

SUPREME COURT
STATE OF LOUISIANA

No. _____

**DEEP SOUTH CENTER FOR ENVIRONMENTAL JUSTICE,
VAYLA NEW ORLEANS, JUSTICE AND BEYOND, 350 NEW ORLEANS,
SIERRA CLUB, MR. THEODORE QUANT AND MS. RENATE HEURICH**
Petitioners-Applicants

VERSUS

**THE COUNCIL OF THE CITY OF NEW ORLEANS,
THE UTILITY, CABLE, TELECOMMUNICATIONS AND TECHNOLOGY
COMMITTEE OF THE NEW ORLEANS CITY COUNCIL, JASON R. WILLIAMS,
STACY HEAD, SUSAN G. GUIDRY, LATOYA CANTRELL NADINE M. RAMSEY,
JARED C. BROSSETT, AND JAMES A. GRAY, II**
Defendants-Respondents

CIVIL PROCEEDING

**On Application for Writ of Certiorari or Review from the Court of Appeal, Fourth Circuit,
No. 2019-CA-0774 consolidated with 2019-CA-0775, The Honorables James F. McKay III,
Paula A. Brown and Dale N. Atkins, Judges; on appeal from the Parish of Orleans Civil
District Court, 2018-3843, The Honorable Piper D. Griffin, Presiding**

APPLICATION FOR WRIT OF CERTIORARI OR REVIEW

William Quigley
Loyola University New Orleans
7214 St. Charles Avenue
New Orleans, LA 70118
Phone: (504) 861-5591
Fax: (504) 861-5440
Email: quigley@loyno.edu

Susan Stevens Miller*
Earthjustice
1625 Massachusetts Ave., N.W., Suite 702
Washington, DC 20036
Phone: (202) 667-4500
Fax: (202) 667-2356
Email: smiller@earthjustice.org
*Appearing *pro hac vice*

Monique Harden
Deep South Center for Environmental Justice
9801 Lake Forest Blvd.
New Orleans, LA 70127
Phone: (504) 510-2943
Fax: (504) 372-3473
Email: moniqueh@dscej.org

Alexander "Sascha" Bollag
Green Justice Legal
540 Broadway Street, Room 304
New Orleans, LA 70118
Phone: (504) 913-7740
Fax: (813) 774-6595
Email: sbollag@greenjusticelegal.org

Counsel for Petitioners-Applicants

**SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET**

NO. _____

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

Deep South Center for Environmental Justice et al

VS.

The Council of the City of New Orleans et al

Applicant: Deep South Center for Environmental Justice et al

Have there been any other filings in this Court in this matter? Yes No

Are you seeking a Stay Order? No
Priority Treatment? No

If so you MUST complete & attach a Priority Form

LEAD COUNSEL/PRO SE LITIGANT INFORMATION

APPLICANT:

Name: Monique Harden

Address: Deep South Center for Environmental Justice
9801 Lake Forest Blvd., New Orleans, LA 70127

Phone No. 504-510-2943 Bar Roll No. 24118

RESPONDENT:

Name: James M. Garner

Address: Sher Garner Cahill Richter Klein & Hilbert, LLC
909 Poydras Street, Suite 2800, New Orleans, LA 70112

Phone No. 504-299-2100 Bar Roll No. 19589

Pleading being filed: In proper person, In Forma Pauperis

Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

Civil, Criminal, R.S. 46:1844 protection, Bar, Civil Juvenile, Criminal Juvenile, Other
 CINC, Termination, Surrender, Adoption, Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: _____ Docket No. _____

Judge/Commissioner/Hearing Officer: _____ Ruling Date: _____

DISTRICT COURT INFORMATION

Parish and Judicial District Court: Civil District Court for Orleans Parish Docket Number: 2018-3843

Judge and Section: Hon. Piper Griffin, Division "I" Section 14 Date of Ruling/Judgment: July 2, 2019

APPELLATE COURT INFORMATION

Circuit: Fourth Docket No. 2019-C-0774c/w0775 Action: Opinion

Applicant in Appellate Court: The Council of the City of New Orleans et al Filing Date: Oct. 30, 2019

Ruling Date: Feb. 12, 2020 Panel of Judges: Hon. James McKay III, Hon. Paula Brown, Hon. Dale Atkins En Banc:

REHEARING INFORMATION

Applicant: _____ Date Filed: _____ Action on Rehearing: _____

Ruling Date: _____ Panel of Judges: _____ En Banc:

PRESENT STATUS

Pre-Trial, Hearing/Trial Scheduled date: _____, Trial in Progress, Post Trial

Is there a stay now in effect? No Has this pleading been filed simultaneously in any other court? No

If so, explain briefly _____

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

March 12, 2020
DATE

Monique Harden
SIGNATURE

Attachment to Writ Application Filing Sheet

List of all additional counsel, their addresses, phone numbers and the parties they represent:

Name: William Quigley

Address: Loyola University New Orleans, 7214 St. Charles Avenue, New Orleans, LA 70118

Phone: 5049-861-5591

Representing Petitioners-Applicants: VAYLA New Orleans, Justice and Beyond,
350 New Orleans, Sierra Club, Mr. Theodore Quant, and Ms. Renate Heurich

Name: Alexander "Sascha" Bollag

Address: Green Justice Legal, 540 Loyola Street, Room 304, New Orleans, LA 70118

Phone: 504-913-7740

Representing Petitioners-Applicants: VAYLA New Orleans, Justice and Beyond,
350 New Orleans, Sierra Club, Mr. Theodore Quant, and Ms. Renate Heurich

Name: Susan Stevens Miller

Address: Earthjustice, 1625 Massachusetts Ave., Suite 702, Washington, DC 20036

Phone: 202-667-4500

Representing Petitioners-Applicants: VAYLA New Orleans, Justice and Beyond,
350 New Orleans, and Sierra Club

Name: Debra J. Fischman

Address: Sher Garner Cahill Richter Klein & Hilbert, LLC, 909 Poydras Street, Suite 2800,
New Orleans, LA 70112

Phone: 504-299-2100

Representing Defendants-Respondents: The Council of the City of New Orleans, the Utility,
Cable, Telecommunications and Technology Committee of the New Orleans City Council, Jason
R. Williams, Stacy Head, Susan Guidry, LaToya Cantrell, Nadine M. Ramsey,
Jared C. Brossett, and James Gray

Name: Stuart D. Kottle

Address: Sher Garner Cahill Richter Klein & Hilbert, LLC, 909 Poydras Street, Suite 2800,
New Orleans, LA 70112

Phone: 504-299-2100

Representing Defendants-Respondents: The Council of the City of New Orleans, the Utility,
Cable, Telecommunications and Technology Committee of the New Orleans City Council, Jason
R. Williams, Stacy Head, Susan Guidry, LaToya Cantrell, Nadine M. Ramsey,
Jared C. Brossett, and James Gray

Name: Corwin St Raymond

Address: City Law Department, 1300 Perdido Street, Suite 5E03, New Orleans, LA 70112

Phone: 504-658-9800

Representing Defendants-Respondents: The Council of the City of New Orleans, the Utility,
Cable, Telecommunications and Technology Committee of the New Orleans City Council, Jason
R. Williams, Stacy Head, Susan Guidry, LaToya Cantrell, Nadine M. Ramsey,
Jared C. Brossett, and James Gray

Name: William Goforth

Address: City Law Department, 1300 Perdido Street, Suite 5E03, New Orleans, LA 70112

Phone: 504-658-9800

Representing Defendants-Respondents: The Council of the City of New Orleans, the Utility, Cable, Telecommunications and Technology Committee of the New Orleans City Council, Jason R. Williams, Stacy Head, Susan Guidry, LaToya Cantrell, Nadine M. Ramsey, Jared C. Brossett, and James Gray

Name: Donesia Turner

Address: City Law Department, 1300 Perdido Street, Suite 5E03, New Orleans, LA 70112

Phone: 504-658-9800

Representing Defendants-Respondents: The Council of the City of New Orleans, the Utility, Cable, Telecommunications and Technology Committee of the New Orleans City Council, Jason R. Williams, Stacy Head, Susan Guidry, LaToya Cantrell, Nadine M. Ramsey, Jared C. Brossett, and James Gray

Name: Sunni LeBoeuf

Address: City Law Department, 1300 Perdido Street, Suite 5E03, New Orleans, LA 70112

Phone: 504-658-9800

Representing Defendants-Respondents: The Council of the City of New Orleans, the Utility, Cable, Telecommunications and Technology Committee of the New Orleans City Council, Jason R. Williams, Stacy Head, Susan Guidry, LaToya Cantrell, Nadine M. Ramsey, Jared C. Brossett, and James Gray

Name: Adam J. Swensek

Address: New Orleans City Council, 1300 Perdido Street, Room 1E6, New Orleans, Louisiana 70112

Phone: 504-658-1109

Representing Defendants-Respondents: The Council of the City of New Orleans, the Utility, Cable, Telecommunications and Technology Committee of the New Orleans City Council, Jason R. Williams, Stacy Head, Susan Guidry, LaToya Cantrell, Nadine M. Ramsey, Jared C. Brossett, and James Gray

