**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF LOUISIANA**

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| **LOUISIANA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,** | § | |
| ***Plaintiffs,*** | § | |
| **v.** | § | **Case No. 3:19-cv-00479 -JWD-EWD** |
| **STATE OF LOUISIANA, *et al.*,** | § | |
| ***Defendants*.** | § | |

**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO TRANSFER VENUE UNDER 28 U.S.C. 1404(a) OR, ALTERNATIVELY, THE FIRST-TO-FILE RULE**

Plaintiffs Louisiana State Conference of the National Association for the Advancement of Colored People ("NAACP"), Anthony Allen, and Stephanie Anthony ("Plaintiffs") respectfully submit this Memorandum in Opposition to Defendants' State of Louisiana, through Attorney General Jeff Landry and the Secretary of State of Louisiana, through Kyle Ardoin (together "Defendants") Joint Motion to Transfer Venue under 28 U.S.C. 1404(a) or Alternatively, the First-To-File Rule (ECF No. 52, the "Motion"). For the reasons set forth below, the Court should deny the Motion.

## INTRODUCTION

Nearly a year after the Complaint was filed in this matter and ten months after filing their motions to dismiss, Defendants move for the first time that this case be transferred to the U.S. District Court for the Eastern District of Louisiana ("Eastern District") on venue grounds. Defendants' arguments, which could and should have been raised in their earlier motions, are wholly without merit and a transparent effort to delay a resolution on the merits. Indeed, many of Defendants' arguments – particularly those that suggest that the claims in this case are the same

as those in *Chisom* or affect the relief granted in *Chisom* – have been decisively rejected by this Court in its denial of Defendants' motion to dismiss.

Plaintiffs filed their Complaint (ECF No. 1) on July 23, 2019. Defendants received two extensions of time in which to respond to the Complaint (*see* ECF Nos. 11, 12, & 23), then separately filed two motions to dismiss under Federal Rule of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim). (ECF Nos. 27 & 28). Neither Defendant argued that the case should be dismissed for improper venue under Fed. R. Civ. P. 12(b)(3) or transferred to the Eastern District under §1404. On March 23, 2020, the Court directed the parties to file supplemental briefs on the question of subject matter jurisdiction. (ECF No. 39.) On March 30, 2020, Defendants filed their joint supplemental brief, in which they exceeded the Court's directive and attempted to argue that this Court should transfer the case to the Eastern District. (ECF No. 40.) The Court rejected Defendants' attempt to belatedly raise this new argument, denying their motion for leave to file the supplemental brief "to the extent Defendants asserted new arguments (specifically regarding the first to file rule and transfer of venue) outside the scope of the Court's notice for supplemental briefing" on subject matter jurisdiction. (ECF No. 41.)

On June 26, 2020, this Court denied Defendants' motions to dismiss for lack of subject matter jurisdiction and failure to state a claim. (ECF No. 47.) Unhappy with that decision, Defendants now formally move that this court should "transfer this matter to the Eastern District . . . to avoid confusion and potentially conflicting court actions between the Eastern and Middle Districts of Louisiana." (Defs.' Br. at 3.) For the reasons set forth in detail below, Defendants cannot carry their burden of demonstrating that transfer is appropriate under §1404 or the first-to-file rule.

## STANDARD OF REVIEW

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a). In considering a motion under § 1404(a), "[t]he Fifth Circuit employs a two-part test – justice and convenience – to determine whether a transfer of venue is warranted." *Util. Constructors, Inc. v. Liberty Mut. Ins. Co.*, No. 3:15-CV-00501-JWD-RLB, 2016 U.S. Dist. LEXIS 97895, at *13-15 (M.D. La. July 25, 2016) (citing *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 314 (5th Cir. 2008)). "[W]hen the transferee venue is not clearly more convenient than the venue chosen by the plaintiff, the plaintiff's choice should be respected. When the movant demonstrates that the transferee venue is clearly more convenient, however, it has shown good cause and the district court should therefore grant the transfer." *In re Volkswagen*, 545 F.3d at 315. *See also CSFB 1998-C2 TX Facilities, LLC v. Rector*, No. 3:14-CV-4142, 2015 WL 1003045, at *6 (N.D. Tex. Mar. 5, 2015) ("[T]he plaintiff's choice of venue should be respected if the transferee venue is not clearly more convenient.").

