cases cited by the State do not require a different result. In *SEC* v. *LBRY, Inc.*, a securities case involving digital blockchain assets where the proposed intervenor was the related non-profit affiliate of the defendant, intervention was denied where defendant stated that the argument intervenor sought to raise was a variation of the argument defendant already intended to present once the lower court ordered full briefing on the matter. 26 F.4th 96, 99–100 (1st Cir. 2022). In contrast, Defendants here have already had the chance for full briefing, and did not raise critical arguments that underpin the rulings in Movants' favor in *Robinson*. Unlike *LBRY*—and setting aside the significant factual dissimilarities between the two cases—the State does not intend to present a "variation" of the *Robinson* Movants' argument on some of the central issues in this case; it has made clear that it will not raise them at all. Similarly, the unpublished, per curiam order in *Lamar* v. *Lynaugh* concerned a Texas inmate with a history of frivolous pro se litigation seeking to intervene in a case that already included a class of inmate defendant-intervenors, a far cry from the factual circumstances here. 12 F.3d 1099 (5th Cir. 1993). Unlike the cases presented by *Robinson* Movants and uncontested by the State, *see, e.g.*, ECF No. 103-1 at 5, 8-9, these two cases do not concern the question of adequate representation by governmental actors. The Court should consider those cases as well the changed circumstances since the Court's initial Order—such as the filing of multiple submissions by the Defendants since that Order that do not contest Plaintiffs' central arguments—in granting intervention.

For their part, Plaintiffs do not explain *why* the State sufficiently represents *Robinson* Movants' interests beyond a cursory reference to the State's "ethical obligation" to defend SB8. Pls. Opp. at 6. Instead, Plaintiffs double down on their contention that race predominated, repeating the arguments raised in their preliminary injunction motion and reply and asserting that even hinting that other considerations beyond race factored into the passage of SB 8 is "a losing battle" that is "doomed to fail."[2] *Id.* Plaintiffs may wish this were so, but this is putting the cart before the horse. Plaintiffs must *prove* this at trial. As it stands, they face no opposition on this issue from the Defendants. The *Robinson* Movants should be permitted to intervene and ensure that the Court benefits from a complete record on this issue.

II. Failure to Challenge Mr. Hefner or Conduct Discovery

The responses also do nothing to mitigate Defendants' conspicuous failure to contest the purported expert opinions of Mr. Hefner, which Plaintiffs rely on extensively throughout their preliminary injunction motion. *See, e.g.*, ECF No. 17-1 at 1 (citing Mr. Hefner's report to argue that "the State created an intentional racial hedge."); *id.* at 6 (citing Mr. Hefner's report to argue that SB8 was drawn "specifically to capture areas with large numbers of African American voters"); *id.* at 22 (citing Mr. Hefner's report to argue that SB8 treats "[t]he rural areas between these cities are treated as mere land bridges to reach pockets of African American voters"). It strains credulity for the State to claim that its failure to contest the credibility or findings of Plaintiffs' *only* expert witness is mere variation "litigation strategy or tactics." State Opp. at 3. Indeed, Mr. Hefner's credibility and findings have been rejected or called into question in prior proceedings. *See Robinson* Br. at 2 (citing *Thomas* v. *Sch. Bd. St. Martin Par.*, No. 65-11314,

[2] Plaintiffs argue that the State could not argue that it was motivated by both political concerns and ensuring that its map complies with the Voting Rights Act. Pls. Opp. at 7. The *Robinson* Movants' amicus brief details at length why this characterization is wrong. *See* ECF No. 94.

2023 WL 4926681, at *12, *29, (W..D. La. July 31, 2023) and *Thomas* v. *Sch. Bd. St. Martin Par.*, 544 F. Supp. 3d 651, 685 (W.D. La. 2021)).[3]

Beyond the simple failure to challenge the reliability or credibility of Mr. Hefner's opinions, the Defendants have to date conducted no fact or expert discovery. Upon being granted partial intervention, *Robinson* Movants sought copies of any discovery requests and responses or initial disclosures that had been exchanged among the parties, including the back-up material related to Mr. Hefner's expert report pursuant to Rule 26(a)(2). Both the Plaintiffs and the State responded that no discovery had yet been exchanged and no initial disclosures had been made. And, while Plaintiffs committed to provide Movants with discovery as it became available, they declined to provide the data underlying Mr. Hefner's report until it is shared with Defendants. *See* Exs. A, B. But without access to this data in advance of the March 22, 2024, expert disclosure deadline, the State cannot meaningfully rebut Mr. Hefner's report or his opinion that the VRA does not require a second majority-Black congressional district. The State's apparent egregious failure to take advantage of the discovery process further underscores the inability of the Defendants to adequately represent Movants' interests.