Name: Richard Stanley

Address: Stanley, Reuter, Ross, Thornton & Alford, LLC, 909 Poydras Street, Suite 2500, New Orleans, LA 70112

Phone: 504-5236-1580

Representing Respondent: Entergy New Orleans, LLC

Name: W. Raley Alford

Address: Stanley, Reuter, Ross, Thornton & Alford, LLC, 909 Poydras Street, Suite 2500, New Orleans, LA 70112

Phone: 504-5236-1580

Representing Respondent: Entergy New Orleans, LLC

Name: Kathryn Munson

Address: Stanley, Reuter, Ross, Thornton & Alford, LLC, 909 Poydras Street, Suite 2500, New Orleans, LA 70112

Phone: 504-5236-1580

Representing Respondent: Entergy New Orleans, LLC

Name: Timothy Cragin

Address: Entergy Services, LLC, 639 Loyola Avenue, Mail Unit L-ENT-26E, New Orleans, LA 70113

Phone: 504-576-2603

Representing Respondent: Entergy New Orleans, LLC

Name: Harry Barton

Address: Entergy Services, LLC, 639 Loyola Avenue, Mail Unit L-ENT-26E, New Orleans, LA 70113

Phone: 504-576-2603

Representing Respondent: Entergy New Orleans, LLC

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MAY IT PLEASE THE COURT:

Petitioners-Applicants, the Deep South Center for Environmental Justice, VAYLA New Orleans, Justice and Beyond, 350 New Orleans, Sierra Club, Mr. Theodore Quant and Ms. Renate Heurich, respectfully petition this Court for certiorari review of the Opinion rendered by the Fourth Circuit Court of Appeal that is contrary to the Open Meetings Law (“OML”).¹ This application arises from a challenge by truthful, directly impacted residents to the use of lying paid actors at public meetings who advocated for and were secretly compensated by a regulated corporation to win the approval of the New Orleans City Council (“City Council”) for a construction project that would net the corporation tens of millions of dollars in profits.

STATEMENT OF WRIT CONSIDERATIONS

- 1. The Fourth Circuit misinterpreted the application of the Open Meetings Law to a public deliberative process in which an advisory committee violated the statute, and issued an Opinion that will have a significant detrimental effect on the public interest, meriting review under La. S.Ct. Rule X, §1(a)(4).**

It is the judgment of the Fourth Circuit that the District Court erred by voiding a decision of the City Council, which adopted a recommendation made in violation of the Open Meetings Law by the Utility, Cable, Telecommunications and Technology Committee (“Council Committee”). Both the City Council and the Council Committee cast majority votes in favor of Resolution 18-65 to approve an application for the construction of a gas plant in New Orleans East by Entergy New Orleans, LLC (“Entergy” or ENO).² According to the Fourth Circuit:

Based on our review of the record, we find that the trial court should not have voided the Resolution. As discussed, while we agree the Open Meetings Law was violated at the Committee meeting, we also find that there were no Open Meetings Law violations at the Council meeting. . . . The Council is free to accept, modify, or reject any or all of the Committee’s recommendations. Therefore, the trial court erred in determining that . . . violations that occurred at the Committee could render the Resolution voidable.³

The Fourth Circuit Opinion erroneously rests on drawing a distinction between the City Council’s binding decision and the Council Committee’s advisory recommendation. However, such a distinction does not exist in the OML. The plain language of the statute defines a “public

¹ Fourth Circuit Opinion, Case No. 2019-CA-0774 c/w 0775, at 17 (Feb. 12, 2020) (App. A).

² Entergy New Orleans, LLC was not a party in the OML enforcement action. Entergy moved for an appeal pursuant to La. C.C.P. art. 2086, which allows an appeal when an unnamed party could have properly intervened in the trial court.

³ See Fourth Circuit Opinion at 17 (App. A).

body” subject to the OML as “city governing authorities” as well as a public body that “possesses policy making, **advisory**, or administrative functions, **including any committee . . .**.” La. R.S. 42:13(A)(2) (emphasis added). The OML applies equally, without distinction, to both the City Council and the Council Committee and their decisions in a public deliberative process.

Additionally, the Fourth Circuit Opinion is inconsistent with the canon of statutory construction, which expressly requires that the OML “shall be construed liberally.” La. R.S. 42:12(A).

The Fourth Circuit Opinion will have a significant detrimental effect on the public interest by allowing an advisory committee to meet in secret and form a deliberative process in violation of the OML. Review by this Court is merited pursuant to La. S.Ct. Rule X, §1(a)(4).

2. The Fourth Circuit Opinion conflicts with decisions by the Louisiana Supreme Court and other courts of appeal which recognize an advisory committee is part of a deliberative process that is subject to the Open Meetings Law, meriting review under La. S.Ct. Rule X, § 1(a)(1).

The Fourth Circuit Opinion conflicts with previous rulings by the Louisiana Supreme Court and rulings by other appellate courts that recognize an advisory committee and the action it takes are part of a deliberative process and subject to the Open Meetings Law. *See, e.g., Spain v. Louisiana High School Athletic Ass'n*, 398 So.2d 1386, 1390 (La. 1981) (finding that a committee of school principals performs a major policy-making, advisory and administrative function in an area that is within the primary control of public bodies listed in the Open Meetings Law); *Brown v. East Baton Rouge Parish School Bd.*, 405 So.2d 1148, 1153 (La. App. 1st Cir. 1981) (affirming decision of the trial court that an advisory committee of a school board is prohibited by the Open Meetings Law from making decisions in closed door meetings).

In the case at issue, the Fourth Circuit determined that there were several egregious violations of the OML by the Council Committee:

Not only was the agenda untimely changed in violation of the Open Meetings Law, but the record reflects that members of the public were deprived of the opportunity to observe the meeting and provide comments during the public comment period at the Committee meeting due to both the change in procedure and the barring of comments from members of the public who were made to wait in the hallway due to limited space. The record shows that members of the public who attended the meeting were prohibited from entering the meeting room and were told that there was no available space. They were also told they could not fill out comment cards to provide comments unless they were in the meeting room. The record also reflects that the individuals whom Entergy paid to attend the meeting and show support for the NOPS did not leave the meeting room once they made comments, and many members of the public left without having the

opportunity to observe the Committee meeting or provide comment because they believed they would not be able to enter the meeting at all. The purpose of the Open Meetings Law is to allow members of the public to observe the meetings of their governing bodies and voice their opinions in the decision-making process, and this purpose was not served at the Committee meeting. La. R.S. 42:12(A); *Joseph*, 2001-1951, p. 14, 805 So.2d at 409; *Delta Development Company, Inc.*, 451 So.2d at 138. Thus, we find that the Committee violated the Open Meetings Law at its February 21, 2018 meeting.⁴

However, the Fourth Circuit Opinion does not address the substantial role of the Council Committee in the deliberative process to hear the closing arguments of the parties to the proceeding, weigh the evidence, select the gas plant over other options, and recommend its approval to the City Council. With the exception that it is comprised of five elected City Councilmembers, the Council Committee is not unlike other advisory committees whose recommendations “constitute an element of the formulation of public policy.” La. Atty. Gen. Op. No. 01-81 (Mar. 28, 2001).⁵

Contrary to Louisiana jurisprudence, the Fourth Circuit Opinion essentially divorces from the deliberative process the Council Committee’s recommendation that was made in violation of the OML. This is in conflict with established Louisiana jurisprudence that recognizes an advisory committee, which is part of a public deliberative process, is subject to the OML. *Spain*, 398 So.2d 1390; *Brown*, 405 So.2d 1153. Review by this Court is merited pursuant to La. S.Ct. Rule X, § 1(a)(1).

3. The Fourth Circuit decided a significant issue of law that should be resolved by this Court regarding the availability of a remedy under the Open Meetings Law when a public body adopts an action recommended by a committee that is in violation of the Open Meetings Law, meriting review under La. S.Ct. Rule X, § 1(a)(2).

The Fourth Circuit Opinion holds that there is no remedy under the OML for the City Council’s decision to adopt the Council Committee’s recommendation that was made in violation of the Open Meetings Law. This Opinion reverses, in part, the judgment of the trial court that voided the City Council’s decision. According to the Opinion:

Because it is only the Council’s decision which ultimately has binding effect, and no [OML] violation occurred at the Council’s meeting, **no remedy is necessary** where no violation occurred.⁶

⁴ Fourth Circuit Opinion at 11-12 (App. A).

⁵ La. Atty. Gen. Op. No. 01-81, *citing* La. Atty. Gen. Op. No. 89-481; La. Atty. Gen. Op. No. 89-481, *citing* La. Atty. Gen. Op. No. 79-132.