In determining whether a § 1404(a) venue transfer is "for the convenience of parties and witnesses" and "in the interest of justice," courts weigh the public and private interest factors originally set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (the "*Gilbert* factors"), a *forum non conveniens* case. *In re Volkswagen*, 545 F.3d at 315 (citing *Humble Oil & Ref. Co. v. Bell Marine Serv., Inc.*, 321 F.2d 53, 56 (5th Cir. 1963)). There are eight *Gilbert* factors – four "private" and four "public." The "private" factors include: (1) "the relative ease of access to sources of proof"; (2) "the availability of compulsory process to secure the attendance of witnesses"; (3) "the cost of attendance for willing witnesses"; and (4) "all other practical

problems that make trial of a case easy, expeditious and inexpensive." *In re Volkswagen*, 545 F.3d at 315. The "public" factors" include: (1) "the administrative difficulties flowing from court congestion"; (2) "the local interest in having localized interests decided at home"; (3) "the familiarity of the forum with the law that will govern the case"; and (4) "the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law." *Id.*

The *Gilbert* "factors are 'not necessarily exhaustive or exclusive' and 'none can be said to be of dispositive weight.'" *Wallace v. Bd. of Supervisors for the Univ. of Louisiana Sys.*, No. CIV.A. 14-657-SDD, 2015 WL 1970514, at *2, 8 (M.D. La. Apr. 30, 2015) (denying motion to transfer venue because Defendant "failed to demonstrate that the Eastern District is 'clearly more convenient' than the Middle District to justify a transfer" pursuant to *Gilbert*) (quoting *Vivint Louisiana, LLC v. City of Shreveport*, 2015 WL 1456216, at *3 (M.D. La. Mar. 23, 2015)).

"Under the first-to-file rule, when related cases are pending before two federal courts, the court in which the case was last filed may refuse to hear it if the issues raised by the cases substantially overlap." *Int'l Fid. Ins. Co. v. Sweet Little Mexico Corp.*, 665 F.3d 671, 677-78 (5th Cir. 2011). A decision to apply the first-filed rule rests on two questions: "(1) whether the two pending actions are so duplicative that they involve substantially overlapping issues such that one court should decide both, and if so, (2) which of the two courts should take the case." *InforMD v. DocRX, Inc.*, CIV. A. 13-533, JJB-SCR, 2015 WL 13064934, at *2 (M.D. La. Aug. 31, 2015) (quoting *Marks v. Mackey*, 2014 WL 3530137, at *3 (W.D. La. July 15, 2014). Two cases substantially overlap if they involve "closely-related questions or common subject matter." *DocRX*, 2015 WL 13064934, at *2. Factors to consider in determining whether a substantial overlap exists include "whether the core issues are the same and the interrelation between the facts, witnesses, and evidence." *Id.* Whether there is substantial overlap is

decided on a case-by-case basis, and rests on whether "much of the proof adduced [in the two cases] would likely be identical." *Int'l Fidelity Ins. Co. v. Sweet Little Mexico Corp.*, 665 F.3d at 678 (citation omitted).

The first-to-file rule "is at heart a discretionary rule." *Louisiana Generating LLC v. Illinois Union Ins. Co.*, No. CIV.A. 10-516-JJB, 2011 WL 4433948, at *1 (M.D. La. Sept. 22, 2011) (rejecting a "mechanical application" of the rule). It serves as "a guideline for federal district courts, assuming there are similar cases pending in different districts. When this occasion arises, the court in which the case was filed *may* refuse to hear it." *Falk v. Marsh Inc.*, CIV. A. 12-1372, 2012 WL 1300187, at *6 (E.D. La. July 9, 2012). When a defendant's motion calls for "mechanical application of the first-filed rule" that would run afoul of notions of comity and judicial efficiency, such motions should be denied. *La. Generating LLC v. Ill. Union Ins. Co.*, CIV A. 10-1516-JB, 2011 WL 4433948, at *1 (M.D. La. September 22, 2011) (denying motion to transfer venue where application of the rule would likely result in a "vicious circle of litigation").