Rather than offer any rationale for ignoring Mr. Hefner and Plaintiffs' invocation of his flawed expert report and failing to conduct any discovery despite the expedited timeline in this case, the State's response focuses exclusively on attempting to minimize the importance of the State's retention of Mr. Hefner in the *Robinson* v. *Ardoin* litigation. Both the State and the

[3] Plaintiffs contest the extent of the conflict between Mr. Hefner's report here and the assertion in *Robinson* regarding a community of interest running "from Shreveport to the Mississippi River." Pls. Opp. at 6. While it is true that the description stems from a Louisiana Regional Folklife Program map, Hefner relied on that map in his *Robinson* expert report for his analysis. *See* ECF No. 103, Ex. A at 8-10. Plaintiffs may disagree whether there is, in fact, a conflict, but that is just another reason why intervention should be permitted so that their expert can be properly tested, which Defendants have failed to do.

Plaintiffs highlight that the State did not cite Mr. Hefner extensively in its opposition to the *Robinson* plaintiffs' preliminary injunction motion or call Mr. Hefner as a witness at the *Robinson* preliminary injunction hearing. *See* State Opp. at 5; Pls. Opp. at 5-6. But that is neither here nor there. The fact remains that the State engaged Mr. Hefner in the *Robinson* v. *Ardoin* litigation as its sole expert on communities of interest. The State has not indicated that Mr. Hefner's engagement in that matter has ended, nor has it disclaimed the myriad reasons why the State would be motivated to avoid contesting his opinions in this case. The State may have an interest in retaining Mr. Hefner in the future, may wish to avoiding cast doubt on its legal and factual arguments in prior proceedings, or may have a general interest in signaling to other potential experts that—should they agree to provide their expertise—the State will not call that expertise into question in later proceedings. The State has disclaimed *none* of these motivations or rationales, nor has it provided *any* affirmative strategic reason why failing to contest Mr. Hefner's expertise would further the defense of SB8. The *Robinson* Movants must be allowed to intervene to ensure that a robust defense to Mr. Hefner's submission, which includes a map Plaintiffs have cited to this Court not only as a remedial map, but also for purposes of establishing liability.

III. Robinson Movants' Interests During the Remedial Phase Will be Prejudiced If They Are Excluded from the Liability Phase

The State does not dispute that the *Robinson* Movants' position at the remedial stage may be prejudiced by the Court's findings in the liability phase. *Robinson* Br. at 9-11. For example, Plaintiffs assert in their preliminary injunction motion that any congressional map in Louisiana that has more than one majority-Black district is necessarily a racial gerrymander—an argument that was squarely rejected by the district court and the Fifth Circuit in *Robinson*. ECF No. 17-1 at 4-5, 17-18. Instead of addressing that argument, the State suggests that *Robinson* Movants' invocation of this point is a "red herring." State Opp. at 4. This argument reflects a failure to

comprehend the significance of Plaintiffs' argument for future remedial proceedings, and serves as further indication of the necessity of Movants' intervention. Plaintiffs' attempt to re-litigate issues squarely addressed and resolved in the prior *Robinson* action clearly prejudice Movants—the Plaintiffs in that prior *Robinson* action—if Defendants here do not address these arguments and Movants are not permitted to do so. *See Robinson* v. *Ardoin*, 37 F.4th 208 (5th Cir. 2022); *Robinson* v. *Ardoin*, 86 F.4th 574 (5th Cir. 2023). Notably, Plaintiffs do not—and could not—contest that they raise these legal issues during the liability phase, including through their submission of an illustrative map with one majority-Black district. ECF No. 17-3 at 12. Instead, Plaintiff asserts without explanation that participation in the remedial phase will be sufficient to protect *Robinson* Movants' interests. Pls. Opp. at 8-9. But that will not be the case if findings at the liability phase on these issues constrain the nature of the remedial relief that can be implemented.

IV. Intervention Does Not Harm Existing Parties

Plaintiffs raise the unfounded specter of intervention delaying or prejudicing the adjudication of the action. Pls. Opp. at 9-10. The facts demonstrate otherwise. The *Robinson* Movants filed for reconsideration *one* day after Plaintiffs' preliminary injunction reply filing, which confirmed that Plaintiffs intended to press—and assert as "concede[d]," *see, e.g.*, ECF No. 101 at 1—the very arguments that Defendants did not address in their oppositions and that *Robinson* Movants raise here as compelling reasons for intervention. Movants similarly file here their response several *hours* after Plaintiffs' Opposition to Intervention. Nor is the number of lawyers is a proxy for calendar delay. Pls. Opp. at 9. If intervention is permitted, Movants will swiftly take any document discovery and meet the remaining deadlines in the case. Plaintiffs appear to seek expediency at the expense of completeness. While that is understandable given the

weaknesses in their case, the fact remains that the Court will be the prime beneficiary of ensuring a complete record at the liability phase on these important factual and legal issues.