⁶ Fourth Circuit Opinion at 17-18 (App. A) (Emphasis added). The Fourth Circuit’s finding that no OML violation occurred at the City Council’s meeting is contradicted by the record showing that Entergy and its supporters were allowed to enter the meeting room through a private

No previous case holds, as the Fourth Circuit now holds, that egregious violations of the OML are irrelevant if the *next* stage in the decision-making process is conducted in compliance with the OML. If this Opinion is allowed to stand, it will deny the right of thousands of Louisiana residents to participate in democracy at the local and state level. The effects of this decision go well beyond the City Council and the residents of New Orleans by setting a new and dangerous legal standard that completely undermines the Open Meetings Law. Committees, subcommittees, and advisory boards are subject to the Open Meetings Law and carry out public policy decisions in each of the 64 parishes, numerous school boards, over 300 incorporated places (cities, towns, and villages), and at least 12 government agencies. The Fourth Circuit's decision will give permission to these committees, subcommittees and advisory boards to meet in secret and take other actions in violation of the OML with impunity. Furthermore, the decision will allow public bodies to make binding decisions that adopt the recommendations made by committees, subcommittees, and advisory boards in violation of the OML. This is a materially unjust result, unimaginable to the Louisiana Legislature that enacted the OML, and, repulsive to the framers and voters who adopted and approved the basic guarantee in the Louisiana Constitution that “[n]o person shall be denied the right to observe the deliberations of public bodies” La. Const. art. XII, § 3 [emphasis added]. The Fourth Circuit Opinion is an affront to basic democratic principles and violates Louisiana law and policy favoring open and transparent public deliberations.

The Louisiana Attorney General has consistently explained that “the intent of the Open Meetings Law would be frustrated if committee meetings are closed to the public.”⁷ Court decisions from other states require *every step* of the decision-making process must comply with the open meetings laws.⁸

entrance and take seats while the doors to the public were locked and over 100 people waited in line to enter; people were denied entry to the room after the meeting started; and people forced to wait outside the meeting room could not observe the meeting. Amended Petition in Case No. 18-3843 (June 7, 2018): Affidavit of Happy Johnson, ¶ 11; Affidavit of Patrick Bryant, ¶ 14; Affidavit of Ted Quant, ¶ 16; Affidavit of Minh Thanh Nguyen, ¶¶ 16-17; Affidavit of Margaret “Meg” Logue, ¶¶ 11-12; Affidavit of Renate Heurich, ¶ 24.

⁷ *Id.*

⁸ See, e.g., *Times Pub. Co. v. Williams*, 222 So. 2d 470, 473 (Fla. Dist. Ct. App. 1969); *Sacramento Newspaper Guild v. Sacramento Cty. Bd. of Sup’rs*, 263 Cal. App. 2d 41, 50, 69 Cal. Rptr. 480, 487 (Ct. App. 1968) (“Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices.”); *Orange Cty. Publications, Div. of Ottaway Newspapers, Inc. v. Council of*

Review by this Court is necessary to prevent this evisceration of the OML, pursuant to La. S.Ct. Rule X, § 1(a)(2).

STATEMENT OF THE CASE

This is a challenge by truthful, directly impacted residents to the use of lying paid actors at public meetings who advocated for and were secretly compensated by a regulated corporation to win the approval of the City Council for a construction project that would net the corporation tens of millions of dollars in profits. Not only did these paid actors openly and flagrantly lie about who they were and why they were there, exactly as they were paid to do, they also physically displaced dozens of directly impacted people who wanted to observe and participate in deliberations which were required to be open to the public under the OML. The use of paid actors was intended to limit residents who opposed the proposed the gas plant from being heard at City Council meetings. This blatant mockery of democracy rightly brought down a storm of scorn and criticism on the City locally and nationally.

Petitioners-Applicants are local public interest organizations and individual New Orleans residents who were awarded judgment in their favor in an OML enforcement action against the City Council.⁹ The lawsuit brought by Petitioners-Applicants involves the egregious actions by Entergy, who covertly use paid actors to pose as concerned residents at City Council meetings and speak in support of Entergy's application to build a gas-fired power plant in the East New Orleans community. Petitioners-Applicants prevailed in the judgment of the District Court that was in their favor and against the City Council for violations of the OML.

As a remedy for the violation of the OML, the District Court voided the decision made by the Council Committee that voted to recommend adoption of Resolution 18-65 to approve the construction of a gas plant by Entergy.¹⁰ The District Court also voided the decision made by the City Council that adopted this unlawful recommendation.¹¹ The Fourth Circuit reversed the remedy imposed by the District Court despite finding that "members of the public were deprived

City of Newburgh, 60 A.D.2d 409, 415, 401 N.Y.S.2d 84, 89 (1978); *City of New Carrollton v. Rogers*, 287 Md. 56, 70–73; 410 A.2d 1070, 1078–1079 (1980) (finding that the deliberative and decision-making process in its entirety which must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business).

⁹ District Court Judgment, Case No. 2018-3843 (July 2, 2019) (App. B).

¹⁰ *Id.*

¹¹ *Id.*

of the opportunity to observe the [Council Committee] meeting and provide comments during the public comment period”¹² and the purpose of the OML was not served at the Council Committee meeting.¹³ This denial of any remedy, despite the Fourth Circuit’s finding that the OML was violated, is contrary to the OML and must be reversed. To date, the Supreme Court has reviewed the application of the OML to a variety of entities and their contested decisions.¹⁴ Direction is needed by the Supreme Court, as the Court has never interpreted the Louisiana constitutional protection of the right to direct participation or interpreted the OML on the question of whether a remedy is available in instances where a public body adopts a committee recommendation made in violation of the OML.

1. Factual Background

This case involves outrageous actions by Entergy to attack the democratic process of the City Council’s public meetings and Entergy’s extraordinary efforts to conceal these acts. It also shows the apparent failure of the City Council and Council Committee to allow residents to enter the meeting rooms to observe and comment.

Petitioners-Applicants presented key facts, which were known to the City Council, of Entergy’s use of paid actors to show sham support at City Council and Council Committee public meetings.¹⁵ These facts were later confirmed and further detailed in a written report of an independent investigation of ENO’s use of paid actors.¹⁶

The public meetings at issue in this appeal are part of the City Council’s consideration of whether or not to approve Entergy’s application to build a gas-fired power plant in New Orleans East.

On June 20, 2016, Entergy filed an initial application with the City Council for authorization to build the gas-fired power plant. The City Council established Council Docket No. UD 16-02 to consider the application. The Council set a procedural schedule for

¹² Fourth Circuit Opinion at 11.

¹³ *Id.* at 12.

¹⁴ The Supreme Court cases include *New Orleans Bulldog Society v. La. Society for the Prevention of Cruelty to Animals*, 222 So.3d 679 (La. 2017); *La. High School Athletics Association, Inc. v. State*, 107 So.3d 583 (La. 2013); *Greemon v. City of Bossier City*, 65 So.3d 1263 (La. 2011); and *Spain v. Louisiana High School Athletic Association*, 398 So.2d 1386 (La. 1981).

¹⁵ Amended Petition at ¶ 85.

¹⁶ Entergy New Orleans, LLC, Investigation Final Report (Oct. 29, 2018).

Entergy's application. On August 10, 2017, the City Council issued Resolution No. R-17-426, which, among other things, directed the Council Utilities Regulatory Office ("CURO") to conduct one public hearing on Entergy's Application in the City Council Chambers. This meeting was scheduled on October 16, 2017.

A. October 16, 2017 Evening Public Hearing

On October 16, 2017, members of the public, many of whom opposed ENO's application, arrived well before the announced start time of 5:30 pm for the public hearing. They were informed that the meeting room doors would be unlocked at 5:00 pm, 30 minutes before the scheduled start time for the meeting. Two buses of ENO supporters arrived around 4:00 pm. These individuals were immediately permitted to enter the meeting room.

Many Vietnamese American and African American residents, who live in the neighborhood where the gas plant was proposed to be built, as well as residents from other neighborhoods, wanted to speak in opposition to the construction of the plant but were not allowed in the room when they arrived and many left when it became clear that, as a result of the large crowd of ENO supporters admitted earlier into the meeting room and that remained in their seats throughout the meeting, they would not be able to comment. An hour into the hearing, Council staff announced that there the meeting had a cut-off time that would not allow for everyone to comment and asked people to stop filling out comment cards. At one point, then-Councilmember Susan Guidry asked people to leave the room when they were done speaking so that others who were outside could come in and provide comment. However, few, if any, of the ENO supporters wearing the orange pro-gas plant t-shirts left.

B. February 21, 2018 Council Committee Public Meeting

Following the completion of the procedural schedule under Council Docket No. UD-16-02, the Council Committee met on February 21, 2018, to consider a draft Resolution that approved one of the two options for the construction of a gas-fired power plant. If approved by the Council Committee, the draft Resolution would then be recommended to the City Council. An agenda published five days prior to the meeting stated that each party to the proceeding would be given 15 minutes for closing argument, and each non-party would be allowed two minutes for comment.