## ARGUMENT

### I. Defendants' Motion was not Filed with Reasonable Promptness

As a threshold matter, while Defendants may not have automatically "waived" their transfer argument by failing to include it in their Rule 12 motions, a motion to transfer venue under § 1404(a) must still be filed with "reasonable promptness." *Peteet v. Dow Chemical Co.*, 868 F.2d 1428, 1436 (5th Cir.) (denying motion to transfer). "[I]f the party opposing transfer can show that the section 1404(a) transfer motion would result in prejudice solely due to the delay in bringing the motion or that the motion is a dilatory tactic, then the movant has failed to show 'reasonable promptness.'" *Konami Digital Entm't Co. v. Harmonix Music Sys., Inc.*, No. CIV A 6:08CV286, 2009 WL 781134, at *7 (E.D. Tex. Mar. 23, 2009). Here, Defendants waited over a

year to file this motion and are only filing it now — months after their initial motions to dismiss and after both Defendants have already filed their Answers. Defendants provide no explanation for their failure to raise this issue earlier, which clearly could and should have been raised in conjunction with their motions to dismiss. Defendants were dilatory, and Plaintiffs will suffer from the prejudice inherent in delayed vindication of their voting rights through serial motions that are clearly calculated to delay a resolution on the merits. The Court should reject the Motion for this reason alone.

## II. A Transfer Of Venue Would Not Serve The Interests Of Justice And Would Not Be Clearly More Convenient So As To Outweigh Plaintiffs' Choice Of Forum

Even if the Court finds that the Motion is timely, Defendants cannot carry their burden of demonstrating that the Eastern District is clearly more convenient. Far from serving the "interests of justice" or being "clearly more convenient" for the parties, transfer to the Eastern District is not supported by even one *Gilbert* factor, and there is absolutely no basis to disturb Plaintiffs' choice of forum for a host of reasons.

*First*, "the relative ease of access to sources of proof" weighs against transfer. Defendants' entire argument on this factor is premised on the faulty assumption that "the *Chisom* plaintiffs and some of the remaining defendants . . . would have at least some input as to the ongoing Consent Decree." (Defs.' Br. at 3, 4.) That the *Chisom* Decree is "ongoing" as to the relief it provided for different plaintiffs in an entirely different part of the State obviously has nothing to do with access to sources of proof in *this* case. As this Court explained in its June 26, 2020 Ruling and Order denying Defendants' motions to dismiss, "a fair reading of the *Complaint* as a whole demonstrates that these Plaintiffs—from East Baton Rouge Parish, and thus outside the *Chisom* class—are in fact seeking relief by the redrawing of Supreme Court District 5 in Baton Rouge." (ECF No. 47, at 22.)

Moreover, "at least some input" is not the legal standard. Rather, "[c]ourts analyze this [*Gilbert*] factor in light of the distance that documents, or other evidence, must be transported from their existing location to the trial venue. This factor will turn upon which party will most probably have the greater volume of documents relevant to the litigation and their presumed location in relation to the transferee and transferor venues." *Wallace*, No. CIV.A. 14-657-SDD, 2015 WL 1970514, at *4 (citation omitted). Here, the presumed location of the State's public voting records and the epicenter of its redistricting authority is Baton Rouge. Indeed, Defendants' offices and the vast majority of Louisiana's government buildings are mere miles from this Court's location in the state capital. Thus, even if "some" unnamed *Chisom* plaintiffs or defendants were entitled to "at least some input" on any issues at stake in this case (which they are not), there is no reason to believe that witnesses, documents, or other evidence would need to be transported any great distance to trial in this Court. If anything, it would impede access to some of those sources to transfer this case to the Eastern District.

*Second*, "the cost of attendance for willing witnesses" and "the availability of compulsory process," factors weigh strongly against transfer. Trying this case in the Eastern District would increase costs not only for likely witnesses, many of whom undoubtedly reside in and around this forum and not the Eastern District, but also for the parties, all of whom reside in or at least work in this district. It would be patently unjust to require Plaintiffs – especially the two individual Plaintiffs who reside in East Baton Rouge – to travel all the way to Orleans Parish to litigate a case concerning Supreme Court District 5. Transferring this case to the Eastern District would uniformly increase costs and would limit the availability of compulsory process over Baton Rouge-area witnesses.