V. In the Alternative, Movants Should Be Permitted to Participate Fully in the Litigation

Neither the Plaintiffs nor the State contest that district courts have wide equitable discretion to permit amici to participate in trial proceedings so as to assist the court and further the interests of justice. Nor do they call into question the numerous examples of district courts permitting amici participation in activities ranging from discovery to oral argument. *See Robinson* Br. at 11 (collecting cases). Nor do they offer any example in which a court rejects a request to participate in the proceedings in the unique circumstances here—where the court has already granted the movant's motion to file an amicus brief and where the movant has been permitted to intervene in any subsequent remedial phase.

The State also cites no authority for the proposition that amicus participation may *only* exceed the submission of an amicus brief where the court invites amicus to so participate, other parties do not oppose, and the party lacks professional expertise. *See* State Opp. at 6. Such a wooden standard contrasts with well-settled precedent that district courts retain a wide degree of flexibility to define the role of any amicus. *See Robinson* Movants' Int. Mot. at 11 (collecting cases). *Perry-Bey* v. *City of Norfolk, Virginia*, No. 2:08CV100, 2008 WL 11348007, at *3 (E.D. Va. Aug. 14, 2008)—which *Robinson* Movants cited in their motion—directly contradicts the State's purported rule. That case involved a challenge to the City of Norfolk's at-large mayor election system, which plaintiffs alleged violated the Voting Rights Act, the Fourteenth and Fifteenth Amendments, and the mandate of a previous Fourth Circuit decision. *Id.* at 1. The NAACP filed a motion to participate as *amicus* (not at the invitation of the court) and the motion was opposed by the City of Norfolk. *Perry-Bey*, No. 2:08CV100, ECF No. 30. The Court held

that the NAACP's amicus status was justified in part due to its previous role litigating the matter whose Fourth Circuit mandate was directly at issue in that case. *Perry-Bey*, 2008 WL 11348007, at *3*2-3. Under those circumstances the court permitted the NAACP to submit its amicus brief *and* participate in oral argument. *Id.*[4]

If intervention is again denied, the unique circumstances presented here provide even stronger justification for participation in these proceedings. This Court has already permitted the *Robinson* Movants to intervene in any remedial procedure. As made clear by its motion to reconsider, the *Robinson* Movants' participation in the merits phase is essential to preserving their ability to participate effectively at the remedial phase. And the State and Secretary of State's omission of critical and obvious arguments from their preliminary injunction oppositions highlight why the *Robinson* Movants' participation in discovery and oral argument would aid this Court's determination of the factual and legal merits.

CONCLUSION

For all of the reasons above, the *Robinson* Movants respectfully request that this Court reconsider its reconsider its Order denying intervention and grant the motion to intervene under Rule 24.

[4] In contrast to the State's analysis, *Morales* v. *Turman*, 820 F.2d 728, 730 (5th Cir. 1987) demonstrates that district courts may flexibly permit amici to participate in litigation activities, and does not purport to set forth the necessary conditions for such participation. That decision was focused on whether participating amici are entitled to attorneys' fees. *Id.* at 731-32. In that context, the court analyzed the relevance of the distinction between a court-appointed amicus and a volunteering amicus. *Id.* But the court did not rely on that distinction to question whether the amici were properly permitted to participate in the first instance. *Id.*

DATED: March 13, 2024

Respectfully submitted,

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EXHIBIT A

From:	Tyler, Jackson
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Cc:	ksadasivan@naacpldf.org; srohani@naacpldf.org; vwenger@naacpldf.org; Hurwitz, Jonathan; jnadcock@gmail.com; Chakraborty, Amitav; Savitt, Adam P; McTootle, Arielle B; sbrannon@aclu.org; MKeenan@aclu.org; Nora Ahmed; tracie.washington.esq@gmail.com
Subject:	RE: Callais v. Landry -- discovery
Date:	Tuesday, March 12, 2024 1:35:41 PM
Attachments:	image001.png

Counsel,

Thank you for reaching out. Plaintiffs will share discovery with the Robinson Intervenors once it has been produced. Plaintiffs will share the map data files at that time as well.

Thank you,
Jackson Tyler

Jackson Tyler
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Subject: Callais v. Landry -- discovery

Counsel,

As you know, the court granted in part the Robinson intervenors' motion to intervene. Please provide us with any initial disclosures and/or discovery requests and responses that have been exchanged among the parties to date.

In particular, we request that plaintiffs' counsel provide any backup materials for Mr. Hefner's expert report, and specifically, census block equivalency files for the map included with the report and any information or data Mr. Hefner relied on in creating the map.

Thank you.

Kind regards,

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EXHIBIT B

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Date: Tuesday, March 12, 2024 2:37:51 PM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png

[Caution: EXTERNAL EMAIL]

Regarding your email of March 7, 2024, we will provide discovery and disclosures as the case progresses and they become available.

Thanks,

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