UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

LOUISIANA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiffs,

v. Case No. 3:19-cv-00479-JWD-SDJ

STATE OF LOUISIANA, *et al.*,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF MOTIONS TO INTERVENE

John L. Weimer, Greg Champagne, Mike Tregre, and Craig Webre, in their individual capacities as voters from Louisiana Supreme Court District Six ("Intervenor Voters"), and John L. Weimer, in his capacity as a candidate for Louisiana Supreme Court Justice from District Six ("Intervenor Candidate") (collectively, "Intervenors"), through undersigned counsel, respectfully submit this reply memorandum in support of their motions to intervene.[1]

I. THE RESPONSE MEMORANDA IGNORE U.S. SUPREME COURT AND FIFTH CIRCUIT PRECEDENT.

Controlling precedent forecloses the arguments in the response memoranda.[2] In *League of United Latin American Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421 (5th Cir. 2011), the Fifth Circuit held that a voter had standing to intervene when a consent decree restricted his right to participate in the electoral process. The Fifth Circuit reversed the district court, which had erred as a matter of law in concluding that the proposed intervenor lacked standing. *See id.* at 428.

[1] R. Doc. 109; R. Doc. 114.

[2] R. Doc. 121 (Plaintiffs' Response); R. Doc. 122 (State Defendants' Response). The existing parties will be referred to collectively as "Respondents."

Similarly, in *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 839 (5th Cir. 1993), the en banc court held that voters had standing to intervene in a case involving a consent decree, observing "the standing of voters in a voting rights case cannot be gainsaid." *Id.* at 845.

Despite this clear authority, the Response Memoranda assert that the Intervenors' statement that they take no position on the merits of this case somehow deprives the Intervenors of standing.[3] To be clear, the Intervenors take no position on the merits of the underlying Voting Rights Act allegations relative to District Five. The Intervenors do have an interest, however, in the Consent Stay Order, which apparently extends to District Six despite the lack of any Voting Rights Act violations in that district.[4] In particular, the Intervenors have an interest in ensuring that the Consent Stay Order does not disenfranchise them relative to the upcoming election.

Further, the Response Memoranda ignore wholesale the U.S. Supreme Court's decision in *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 (2022). *Cameron* confirms both the strength of the Intervenors' interest and the timeliness of their motion. The Intervenors have a strong interest in defending their constitutional rights as voters and as a

[3] *E.g.,* R. Doc. 121, p. 1.

[4] The Respondents cannot have it both ways. If this litigation *does not extend* to District Six, the Consent Stay Order must be modified—regardless of whether the Respondents consent. *See LULAC No. 4434*, 999 F.2d at 846 ("Because the consent decree does not merely validate a compromise but, by virtue of its injunctive provisions, reaches into the future and has continuing effect, its terms require more careful scrutiny. Even when it affects only the parties, the court should, therefore, examine it carefully to ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence. . . . If the decree also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed.") (emphasis omitted) (quoting *United States v. City of Miami*, 664 F.2d 435, 440 (5th Cir.1981) (en banc) (Rubin, J.)). If this litigation *does extend* to District Six (notwithstanding the holding of the prior Fifth Circuit opinion in this very case), the Intervenors are entitled to an opportunity to participate in the litigation to protect their constitutional rights. *See Allen v. Louisiana*, 14 F.4th 366, 373 (5th Cir. 2021).

candidate, respectively, to participate in the November election. Put simply, the Intervenors want the November 2022 election to proceed; the Respondents do not.[5] Given that the Attorney General and Secretary of State have acquiesced in an indefinite stay, the Intervenors' only option is to take up the defense of allowing the election to proceed. Under such circumstances, it would be error to deny intervention. *See Cameron*, 142 S. Ct. at 1011–12 ("The Sixth Circuit panel failed to account for the strength of the Kentucky attorney general's interest in taking up the defense of HB 454 when the secretary for Health and Family Services elected to acquiesce.") (reversing denial of intervention).

Further, under *Cameron,* the timeliness of the Intervenors' motions is assessed from the date when they learned that the State Defendants would not protect their interests—not the date when the lawsuit was filed. *See id.* 142 S. Ct. at 1012 ("The attorney general's need to seek intervention did not arise until the secretary ceased defending the state law, and the timeliness of his motion should be assessed in relation to that point in time."). As explained in the Intervenors' prior briefing and exhibits, the assumption implicit in the stay that a pre-election solution could occur before the November election is no longer reasonable. Nor was there any public notice of the stay, and the Intervenor Candidate discovered its existence only some weeks after its entry.[6]

[5] The State Defendants assert that their interests and the Respondents' interests are aligned because everyone wants to "conduct all Louisiana Supreme Court elections in accordance with applicable federal and state laws." R. Doc. 122, p. 10. This level of abstraction obscures the heart of the dispute: the Intervenors and the Respondents disagree about what the law requires. The Intervenors want to vote and qualify as a candidate in the November election; the Respondents want to prevent them from doing that. The State Defendants cannot represent the voters whose rights they "consented" to disenfranchise, nor the candidates who have been sidelined by that putative consent.