*Third*, the "practical problems that make trial of a case easy, expeditious, and inexpensive" do not weigh at all in favor of a transfer to the Eastern District. Defendants argue that because the Eastern District "presided over six years of litigation in the 1990s" and then eight years ago "heard and resolved a contentious legal battle over who the new chief justice of the Louisiana Supreme Court should be," it "has substantial familiarity with the issues involving drawing new district lines for majority-minority judicial districts in Louisiana." (Defs.' Br. at 4-5.) Again, Defendants wrongly assume that this case somehow implicates *Chisom*, an argument this Court has rejected. More important, Defendants' attribution of special expertise to the Eastern District does not withstand scrutiny. This Court, too, has considered multiple Voting Rights Act ("VRA") cases, including, specifically, challenges to judicial districts. *See, e.g.*, *Terrebonne Par. Branch NAACP v. Jindal*, 274 F.Supp.3d 395 (M.D. La. 2017), *rev'd*, 963 F.3d 447 (5th Cir. 2020); *Campbell v. Edwards*, No. CV 17-1261-JWD-EWD, 2019 WL 291638, (M.D. La. Jan. 23, 2019); *Hall v. Louisiana*, 108 F. Supp. 3d 419 (M.D. La. 2015).

*Fourth*, the "administrative difficulties flowing from court congestion" in this Court are not greater than those faced by the Eastern District and are insufficient to defeat Plaintiffs' choice of forum in any event. Defendants cite a July 2019 opinion in which this Court compared its docket to that of the U.S. District Court for the Western District of Louisiana and noted that the Middle District "enjoys a high case load and a heavily congested docket," *Lotief v. Bd. of Supervisors for Univ. of Louisiana Sys.*, No. CV 18-991-JWD-EWD, 2019 WL 3453918, at *3, 6 (M.D. La. July 31, 2019). The most recently published official statistics, however, reveal a significantly higher number of cases currently pending in the Eastern District than in this Court. *See* Administrative Office of the U.S. Courts, *U.S. District Courts–Combined Civil and Criminal Federal Court Management Statistics (March 31, 2020)*, available at

https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2020/03/31-3 (showing 3,541 pending cases and 665 "weighted filings" per judgeship in the Eastern District vis-à-vis 619 pending cases and 365 weighted filings per judgeship in the Middle District).[1] Furthermore, this Court has held "that merely comparing the number of judges between the district courts and the number of civil cases each judge handles within each district is too speculative to establish administrative difficulties from relative court congestion." *Wallace*, 2015 WL 1970514, at *7 (denying transfer of venue from the Middle District to the Eastern District). Thus, this Court is at least as well positioned as the Eastern District to see the case through to a fair and speedy resolution.

*Fifth*, this Court is as familiar with "the law that will govern the case" as the Eastern District or any other court. Hopeful, perhaps, that saying it enough times will make it true, Defendants contend that "the Eastern District . . . is certainly the court with the most familiarity of the law controlling this case. The case has been with that court for more than thirty years." (Defs.' Br. at 5 (emphasis added).) Obviously, "this" case – which concerns Supreme Court District 5 and not the class of "all blacks registered to vote in Orleans Parish" or Supreme Court District 1 (*see* ECF No. 47 at 21-22) – has not been before the Eastern District for "thirty years," or ever. This case, a novel challenge to Supreme Court District 5, was filed in this Court just over one year ago.

Moreover, Defendants' assertion that transfer is warranted because they could be placed in the untenable position of having "to violate one court's order to obey the other court's order" has already been rejected by this Court. (Defs.' Br. at 6.) As the Court held in its June 26 Order,

[1] "Weighted filings statistics account for the different amounts of time district judges require to resolve various types of civil and criminal actions." Administrative Office of the U.S. Courts, Explanation of Selected Terms (Dec. 2019), available at https://www.uscourts.gov/sites/default/files/explanation_of_selected_terms_december_2019_0.pdf.

"[c]ontrary to Defendants' arguments, this relief [the redrawing of Supreme Court District 5 in Baton Rouge] can easily be accomplished without redrawing District 1 in Orleans Parish, and Plaintiffs' stipulation to this effect reflects that." (ECF No. 47 at 22.) Plaintiffs maintain, and will later show, that there is at least one way to redraw Supreme Court District 5 without affecting Orleans Parish and Supreme Court District 1. Defendants' baseless assertion that "it appears a practical impossibility" (Defs.' Br. at 8) is simply wrong and is, in any event, an issue to be decided by this Court on the merits. Indeed, Defendants' obsessive attempts to make this case about *Chisom* suggest that they are well aware that such a solution is possible and will stop at nothing to delay and avoid it.

Finally, "the local interest in having localized interests decided at home" weighs strongly in favor of keeping this case in the Middle District. The outcome of this case will impact no one more than the voters, and particularly the African-American voters, in and around Baton Rouge. Simply put, they deserve to have this case heard "at home."