Many members of the public arrived at the designated meeting site at approximately 9:30 am, 30 minutes before the meeting was scheduled to begin. At that time, the doors to the meeting room were locked and no one was allowed to enter.¹⁷ Approximately 70 people were denied entry to the meeting by security, allegedly because there was no more space in the meeting room.¹⁸

The majority of these individuals were residents of New Orleans East and the Lower Ninth Ward.¹⁹ For example, VAYLA New Orleans (“VAYLA”), a multi-racial community organization in New Orleans East, organized two buses to transport 67 community members from New Orleans East to the meeting. The community members arrived at the meeting room at approximately 9:20 am.²⁰ However, VAYLA representatives were informed that the room was at capacity and that none of the community members would be admitted.²¹ The community members were not allowed in the meeting even though there were empty seats in the room.²² During the meeting, Councilmembers acknowledged that people had been shut out of the proceeding. Then-Councilmember Susan Guidry observed that ENO “bused in a lot of people early and so it filled up the room so people couldn’t get in. I’m just saying, hey, it’s a strategy.”²³

Many members of the public waited outside of the meeting room for three hours or more without being admitted.²⁴ In fact, despite VAYLA members waiting approximately four to five hours, only three individuals from VAYLA were permitted to comment, and very few other members of VAYLA were allowed to even enter the room.²⁵ At no time were those who were

¹⁷ Amended Petition: Affidavit of Margaret “Meg” Logue, ¶ 5 (“Logue Affidavit”); Affidavit of Dr. Beverly L. Wright (“Wright Affidavit”), ¶¶ 13, 15; Affidavit of Dynisha Dianne Hugle, ¶ 9 (“Hugle Affidavit”).

¹⁸ Amended Petition: Affidavit of Ted Quant, ¶¶ 8, 10; Logue Affidavit, ¶ 5; Affidavit of Renate Heurich (“Heurich Affidavit”), ¶ 8; Affidavit of Grace Morris (“Morris Affidavit”), ¶ 9; Affidavit of Patrick Henry Bryant, ¶ 9 (“Bryant Affidavit”); Affidavit of Robert D. Sullivan, (“Sullivan Affidavit”) ¶ 17; Affidavit of Jacob Horwitz, ¶ 7; Affidavit of Andrew Wells, ¶ 8.

¹⁹ Amended Petition: Logue Affidavit, ¶ 5; Bryant Affidavit, ¶ 8.

²⁰ Amended Petition: Affidavit of Minh Thanh Nguyen, ¶ 16 (“Nguyen Affidavit”); Hugle Affidavit, ¶ 7.

²¹ Amended Petition: Nguyen Affidavit, ¶¶ 6, 8; Hugle Affidavit, ¶ 9.

²² Amended Petition: Brown Affidavit, ¶ 12; Logue Affidavit, ¶ 7; Nguyen Affidavit, ¶¶ 9, 10; Wright Affidavit, ¶ 18; Bryant Affidavit, ¶ 11; Sullivan Affidavit, ¶ 12.

²³ See Kevin Litten, *Chamber renovation creates headaches for N.O. City Council*, The Times-Picayune (Mar. 7, 2018).

http://www.nola.com/politics/index.ssf/2018/03/city_hall_renovation_council.html

²⁴ Amended Petition: Brown Affidavit, ¶ 12; Logue Affidavit, ¶ 7; Nguyen Affidavit, ¶¶ 9, 10; Wright Affidavit, ¶ 18; Bryant Affidavit, ¶ 11; Sullivan Affidavit, ¶ 12.

²⁵ Amended Petition: Nguyen Affidavit, ¶¶ 13-15.

barred from the meeting room informed regarding whether they would ever be permitted to speak.

The Council Committee used a comment card process. An individual fills out a comment card and gives that card to a designated Council employee. During the public comment period, the Council Committee Chair calls individuals up to speak based on these cards. An individual who does not fill out a comment card is not permitted to speak at the public meeting.

Many of the individuals who were locked out of the meeting filled out comment cards. Ms. Grace Morris of the Sierra Club attempted to give these comment cards to Mr. Keith Lampkin, Chief of Staff to then-Council Committee Chair and Councilmember Jason R. Williams, so that those who were locked out of the meeting could get in the queue to speak. Mr. Lampkin told Ms. Morris that he could only accept comment cards from people inside the room and that “there would be no way to facilitate everyone speaking [that day].”²⁶ Mr. Lampkin also refused to ask people to leave after they made public comments so that others could come inside the meeting room and comment.²⁷ At no time during the meeting were those citizens who were barred from entering the meeting room informed regarding whether they would ever be permitted into the room or whether they would be permitted to speak.

During this public comment period, the Chair failed to follow the instructions provided in the official agenda notice.²⁸ The agenda notice expressly stated that parties to the underlying proceeding would not be allowed to speak during the public comment period. The Chair did not enforce this rule or even inquire if the speaker was a party. He never announced that the provision of the agenda notice limiting who could speak was being abandoned. Thus, Dr. Beverly Wright, Executive Director of the Deep South Center for Environmental Justice, a party to the underlying Entergy gas plant proceeding, never filled out a comment card and never spoke during the public comment period because the written directive in the agenda notice expressly stated that parties would be prevented from speaking.²⁹ Similarly, Ms. Grace Morris of the Sierra Club did not fill out a comment card because her understanding was that she and members of the Sierra Club, a party to the underlying proceeding, would not be allowed to comment at the public

²⁶ Amended Petition: Morris Affidavit, ¶ 12.

²⁷ *Id.*

²⁸ Amended Petition: Exh. 7 - Council Committee Agenda Notice.

²⁹ Amended Petition: Wright Affidavit, ¶ 23.

session.³⁰ It is impossible to know how many members of the Deep South Center for Environmental Justice, the Sierra Club, 350 New Orleans, and other parties to the underlying proceeding did not attend all or part of the meeting because they believed that, based on the agenda notice, they would not be permitted to speak during the public comment session. However, Entergy employees and representatives were allowed by the Chair to speak during the public comment session even though Entergy was a party to the underlying proceeding.

To summarize, while supporters of Entergy (who were later discovered to be actors paid to attend the meeting and show support for Entergy) were given preferential access to the meeting room, approximately 70 members of the public were prohibited from entering the meeting due to purported limited space. Moreover, the procedures outlined in the agenda regarding who was allowed to speak at the meeting were not followed. At the conclusion of the meeting, the Council Committee voted four-to-one to refer the Resolution to the full Council.

Here again, the evidence demonstrates that professional actors were recruited and paid to attend the meeting and present public comments as though they were concerned citizens in support of Entergy's proposed gas plant.³¹ This was a hostile tactic designed to not only present sham support for Entergy's proposed gas plant, but also take space in the meeting room for the real concerned residents of New Orleans to observe the meeting and comment.³² In each of the public meetings on October 16, 2017 and February, 21, 2018, real concerned residents were denied access to the meeting rooms where they could observe and/or make comments for the purported reason that there were no seats available.

Directly after this meeting, Ms. Renate Heurich, Vice President of 350 New Orleans, sent an email to the City Council regarding the manner in which the UCTT Committee meeting was conducted. Specifically, Ms. Heurich stated:

I understand that approximately 50-60 community members who arrived at 9:30 this morning were not able to go inside the auditorium due to limited space inside. However, when we kept receiving text messages with pictures of empty seats we became upset and started shouting to be let in. After waiting for about 90 minutes,

³⁰ Amended Petition: Morris Affidavit, ¶ 14.

³¹ See Michael Isaac Stein, *Actors were paid to support Entergy's power plant at New Orleans City Council meetings*, The Lens (May 4, 2018), <https://thelensnola.org/2018/05/04/actors-were-paid-to-support-entergys-power-plant-at-new-orleans-city-council-meetings/>. (“The Lens article”).

³² Original Brief of Petitioners-Appellees, Deep South Center for Environmental Justice et al., Case No. 2019-Ca-0774 c/w 0775, at 9-10 (Dec. 2, 2019).

a limited number of people were allowed access. But even as more and more people left the building, nobody else was allowed to enter, except for another small group a good while later.

Around 12:30, 2 1/2 hours into the meeting, about 20 people were still waiting outside, some of them sitting on the floor. Many others had given up and left. When someone else exited, I entered the room and saw at least 20/30 empty seats right where I was. Security told me I was not allowed in, but I proceeded down the steps, pointing to the many empty seats. Consequently, security motioned a second security guard to escort me out. I told him that I wanted to sit in one of the numerous empty seats, but he insisted that I leave the room. I complied because I didn't want to get arrested even though I just wanted to participate in a public meeting.³³

The Council Committee did not offer any response when it was notified during the public comment session that paid actors were in the meeting room. Nor did the Council, other than Councilmember Guidry, respond to an email by Appellee Renate Heurich documenting the fact that residents were denied the opportunity to observe and comment.³⁴

On March 6, 2018, attorneys representing 350 New Orleans sent a letter to the City Council stating that the manner in which the Council Committee conducted the public meeting constituted a significant violation of the OML and requested that the Council require the Council Committee to conduct a second public meeting that complied with the OML.³⁵ The letter was included on the regular meeting agenda of the City Council. During this meeting, a representative made an oral comment to the City Council in which she discussed the Open Meetings Law violations presented in the letter. The City Council never responded.

C. March 8, 2018 Full Council Meeting

On March 8, 2018, the full Council considered the Council Committee's vote in favor of Council Resolution No. R-18-65. People arrived early and formed a line outside of the meeting room more than hour before the meeting was to start at 10:00 am. In contrast, Entergy employees were escorted to a separate entrance (not accessible to the public) and were seated in the meeting room as people waited to be admitted outside of the locked doors.³⁶ Mr. Patrick Bryant observed the ENO employees being led into the meeting room through this private entrance.³⁷ He and others

³³ Amended Petition: Heurich Affidavit, Exh. 1.

³⁴ Amended Petition: Heurich Affidavit, ¶ 21.