[6] *See* Affidavit of Public Notice, Doc. 114-5 (confirming that the Secretary of State's website continues to list the November 8 election date); Affidavit of John L. Weimer, Doc.114-9, ¶ 19 ("The fact that a stay was granted was not communicated to me as Chief Justice or to the members of the Louisiana Supreme Court as a group by any of the parties, either officially or unofficially.

Cameron eliminates any argument that the Intervenors were on notice of the need to intervene as of the date that the Complaint was filed.

To be clear, the Intervenors have never claimed to be unaware of this lawsuit, but no one was made aware that the State Defendants would abandon their defense of the case and "consent" to a stay halting future elections indefinitely. The Respondents fail to mention that after the Complaint was filed three other Supreme Court elections proceeded and three justices were duly elected and seated, all in accordance with their existing districts. Under the State Defendants' theory, that should have been impossible because the Complaint itself placed those allegedly "malapportioned" districts in theoretical jeopardy.

The Intervenors have submitted detailed affidavits explaining that they lacked advance notice of the stay. In contrast, the exhibits submitted by the State Defendants illustrate only that, as of early 2021, the Intervenor Candidate was being advised that it was "highly probable that the underlying litigation will be transferred to the Eastern District of Louisiana" where "Plaintiffs will push [the Judge] to expedite the trial in this case . . . ."[7] Pushing for an expedited trial on the merits in the Eastern District of Louisiana is not equivalent to conceding a stay of future elections is appropriate in the Middle District of Louisiana. And, regardless of any email traffic in early 2021, the possibility that the parties subsequently would agree to a statewide stay was not foreseeable given that the Fifth Circuit instructed in September 2021: "[A] federal consent decree cannot manacle a state's entire judicial election system based on an alleged violation in *one* district. A federal court would lack authority to enter such a decree, *even if the parties asked it to*." *Allen v. Louisiana*, 14 F.4th 366, 373 (5th Cir. 2021) (emphasis supplied). Given these circumstances, the

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The fact a stay had been granted was discovered as a result of a colleague being advised of the stay some weeks after the stay was granted.").

[7] Doc. 122-1, pp. 2-3.

Intervenors cannot be faulted for failing to predict that the State Defendants would align themselves with the Plaintiffs in negotiating a statewide consent stay.

II. THE INTERVENTION IS NECESSARY TO SAFEGUARD THE ELECTION AND PREVENT AN UNWARRANTED INFRINGEMENT ON INTERVENORS' CONSTITUTIONAL RIGHTS.

The Response Memoranda reveal intervention is necessary to ensure an adversarial process that safeguards the election. By consenting to a blanket and indefinite stay of Louisiana Supreme Court elections, the Respondents have refused to protect the rights of the Intervenors to participate in a democratic election in November in accordance with Louisiana law. Further, the role of the Secretary of State is limited to implementing either this Court's order or state election law and thus he cannot safeguard the Intervenors' interests. Without intervention, there will be no advocacy in favor of allowing the November election to proceed.

The Respondents' position that Chief Justice Weimer can remain in office without the need for an election only confirms that the Consent Stay Order, if left intact, will subvert the democratic process. The Respondents, through counsel, have suggested at recent status conferences that the Intervenor Candidate could remain in office through an Ad Hoc Vacancy appointment by the other Justices or even through a U.S. District Court order. The Complaint, by comparison, suggests that the Governor may make his own appointment. *But see Miller v. Oubre*, 682 So.2d 231, 237 (La. 1996) (unanimously ruling that La. R.S. 42:2 applies to the judicial branch). These multiple competing proposals make two things clear: (1) allowing the Consent Stay Order to remain unchallenged will create further legal uncertainty as to the legitimacy of whoever fills the seat; and (2) regardless of which proposal is correct, the plain effect of the Consent Stay Order will disenfranchise the voters of District Six from electing a Justice as provided by law.

III. ANY ALLEGED DEFICIENCY IN THE INITIAL MOTION HAS BEEN CURED.

The Response Memoranda quibble with the substance of the Intervenors' first motion, arguing that it failed to set forth an applicable claim or defense. While these critiques lack merit, any alleged deficiency was cured by the filing of the second motion. *See* R. Doc. 122, p. 1 n.2 (conceding that "this error has been rectified in their amended filing"); *see also* R. Doc. 114-4 (Intervenors' proposed Answer, Counterclaim and Cross-Claim).