For all of these reasons, Defendants cannot come close to demonstrating that the Eastern District is "clearly more convenient" than this Court. Plaintiffs' choice of forum should therefore be respected and the Motion denied. *In re Volkswagen*, 545 F.3d at 315

**III. The First-to-File Rule Is Inapplicable and Does Not Support a Transfer**

Defendants' arguments fare no better under the first-to-file rule. There is no overlap between this case and *Chisom*, much less the "substantial overlap" of issues and "identical proof likely to be adduced at trial" necessary to warrant transfer on that basis. And as this Court has held in denying Defendants' motions to dismiss, there is no need for the Court to issue a ruling that conflicts with *Chisom* to grant the relief Plaintiffs seek.

### A. There Is No Overlap Between This Case and *Chisom*

Defendants' assertion that there is "almost complete" overlap of the issues between this case and *Chisom* grossly misstates the nature of the two actions and misapprehends the law. (Defs.' Br. at 7.) As an initial matter, *Chisom* was filed three decades ago. It was a "class action suit on behalf of all blacks registered to vote in Orleans Parish." (ECF No. 47 at 21-22, (quoting *Chisom v. Edwards*, 659 F. Supp. 183, 183 (E.D. La. 1987), *rev'd*, 839 F.2d 1056 (5th Cir. 1988))). *Chisom* is not "pending" before the Eastern District. In stark contrast, this case concerns the present-day issue of whether the State of Louisiana dilutes African-American votes for state Supreme Court justices in Supreme Court District 5, i.e., in Baton Rouge and surrounding areas. (*See* ECF No. 47 at 22). The plaintiff class in this case is African-American voters in the Baton Rouge area. Thus, while both cases involve challenges under VRA Section 2, it is nonsensical to assume that the "proof adduced [in the two cases] would likely be identical" when such a radical divergence in both time and fact exists between the cases. *Int'l Fidelity Ins. Co. v. Sweet Little Mexico Corp.*, 665 F.3d at 678 (citation omitted).

Furthermore, the second round of litigation in *Chisom v. Jindal* was decided over eight years ago and concerned the interpretation of the *Chisom* Decree for purposes of calculating Justice Johnson's tenure – not Section 2 voting rights. 890 F. Supp. 2d 696 (E.D. La. 2012). That issue is also no longer "pending" before the Eastern District. As Defendants coyly admit, "some of the parties" – i.e., the State of Louisiana, through its officers – argued in that case that the *Chisom* Decree deprived the Eastern District of jurisdiction. *Id.* at 702 (E.D. La. 2012). It is troubling that the State now argues that this case should be heard in the Eastern District because the *Chisom* plaintiffs were first to file in that court – the same court that, according to the State, lacked jurisdiction over the *Chisom* Decree eight years ago. As this Court stated in denying Defendants' motions to dismiss, "this case is easily distinguishable from *Chisom v. Jindal* and

Chief Justice Johnson's dispute, as that suit involved the interpretation of an express provision of the Consent Decree— the one dealing with emoluments and equal participation in the cases, duties, and powers of other justices." (*See* ECF No. 47 at 22, citing *Chisom v. Jindal*, 890 F. Supp. 2d at 713-15.)

Temporal issues aside, the fact that the State of Louisiana and Secretary of State were signatories to the *Chisom* Decree adds nothing to the question of factual overlap. (Defs.' Br. at 7.) Statewide officials enter into consent decrees on behalf of the State on any number of issues as a matter of routine. This does not automatically create factual, "substantial overlap" in any case in which state officials are named defendants, as evidenced by the dearth of law cited by Defendants in support of their argument.

### B. This Court Need Not Encroach on the Authority of the Eastern District or Issue a Ruling that Conflicts with the *Chisom* Consent Decree

Defendants' parsing of words to create a potential for "conflict" between this Court and the Eastern District is equally unpersuasive. The fact that the Eastern District ordered the creation of "a" new district does not forever preclude this Court from hearing claims concerning "any" or "all seven" districts or demonstrate *any* "overlap" between this case and *Chisom*. (Defs.' Br. at 20). That the *Chisom* decree mentions "newly reapportioned districts" is similarly irrelevant. Naturally, one or more districts would have had to be "newly reapportioned" in order to create an entirely new district in Orleans Parish. This does not suggest, as Defendants would have it, that the Eastern District intended to forever retain jurisdiction over all challenges to any Supreme Court districts anywhere in the State. As this Court already recognized in denying Defendants' Motions to Dismiss, "the instant case falls outside the jurisdiction of the *Chisom* Consent Judgment, and the State's motion can be denied on this ground alone." (ECF No. 47 at

22.) This Court need not "trench upon the authority" of the Eastern District in order to afford the relief sought by Plaintiffs.