³⁵ Letter from William P. Quigley, Susan Stevens Miller, and Jill Tauber to the New Orleans City Council (Mar. 6, 2018).

³⁶ Amended Petition: Johnson Affidavit, ¶ 11.

³⁷ Amended Petition: Bryant Affidavit, ¶ 14.

proceeded to enter the room through this same entrance and were confronted by an Entergy employee who attempted to physically block them, but Mr. Bryant and a few others were able to enter.³⁸ Like at the February 21, 2018 meeting, members of the public were prevented from attending the public meeting.³⁹ Approximately 30 people were forced to wait outside, and some left after waiting for hours.⁴⁰

2. The Litigation

On April 19, 2018, Plaintiff/Appellants filed an OML complaint pursuant to La. R.S. 42:25(C). This lawsuit sought remedies for two public meetings held by the City Council and the Council Committee that denied them and other New Orleans residents the right to direct public participation under the Louisiana Constitution, Article XII, Section 3; and, under La. R.S. 42:14(D), the statutory right to an open meeting and to comment on a public meeting agenda item prior to a vote being taken on it by the public body. In response, the City Council filed its opposition on July 3, 2018. The District Court held a hearing in which oral arguments were presented on July 19, 2018.

At the June 14, 2019 hearing, the District Court orally presented its judgment on the OML complaint in favor of Plaintiffs/Appellants. The District Court carefully examined the facts and the law and appropriately set the process aside as a violation of the OML. The District Court upheld this right in rendering a judgment “to make sure that . . . citizens voices are heard” at City Council meetings.⁴¹

On July 2, 2019, the District Court issued the written judgment which ruled that the Council Committee public meeting on February 21, 2018 violated the OML.⁴² This judgment voided the vote taken by the Council Committee in favor of approving Entergy’s gas plant application and also voided the action taken by the Council which adopted Council Committee’s action as it was void *ab initio*.

The City Council and Entergy filed an appeal of the District Court’s decision in the Fourth Circuit. Both parties argued 1) that Entergy was not a public body and any action taken

³⁸ *Id.*

³⁹ Amended Petition; Quant Affidavit, ¶ 16); Nguyen Affidavit, ¶¶ 16-17.

⁴⁰ Amended Petition; Logue Affidavit, ¶¶ 11-12; Heurich Affidavit, ¶ 24.

⁴¹ Excerpt of District Court Hearing Transcript at 5 (June 14, 2019) (App. C).

⁴² District Court Judgment (App. B).

by Entergy does not render the Resolution voidable; 2) any violation at the Council Committee meeting was cured by the full Council meeting; and 3) the trial court abused its discretion in voiding the resolution.

On February 12, 2020, the Fourth Circuit rendered its decision. The Fourth Circuit found that the Council Committee violated the OML. With regard to the published agenda for the February 21, 2018 meeting, the Fourth Circuit found that the procedure for allowing public comment was altered and thus the Council Committee did not follow the meeting agenda as published.⁴³ This change to the procedure of the agenda was made less than twenty-four hours before the meeting, in violation of La. R.S. 42:19(A)(1)(b)(ii)(aa).⁴⁴

The Fourth Circuit also found that members of the public were deprived of the opportunity to observe the meeting and provide comments during the public comment period at the Committee meeting due to both the change in procedure and the barring of comments from members of the public who were made to wait in the hallway due to limited space.⁴⁵ Specifically, the Fourth Circuit found:

The record shows that members of the public who attended the meeting were prohibited from entering the meeting room and were told that there was no available space. They were also told they could not fill out comment cards to provide comments unless they were in the meeting room. The record also reflects that the individuals whom Entergy paid to attend the meeting and show support for the NOPS did not leave the meeting room once they made comments, and many members of the public left without having the opportunity to observe the Committee meeting or provide comment because they believed they would not be able to enter the meeting at all.⁴⁶

However, with regard to the full Council meeting held on March 8, 2018, the Fourth Circuit found that no violation of the OML occurred at this meeting.⁴⁷

The Fourth Circuit noted the different purposes of the City Council and the Council Committee in the deliberative process. The Council Committee meeting was meant to provide the City Council with a recommendation on Entergy's application, and the Council Committee took the action of making such a recommendation, as it is required to do under the Council's own regulations.⁴⁸ In contrast, the City Council meeting was "meant to put the recommendation

⁴³ Fourth Circuit Opinion at 10.

⁴⁴ *Id.* at 11.

⁴⁵ *Id.* at 11-12.

⁴⁶ *Id.* at 12.

⁴⁷ *Id.* at 12-13.

⁴⁸ *Id.* at 16.

of the Council Committee to full vote, adopting the Resolution and giving Entergy approval . . .

.⁴⁹

Finally, the Fourth Circuit found that despite the trial court's great discretion, the trial court should not have voided the Resolution, because there was no OML violation at the full Council meeting and the full Council was free to accept, modify or reject the Council Committee's recommendation.⁵⁰ According to the Fourth Circuit, because only the full Council's decision ultimately has binding effect, no remedy is necessary.⁵¹

This timely Application followed.

ASSIGNMENT OF ERRORS

1. The Fourth Circuit erred in its interpretation and application of the OML by failing to: (i) accord the plain meaning to La. R.S. 42:13(A)(2), (A)(3) and La. R.S. 42:13(A)(1); (ii) adopt an approach to OML interpretation that protects residents' rights to observe and comment at public meetings; and (iii) give effect to the legislative intent which expressly requires that the provisions of the OML be construed liberally. La. R.S. 42:12(A).
2. The Fourth Circuit erred in its construction of the Louisiana Constitution Article XII, Section 3 by failing to i) recognize the right to observe and comment is an individual right and ii) distinguish between the right to observe a public meeting and the right to comment at that meeting.

SUMMARY OF THE ARGUMENT

Despite concluding that serious violations of the OML occurred during the Council Committee meeting on February 21, 2018, the Fourth Circuit denied the residents who were severely harmed any remedy for those violations. In this case of first impression, the Petitioners-Applicants seek review of the Fourth Circuit Court decision essentially approving an openly corrupted deliberative process that violated the OML. This Court should grant the requested writ and overturn the Fourth Circuit Opinion because the Fourth Circuit erroneously ignored

⁴⁹ *Id.*

⁵⁰ Fourth Circuit Opinion at 17.

⁵¹ *Id.* at 17-18.

Petitioners-Applicants' state constitutional right to direct participation, failed to apply the proper standard of statutory interpretation set forth in the OML; and incorrectly interpreted the OML.

Specifically, the Fourth Circuit incorrectly held that egregious violations of the OML are irrelevant if the *next* stage in the decision-making process is conducted in compliance with the statute. Pursuant to this decision, the committees and advisory boards operating under the authority of a full public body may now violate the OML with impunity, knowing that residents adversely affected by these violations will have no remedy or recourse.

In resolving this significant issue of law for the first time, the Fourth Circuit misinterpreted La. R.S. 42:13(A)(2), which provides that the OML applies to committees if the committee possesses "policy making, *advisory*, or administrative functions." The Fourth Circuit erroneously divorced the Council Committee's meeting and action from City Council's meeting and action, rather than correctly interpreting this section as creating and applying the OML to their joint deliberative process. To reach the erroneous conclusion that "no remedy is necessary,"⁵² the Fourth Circuit reasoned that the full City Council is not bound by the actions of the Council Committee and only the City Council's decision was binding.

The Fourth Circuit's conclusion is contrary to the plain meaning of the OML, which expressly provides that the OML applies to advisory as well as policy making committees. Statutes must be read to give each provision effect. However, the Opinion renders the term "advisory" meaningless. Moreover, the Fourth Circuit's conclusion is inconsistent with the canon of statutory construction expressly set forth in the OML. La. R.S. 42:12(A) requires that "the provisions of [La. R.S. 42:11 through La. R.S. 42:28] shall be construed liberally." The Fourth Circuit's restricted the OML to only the decision of the Council Committee and not the entire deliberative process. This disregard of the expressed requirement for liberal construction of the OML warrants review.

The Fourth Circuit's Opinion also is logically inconsistent. According to the Fourth Circuit the sole purpose of the March 8, 2018 meeting of the City Council was to consider the recommendation made by the Council Committee. Yet, the Fourth Circuit concludes that the Council Committee meeting at which the recommendation was adopted was not a "necessary

⁵² *Id.* at 18.

component” of the Resolution’s passage.⁵³ If the Council Committee had not made a recommendation in which it selected one of two options for a gas plant, there would have been no need for the City Council meeting to consider that recommendation. Not only was the Council Committee recommendation a necessary component of the City Council meeting, this recommendation was the *only* component of the March 8, 2018 meeting. Without the recommendation, the meeting of the City Council would not have occurred.

The Fourth Circuit also incorrectly concludes that the full City Council did not violate the OML. Under the Louisiana Constitution, the public has a right to observe public meetings. It is clear beyond question: **all** members of the public have an absolute right to observe the meeting.

The City Council violated the Open Meetings Law when members of the public were excluded from the March 8, 2018 public meeting for hours. More than 20 residents were barred from attending the March meeting for over two hours.