IV. THE RESPONDENTS' ARGUMENTS ON THE MERITS ILLUSTRATE THE NEED FOR THE INTERVENTION.

Much of the Response Memoranda is addressed to arguments on the merits. The Intervenors recognize that the Respondents disagree with them on the merits, but this Court need not decide the merits to allow the intervention. Insofar as the merits-based arguments can be considered, they demonstrate the need for development of the legal issues through an adversarial process—rather than through confidential "settlement negotiations"[8]—for three reasons.

First, any resolution will have to be made public because, as the Consent Stay Motion concedes, it will require legislative action and perhaps also a constitutional amendment. *Second*, and more importantly, any claimed but undisclosed "progress in negotiations" is not a compelling state interest that justifies concrete and actual deprivations of constitutional rights. The hollow promise that a Louisiana citizen can vote or run for office (perhaps) in an unidentified future election is an admission that those rights are deprived presently. *Third,* allowing the election to proceed in November will not interfere with any eventual redistricting process. If and when redistricting occurs, candidates will qualify to run from the new districts. And, just as the three recently-elected Justices will not lose their seats or have to move when new districts ultimately are

[8] Doc. 122, p. 7.

drawn and approved, there is no special reason that District Six should be treated any differently. The Intervenors' constitutional rights to vote and run for election outweigh any alleged temporary inconvenience to the Respondents' confidential negotiations.

For the reasons set forth above and in their prior briefing, the Intervenors request that they be permitted to participate so that they may defend their constitutional right to participate in District Six's November election and avoid "severe[] prejudice." *See LULAC Dist.* 19, 659 F.3d at 434; *see also Ross v. Marshall*, 426 F.3d 745, 753 (5th Cir. 2005) ("Intervention should generally be allowed where no one would be hurt and greater justice could be attained.").

Dated: July 7, 2022.

Respectfully submitted,

/s/ *Eva J. Dossier*
Richard C. Stanley, La. Bar No. 8487
Eva J. Dossier, La. Bar No. 35753
John P. D'Avello, La. Bar No. 39082
STANLEY, REUTER, ROSS, THORNTON & ALFORD, L.L.C.
909 Poydras Street, Suite 2500
New Orleans, LA 70112
Telephone: 504-523-1580
Facsimile: 504-524-0069
rcs@stanleyreuter.com
ejd@stanleyreuter.com
jpd@stanleyreuter.com

John W. Perry, Jr., La. Bar No. 10524
PERRY, BALHOFF, MENGIS & BURNS, L.L.C.
2141 Quail Run Drive
Baton Rouge, Louisiana 70808
Telephone: 225-767-7730
Facsimile: 225-767-7967
perry@pbmbllc.com

Harold M. Block, La. Bar No. 03150
BLOCK & BOUTERIE
408 West Third Street
Thibodaux, Louisiana 70301
Telephone: 985-447-6767
Facsimile: 985-446-7357
hmb@blockandbouterie.com

Daniel A. Cavell, La. Bar No. 04074
MORVANT & CAVELL, L.L.C.
402 W. 4th Street
Thibodaux, LA 70301
Telephone: 985-449-7500
Facsimile: 985-449-7520
dcavell@bellsouth.net

Danna E. Schwab, La. Bar No. 20367
THE SCHWAB LAW FIRM
7847 Main Street
Houma, LA 70360-4455
Telephone: 985-868-1342
Facsimile: 985-868-1345
dschwab@theschwablawfirm.com

Christopher H. Riviere, La. Bar No. 11297
CHRISTOPHER H. RIVIERE, P.L.C.
103 West 3rd Street
Thibodaux, LA 70301
Telephone: 985-447-7440
Facsimile: 985-447-3233
criviere@rivierelaw.com

William A. Stark, La. Bar No. 12406
THE STARK LAW FIRM
275 Gabasse Street
Houma, LA 70360
Telephone: 985-223-3213
Facsimile: 985-868-8584
billy@williamstark.com

Carl A. Butler, La. Bar No. 17261
BUTLER LAW FIRM, L.L.C.
2400 Veterans Blvd., Suite 485
Kenner, LA 70062
Telephone: 504-305-4117
Facsimile: 504-305-4118
cbutler@butlerlawllc.com

Attorneys for John L. Weimer, Greg Champagne, Mike Tregre, and Craig Webre, in their individual capacities as voters from Louisiana Supreme Court District Six, and John L. Weimer, in his capacity as a candidate for Louisiana Supreme Court Justice from District Six

CERTIFICATE OF SERVICE

I certify that on July 7, 2022, the foregoing was filed using the Court's ECF System, which constitutes services on all counsel having appeared of record in this proceeding.

/s/ *Eva J. Dossier*
Eva J. Dossier