Defendants' argument that it is a "practical impossibility" to create a new majority-minority district encompassing Baton Rouge is baseless and irrelevant to their Motion. Plaintiffs will show at trial that there is at least one way to draw such a district, but these issues are factual questions that go to the merits of claims, not factors to be considered on a motion to transfer venue on a first-to-file theory. True to form, Defendants' "practical impossibility" argument is premised upon the faulty notion that any ruling by this Court – apparently even if it did not impact Supreme Court District 1 – would encroach upon the *Chisom* Decree or the Eastern District's jurisdiction. But Plaintiffs have repeatedly expressed, and this Court has already recognized, that they have no desire to seek relief that would redraw Supreme Court District 1.

## CONCLUSION

Defendants' belated motion to transfer appears to be a thinly disguised attempt to forum shop and create delay. Even if the Court were to accept the Motion at this time, the *Gilbert* factors weigh strongly against transferring this case, which presents an entirely new, present-day challenge to the State's failure to protect the voting rights of African American voters in the Baton Rouge area under Section 2 of the VRA.

WHEREFORE, for all the foregoing reasons, the Plaintiffs pray that the Motion to Transfer Venue under 28 U.S.C. 1404(A) or, Alternatively, the First-To-File Rule be denied.

Dated: August 7, 2020

Respectfully submitted,

/s/ *Alec W. Farr*
By: Alec W. Farr, Esq.*
awfarr@bclplaw.com
/s/ *Adam L. Shaw*
Adam L. Shaw, Esq.*
adam.shaw@bclplaw.com
Jason C. Semmes, Esq.*
jason.semmes@bclplaw.com
**BRYAN CAVE LEIGHTON PAISNER LLP**
1155 F Street NW, Suite 700
Washington, DC 20004
(202) 508-6000
(202) 508-6200 Facsimile

Meryl Macklin, Esq.*
meryl.macklin@bclplaw.com
**BRYAN CAVE LEIGHTON PAISNER LLP**
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111
(415) 675-3400
(415) 675-3434 Facsimile
*admitted *pro hac vice*

Jon Greenbaum, Esq.*
jgreenbaum@lawyerscommittee.org
Ezra D. Rosenberg, Esq.*
erosenberg@lawyerscommittee.org
Jennifer N. Nwachukwu, Esq.*
jnwachukwu@lawyerscommittee.org
**LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW**
1500 K Street NW, Suite 900
Washington, DC 20005
(202) 662-8600
*admitted *pro hac vice*

[Signature blocks continue on next page.]

/s/ *Arthur R. Thomas*
By: Arthur R. Thomas, Esq., LA Bar #12797
**ATTORNEY AT LAW**
3313 Government Street
Baton Rouge, LA 70806
(225) 334-7490
(225) 334-7491 Facsimile

*Counsel for Plaintiffs Louisiana State Conference of the National Association for the Advancement of Colored People, Anthony Allen, and Stephanie Anthony*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 7, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record identified below.

Elizabeth B. Murrill
Solicitor General – Lead Counsel
Angelique D. Freel
Jeffrey Wale
Carey T. Jones
Assistant Attorneys General
LOUISIANA DEPARTMENT OF JUSTICE
1885 North Third Street
Post Office Box 94005
Baton Rouge, LA 70804-9005
freela@ag.louisiana.gov
walej@ag.louisiana.gov

Jason Torchinsky
Phillip M. Gordon
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 N. Hill Drive, Suite 100
Warrenton, VA 20186
jtorchinsky@hvjt.law
pgordon@hvjt.law

*Counsel for Defendant State of Louisiana*

Celia R. Cangelosi
Bar Roll No. 12140
5551 Corporate Blvd., Suite 101
Baton Rouge, LA 70808
celiacan@bellsouth.net

*Counsel for Defendant Secretary of State*

/s/ *Adam L. Shaw*
Adam L. Shaw