Moreover, Louisiana courts carefully consider the facts and circumstances of prior events leading to a public meeting where a violation of the Open Meetings Law is alleged.⁵⁴ The Council Committee and the City Council certainly are under a legal obligation to protect the public’s right to observe and comment at public meetings. The Court should note that the OML violations that occurred at the February 21, 2018 meeting of the Council Committee was the third known instance in just a four-month period in which citizens were denied access to a City Council public meeting.⁵⁵ Rather than take the necessary steps to resolve these violations of the law despite requests to do so,⁵⁶ the City Council simply allowed citizens to once again be denied access to the public meeting on March 8, 2018. The Court should grant review and find that the City Council failed in its obligation to protect the public’s right to observe and comment.

LAW AND ARGUMENT

Louisiana guarantees the right of all people to observe the deliberations of public bodies. The Louisiana Constitution, Article XII, Section 3 expressly provides that “[n]o person shall be denied the right to observe the deliberations of public bodies and examine public documents,

⁵³ Fourth Circuit Opinion at 17.

⁵⁴ *See, e.g., Jackson v. Board of Commissioners for Housing Authority of New Orleans*, 514 So.2d 628, 629 (La. App. 4th Cir. 1987) (concluding that the Open Meetings Law was violated based, in part, on evidence of events taking place prior to a public meeting).

⁵⁵ *See Litten, supra* note 23.

⁵⁶ Amended Petition: Heurich Affidavit, ¶ 21; Bryant Affidavit, ¶ 13.

except in cases established by law.” Building upon this foundation, the Louisiana Legislature enacted the OML. La. R.S. 42:12(A). *See also Wagner v. Beauregard Par. Police Jury*, 525 So. 2d 166, 169 (La. Ct. App. 1988). The OML’s purpose is set forth in La. R.S. 42:12(A):

It is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy. Toward this end, the provisions of [La. R.S. 42:11 through La. R.S. 42:28] *shall be construed liberally*. (emphasis added).

The OML requires that “[e]very meeting of any public body shall be open to the public,” with limited exceptions. La. R.S. 42:14(A). Public bodies include the board of any political subdivision, and *any committee or subcommittee* thereof. La. R.S. 42:13(A)(2), (A)(3) (emphasis added). The Attorney General has determined that the Council, as well as any Council committee, is a “public body” for purposes of the OML. La. Atty. Gen. Op. No. 10-0121 (June 7, 2010). A meeting of a public body occurs when a public body convenes to deliberate or act on any matter over which it has supervision, control, jurisdiction, or *advisory power*. La. R.S. 42:13(A)(1) (emphasis added). Considered together, these provisions guarantee the public’s right to observe the meetings of any public body whenever it meets to perform any official duties.

Louisiana law further requires that each public body accept public comment. Thus, all public bodies are required to allow public comment prior to taking action on an agenda item on which a vote is to be taken. La. R.S. 42:14(D). The importance of public comment is highlighted by a Louisiana Court of Appeal’s finding that:

In determining the reasonableness of the Commission’s decision, we must review the opinions and concerns raised at the public hearing, as well as the testimony presented at trial. Expressions of opinion made by citizens to a legislative body serve as a manner by which the legislative body learns the will of the people and determines what may benefit the public good.

Prest v. Par. of Caddo, 41,039 (La. App. 2 Cir. 6/2/06); 930 So. 2d 1207, 1211.

Under La. R.S. 42:13(A)(1), the OML applies even when a committee is only serving an advisory function. Thus, even when a committee serves only an advisory function, that committee is a public body, and the convening of a quorum of the committee constitutes a public meeting as defined in La. R.S. 42:13. *See* La. Atty. Gen. Op. No. 16-0170 (Dec. 5, 2016).

Finally, the OML establishes the mandate that courts are “to issue all necessary orders to ensure compliance and prevent noncompliance with [the statute].” La. R.S. 42:26(B).

1. Review should be granted to restore the protections guaranteed to all persons under the Louisiana Constitution, Article XII, Section 3.

At issue here is a matter central to democracy and government by and for the people. The right of Petitioners-Applicants to open meetings is protected by the Louisiana Constitution, Article XII, and Section 3, which expressly provides that “[n]o person shall be denied the right to observe the deliberations of public bodies . . . except in cases established by law.” The Open Meetings Law builds on this constitutional foundation by empowering citizens with enforcement authority. La. R.S. 42:25. *See also Wagner v. Beauregard Parish Police Jury*, 525 So.2d 166, 169 (La. App. 3d Cir. 1988) (The Open Meetings Law was enacted to ensure the rights of citizens to observe and participate in the deliberations of public bodies).

The Open Meetings Law is to be accorded the highest protection allowed. The Louisiana legislature has made it clear that the law is to be liberally construed in favor of sunshine and open government. The purpose of this law is set forth in La. R.S. 42:12(A):

It is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy. Toward this end, the provisions of [La. R.S. 42:11 through La. R.S. 42:28] **shall be construed liberally.**

[Emphasis added.]

As explained by the Fourth Circuit Court of Appeals, “the purpose of the Open Meetings Law is to allow the public to voice its opinion in the decision making process.” *Jackson v. Board of Commissioners for Housing Authority of New Orleans*, 514 So.2d 628, 629 (La. App. 4th Cir. 1987).

Governmental action that is in violation of the Open Meetings Law “shall be voidable by a court of competent jurisdiction.” La. R.S. 42:24. For such a governmental action, the Open Meetings Law provides the judicial remedy of a “judgment rendering the action void.” La. R.S. 42:26(A)(4). Furthermore, the Open Meetings Law imbues the court with the “jurisdiction and authority to issue all necessary orders to require compliance and prevent noncompliance. . . .” La. R.S. 42:26(B).

The Fourth Circuit found that the Council Committee’s public proceeding violated the Open Meetings Law and, by extension, Louisiana Constitution Article XII, Section 3. However, the Fourth Circuit held that the District Court abused its discretion when that court voided the Resolution.

This Court should find that a granting of writ is merited because the Fourth Circuit’s interpretation of the OML violates the basic rules of statutory construction and the Fourth Circuit erroneously concluded that the full City Council did not violate the Louisiana Constitution. The Fourth Circuit misinterpreted the application of the Open Meetings Law to an advisory committee of a public body.

2. The Fourth Circuit misinterpreted the application of the Open Meetings Law to an advisory committee of a public body, and creates a manifest injustice in holding that there is no remedy under the Open Meetings Law when a public body adopts a committee’s recommendation made in violation of the statute.

In Louisiana, “courts should avoid a construction which would render any portion of the constitution meaningless.” *Succession of Lauga*, 624 So.2d 1156, 1166 (La. 1993); *Kungys v. United States*, 485 U.S. 759, 778 (1988) (“It is a ‘cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.’”). When interpreting statutory provisions, the courts have found that “[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.”⁵⁷ “[C]lear and unambiguous” denote language that is not “subject to more than one reasonable interpretation.”⁵⁸ “[A]bsurd consequences” are results that are contrary to the purpose of the law.⁵⁹ A court’s goal in interpreting the language of a statutory provision should be “to determine the meaning of what has been written, not to delete sections from the [c]onstitution on the theory that if conditions had been different they would not have been written.”⁶⁰

⁵⁷ La. Civ. Code Art. 9. *See La. Dep’t of Agric. & Forestry v. Sumrall*, 728 So. 2d 1254, 1258 (La. 1999) (stating that the principle is rudimentary in the civil law).

⁵⁸ *La. Mun. Ass’n v. State*, 773 So. 2d 663, 667 (La. 2000).

⁵⁹ *See, e.g., In re Coon*, 141 So. 2d 112, 121 (La. App. 1st Cir. 1962).

⁶⁰ *Harrison v. Day*, 200 Va. 439, 449, 106 S.E.2d 636, 644 (1959); *see also* 16 Am. Jur. 2d Constitutional Law § 60 (1998); *W. Union Tel. Co. v. R.R. Comm’n of La.*, 45 So. 598, 599 (La. 1908) (“Constitutions import the utmost discrimination in the use of language.”) (citation omitted).

Public bodies include the board of any political subdivision, and *any committee or subcommittee* thereof. La. R.S. 42:13(A)(2), (A)(3) (emphasis added). The Attorney General has determined that the Council, as well as any Council committee, is a “public body” for purposes of the OML. La. Atty. Gen. Op. No. 10-0121 (June 7, 2010). A meeting of a public body occurs when a public body convenes to deliberate or act on any matter over which it has supervision, control, jurisdiction, or *advisory power*. La. R.S. 42:13(A)(1) (emphasis added).

Despite this clear language that the OML applies even when a committee is operating in an advisory capacity, the Fourth Circuit found that because the Council is free to accept, modify, or reject any or all of the Council Committee’s recommendations the Council Committee meeting was not a “necessary component” of the Resolution’s passage.⁶¹

The Fourth Circuit’s decision violates the letter and the spirit of the OML. The Fourth Circuit’s conclusion essentially reads the term “advisory power” out of the statute. Every committee or subcommittee which acts in an advisory capacity will only make a recommendation to the full public body. To declare that these recommendations are not part of a public body’s decision-making process is contrary to law and practice. As the Louisiana Attorney General explained:

[s]ince the deliberations would constitute an element of the formulation of public policy, the intent of the Open Meetings Law could be frustrated if the committee meetings are closed to the public. Accordingly, it was concluded the committee should meet in public so that interested citizens can have the benefit of deliberations and decisions which could have a profound effect on the public policy.⁶²

⁶¹ Fourth Circuit Opinion at 17.

⁶² La. Atty. Gen. Op. No. 01-81 (2001), *citing* La. Atty. Gen. Op. No. 89-481. Additionally, several states have concluded that *every step* of the decision-making process must comply with the open meetings laws. *See, e.g., Times Pub. Co. v. Williams*, 222 So. 2d 470, 473 (Fla. Dist. Ct. App. 1969) (explaining that the legislature intended to affect every step of the decision-making process); *Sacramento Newspaper Guild v. Sacramento Cty. Bd. of Sup’rs*, 263 Cal. App. 2d 41, 50, 69 Cal. Rptr. 480, 487 (Ct. App. 1968) (“Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices.”); *Orange Cty. Publications, Div. of Ottaway Newspapers, Inc. v. Council of City of Newburgh*, 60 A.D.2d 409, 415, 401 N.Y.S.2d 84, 89 (1978) (legislature intended to include every step of the decision-making process); *City of New Carrollton v. Rogers*, 287 Md. 56, 70-73, 410 A.2d 1070, 1078-1079 (1980) (finding that the deliberative and decision-making process in its entirety which must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business).

This statutory provision must be given effect. Moreover, this very narrow interpretation of the OML cannot be reconciled with the express intent of the Legislature to construe all provisions of the OML liberally.⁶³

Thus, this Court should find that the meeting and vote by the Council Committee was a required step in the City Council's decision making process, and that *every* step in the process must meet the Open Meetings Law requirements or the entire process is tainted by the violation.

The Fourth Circuit's erroneous interpretation and application of the OML led to the holding that no remedy is available for the outrageous violations of the statute. The Opinion will create the manifest injustice of allowing public bodies to hold meetings in secret and commit other acts that deny adequate notice of a meeting or opportunity for public observation and comment. Review by this Court is merited to prevent this injustice.

Furthermore, the Fourth Circuit's opinion is logically inconsistent. The Fourth Circuit states:

The Committee meeting was meant to provide the full Council with a recommendation on Entergy's application for the [gas plant] construction, and the Committee took the action of making such a recommendation, as it is required to do under the Council's own regulations. Though the Council was free to accept, reject, or modify the recommendation of the Committee, the Council meeting was meant to put the recommendation of the Committee to full vote, adopting the Resolution and giving Entergy approval to build the [gas plant].⁶⁴

Thus, the sole purpose of the March 8, 2018 meeting of the City Council was to consider the recommendation made by the Council Committee. Yet, the Fourth Circuit concludes that the Council Committee meeting at which the recommendation was adopted was not a "necessary component" of the Resolution's passage.⁶⁵ If the Council Committee had not made a recommendation, there would have been no need for the full City Council meeting. Not only was the Council Committee recommendation a necessary component of the full City Council meeting, this recommendation was the *only* component of the March 8, 2018 meeting. Without the recommendation, the meeting would not have occurred.

⁶³ La. R.S. 42:12. *See Wayne v. Capital Area Legal Servs. Corp.*, 108 So.3d 103, 115 (La. App. 1st Cir. 2012) (recognizing the strong public policy behind the Open Meetings Law and the broad construction mandated of its provisions).

⁶⁴ Fourth Circuit Opinion at 16.

⁶⁵ *Id.* at 17.

3. The Fourth Circuit did not consider the full record on appeal that shows the City Council violated the Open Meetings Law when residents were prevented from observing the March 8, 2018 public meeting and by failing in its obligation to protect the public’s right to observe and comment.

Under the Louisiana Constitution, the public has a right to observe public meetings. It is clear beyond question: **all** members of the public have an absolute right to observe the meeting.

The City Council violated the Open Meetings Law when members of the public were excluded from the March 8, 2018 public meeting for hours. More than 20 residents were barred from attending the March meeting for over two hours. This violation was compounded by the City Council or its staff giving preferential treatment to Entergy supporters by allowing them to enter the meeting room early through a back door. Barring members of the public from observing a public meeting is a clear and egregious violation of fundamental rights guaranteed to Louisiana citizens—rights that are “essential to the maintenance of a democratic society.”⁶⁶

Moreover, Louisiana courts carefully consider the facts and circumstances of prior events leading to a public meeting where a violation of the Open Meetings Law is alleged.⁶⁷ In this case, the October meeting is relevant as a prior event leading to the OML violations that occurred subsequently in the February meeting and March meeting. Based on what transpired at the October meeting, the Council should have taken action to ensure that the subsequent meetings would be free of such interference to public participation.

The Council Committee and the City Council certainly are under a legal obligation to protect the public’s right to observe and comment at public meetings. The Court should note that the OML violations that occurred at the February 21, 2018 Council Committee meeting was the third known instance in just a four-month period in which citizens were denied access to a City Council public meeting.⁶⁸ Rather than take steps to resolve these violations of the law despite requests to do so,⁶⁹ less than a month later, at the March 8, 2018 City Council meeting, the City Council simply allowed citizens to once again be denied access to a public meeting.

⁶⁶ La. R.S. 42:12(A).

⁶⁷ See, e.g., *Jackson*, 514 So. 2d at 629 (concluding that the Open Meetings Law was violated based, in part, on evidence of events taking place prior to a public meeting).

⁶⁸ See Litten, *supra* note 23.

⁶⁹ Amended Petition: Heurich Affidavit, ¶ 21 (Exh. 2); Bryant Affidavit, ¶ 13 (Exh. 11).

Following the October meeting and prior to its February meeting, the City Council was aware of Entergy's use of paid actors and paid supporters;⁷⁰ preferential treatment for Entergy supporters that gave them early entry into the meeting room before the doors were opened to the public;⁷¹ and other people being denied entry to the meeting room due to insufficient space.⁷² The City Council did not inquire into these complaints or take action to ensure that the subsequent February meeting and March meeting would be free of such interference to public participation. Thus, despite being aware of egregious and significant interference with the Open Meetings Law prior to both its February meeting and March meeting, the City Council did nothing to stop it.

The Court should find that the City Council failed in its obligation to protect the public's right to observe and comment. These failures include 1) the City Council's failure to resolve the issue of citizens being locked out of meetings despite the repeated occurrence of this violation; 2) the City Council received at least three communications after the February 21, 2018 meeting and before the March 8, 2018 meeting but failed to resolve or even acknowledge the violations which took place at the February meeting or take any steps to ensure that the same violations would not occur in future meetings; and 3) the City Council or its staff's favorable treatment to Entergy employees and supporters at the March meeting by permitting them to enter the room and obtain seats prior to residents who had gathered to speak on the issue.

Violations of the OML by the City Council or its committees are not an isolated incident. On the contrary, evidence demonstrates a pattern of behavior which constitutes a willful failure to follow the OML. The Fourth Circuit decision, which allows clear violations of the OML with no consequences, provides no impetus for the City Council to alter its behavior.

⁷⁰ Kevin Litten, *Meet the man who exposed Entergy's paid actors scandal*, The Times-Picayune/NOLA.com (June 28, 2018), <https://www.nola.com/expo/news/erry-2018/06/379d60254b5871/meet-the-man-who-exposed-enter.html> (reporting that during the public comment session at the February meeting, New Orleans resident Danil Faust notified Councilmembers that people were paid to show support for the proposed Entergy gas plant and sign non-disclosure agreements); Kristen Pierce, *City Council Could Face Lawsuit Following Public Hearing on Entergy Plant*, WWL TV News (March 7, 2018), <https://www.wwltv.com/article/news/local/city-council-could-face-lawsuit-following-public-hearing-on-entergy-plant/289-526747370> (interviewing Mr. Andrew Wiseman, an actor, who said he was paid to attend the October meeting, that he "heard about the gig through one of his acting buddies", and that he was told to "Just sit down, wear a t-shirt, don't talk, don't open your mouth").

⁷¹ Amended Petition: Heurich Affidavit, ¶¶ 26-27 (Exh. 2).

⁷² *Id.* at 28.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioners-Applicants respectfully pray that the Louisiana Supreme Court grant a writ of certiorari or review pursuant to La. S.Ct. Rule X, § 1(a)(1), (2), and (4).

Respectfully submitted by:

William Quigley
La. Bar No. 07769
Loyola University New Orleans
7214 St. Charles Avenue
New Orleans, LA 70118
Phone: (504) 861-5591
Fax: (504) 861-5440
Email: quigley@loyno.edu

/s/ Monique Harden
Monique Harden
La. Bar No. 24118
Deep South Center for
Environmental Justice
9801 Lake Forest Blvd.
New Orleans, LA 70127
Phone: (504) 510-2943
Fax: (504) 372-3473
Email: moniqueh@dscej.org

Susan Stevens Miller
Earthjustice
1625 Massachusetts Avenue, N.W.
Suite 702
Washington, DC 20036
Phone: (202) 667-4500
Fax: (202) 667-2356
Email: smiller@earthjustice.org
Admitted Pro Hac Vice

Alexander "Sascha" Bollag
La. Bar No. 34447
Green Justice Legal
540 Broadway Street, Room 304
New Orleans, LA 70118
Phone: (504) 913-7740
Fax: (813) 774-6595
Email: sbollag@greenjusticelegal.org

CERTIFICATE OF SERVICE

I hereby certify that I have, on this 13th day of March 2020, served a copy of the foregoing to the Louisiana Court of Appeal, Fourth Circuit via its E-Court website, as per instructions from the Clerk of Court, and to all known counsel of record in this matter via electronic mail.



 Monique Harden, Counsel

Honorable James F. McKay, III Honorable Paula A. Brown Honorable Dale N. Atkins Louisiana Court of Appeal, Fourth Circuit 410 Royal Street New Orleans, LA 70130 Phone: 504-412-6001 Fax: 504-412-6019 Email: coc@la4th.org E-Court website: https://ecourt.la4th.org/	
Richard C. Stanley, Bar No. 8487 W. Raley Alford, III #27354 Kathryn W. Munson #35933 Stanley, Reuter, Ross, Thornton & Alford, L.L.C. 909 Poydras Street, Suite 2500 New Orleans, LA 70112 Phone: 504-523-1580 Fax: 504-524-0069 Email: rcs@stanleyreuter.com wra@stanleyreuter.com kwm@stanleyreuter.com	Timothy S. Cragin #22313 Harry Barton #29751 ENO Services, LLC 639 Loyola Avenue New Orleans, LA 70113 Phone: 504-576-2603 Fax: 504-576-5579 Email: tcragin@ENO.com hbarton@ENO.com
<i>Counsel for ENO New Orleans, LLC</i>	
James M. Garner #19589 Debra J. Fischman #5578 Stuart D. Kottle #37194 Sher Garner Cahill Richter Klein & Hilbert, LLC 909 Poydras Street, Suite 2800 New Orleans, LA 70112 Phone: (504) 299-2102 Fax: (504) 299-2300 Email: jgarner@shergarner.com dfischman@shergarner.com skottle@shergarner.com	Corwin M. St. Raymond #31330 William Goforth #33153 Donesia D. Turner #23338 Sunni J. LeBeouf #28842 City Attorney 1300 Perdido Street, Room 5E03 New Orleans, LA 70112 Phone: (504) 658-9800 Fax: (504) 658-9868 Email: cmstraymond@nola.gov wrgoforth@nola.gov sunni.lebeouf@nola.gov donesia.turner@nola.gov Adam J. Swensek #30751 New Orleans City Council 1300 Perdido Street, Room 1E6 New Orleans, LA 70112 Phone: (504) 658-1109 Email: adam.swensek@nola.gov
<i>Counsel for The Council of the City of New Orleans, the Utility, Cable, Telecommunications and Technology Committee of New Orleans City Council, Jason R. Williams, Stacy Head, Susan G. Guidry, Latoya Cantrell, Nadine M. Ramsey, Jared C. Brossett, and James A. Gray, II</i>	

RULE XLII, § 5 Statement

I am authorized by Co-Counsel listed below to submit this Application for Writ of Certiorari or Review as an electronically filed document to the Louisiana Supreme Court on their behalf.

William Quigley
Alexander "Sascha" Bolag
Susan Stevens Miller

/s/ Monique Harden
La State Bar No. 24118

**Appendix to Petitioners-Applicants'
Application for Writ of Certiorari or Review**

Appendix A
Court of Appeal, Fourth Circuit, Opinion
rendered on Case No. 2019-CA-0774 c/w
2019-CA-0775 (February 12, 2020)

DEEP SOUTH CENTER FOR ENVIRONMENTAL JUSTICE, VAYLA NEW ORLEANS, JUSTICE AND BEYOND, 350 NEW ORLEANS, SIERRA CLUB, MR. THEODORE QUANT AND MS. RENATE HEURICH

* NO. 2019-CA-0774
*
* COURT OF APPEAL
*
* FOURTH CIRCUIT
*
* STATE OF LOUISIANA

* * * * *

VERSUS

THE COUNCIL OF THE CITY OF NEW ORLEANS, THE UTILITY, CABLE, TELECOMMUNICATIONS AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL, JASON R. WILLIAMS, STACY HEAD, SUSAN G. GUIDRY, LATOYA CANTRELL, NADINE M. RAMSEY, JARED C. BROSSETT, AND JAMES A. GRAY, II

CONSOLIDATED WITH:

DEEP SOUTH CENTER FOR ENVIRONMENTAL JUSTICE, VAYLA NEW ORLEANS, JUSTICE AND BEYOND, 350 NEW ORLEANS, SIERRA CLUB, MR. THEODORE QUANT AND MS. RENATE HEURICH

VERSUS

THE COUNCIL OF THE CITY OF NEW ORLEANS, THE UTILITY, CABLE, TELECOMMUNICATIONS AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL, JASON R. WILLIAMS, STACY HEAD, SUSAN G. GUIDRY, LATOYA CANTRELL, NADINE M. RAMSEY, JARED C. BROSSETT, AND JAMES A. GRAY, II

CONSOLIDATED WITH:

NO. 2019-CA-0775

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2018-03843, DIVISION "I-14"
Honorable Piper D. Griffin, Judge

Judge Dale N. Atkins

(Court composed of Chief Judge James F. McKay, III, Judge Paula A. Brown,
Judge Dale N. Atkins)

Monique C. Harden
DEEP SOUTH CENTER FOR ENVIRONMENTAL JUSTICE
9801 Lake Forest Blvd.
New Orleans, LA 70127

William Patrick Quigley
LOYOLA UNIVERSITY - SCHOOL OF LAW
7214 St. Charles Avenue
Box 902
New Orleans, LA 70118

Alexander "Sascha" Bollag
GREEN JUSTICE LEGAL
540 Broadway Street, Room 304
New Orleans, LA 70118

Susan Stevens Miller
EARTHJUSTICE
1625 Massachusetts Avenue, N.W.
Suite 702
Washington, DC 20036

COUNSEL FOR PLAINTIFF/APPELLEE

Richard C. Stanley
W. Raley Alford, III
Kathryn W. Munson
STANLEY, REUTER, ROSS, THORNTON & ALFORD, L.L.C.
909 Poydras Street
Suite 2500
New Orleans, LA 70112

Corwin M. St. Raymond
Deputy City Attorney
William R. H. Goforth
Assistant City Attorney
Donesia D. Turner
Senior Chief Deputy City Attorney
Sunni J. LeBeouf
CITY ATTORNEY
1300 Perdido Street
City Hall - Room 5E03
New Orleans, LA 70112

Adam J. Swensek
Executive Counsel
NEW ORLEANS CITY COUNCIL
1300 Perdido Street, Room 1E6
New Orleans, Louisiana 70112

Timothy S. Cragin
Harry M. Barton
ENERGY SERVICES, INC.
639 Loyola Avenue
L-ENT-26E
New Orleans, LA 70113

James M. Garner
Debra J. Fischman
Stuart D. Kottle
SHER GARNER CAHILL RICHTER KLEIN & HILBERT, L.L.C.
909 Poydras Street
Suite 2800
New Orleans, LA 70112

COUNSEL FOR DEFENDANT/APPELLANT

**AFFIRMED IN PART AND REVERSED IN PART
FEBRUARY 12, 2020**

Appellants, Entergy New Orleans, LLC (“Entergy”) and The Council of the City of New Orleans (the “Council”), appeal the trial court’s June 14, 2019 judgment voiding the Council’s March 8, 2018 decision to adopt Resolution R-18-65 (the “Resolution”), which granted Entergy authorization to build the New Orleans Power Station (the “NOPS”) in New Orleans East due to the violations of the Open Meetings Law, La. R.S. 42:11, *et seq.* that occurred at the Council’s February 21, 2018 Utility, Cable, Telecommunications, and Technology Committee (the “Committee”) meeting. For the reasons that follow, we affirm the decision of the trial court in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

On June 20, 2016, Entergy filed an initial application with the Council for authorization to build the NOPS. The Council established Council Docket No. UD-16-02 to consider the application. The Council set a procedural schedule for Entergy’s application, which directed, among other things, that Entergy hold public meetings on the NOPS to give information to members of the public and provide the public an opportunity to comment. The Council adopted another resolution on August 10, 2017, which ordered an additional public hearing to be held in the

Council Chamber on October 16, 2017.¹ Several public interest groups intervened as parties to the Council Docket No. UD-16-02, including Deep South Center for Environmental Justice, 350 New Orleans, and the Sierra Club.

Following the completion of the procedural schedule under the Council Docket No. UD-16-02, the Committee met on February 21, 2018, to consider the Resolution to construct the NOPS. If approved by the Committee, the Resolution would then be recommended to be considered by the full Council. An agenda published five days prior to the meeting stated that each party to the proceeding would be given fifteen minutes for closing argument, and each non-party would be allowed two minutes for comment. However, while supporters of Entergy (who were later discovered to be actors paid to attend the meeting and show support for Entergy) were given preferential access to the meeting room, approximately fifty to sixty members of the public were prohibited from entering the meeting due to purported limited space. The procedures outlined in the agenda regarding who was allowed to speak at the meeting were not followed. Representatives of Entergy, which was a party to the proceeding, were allowed to give public comment during the portion of the meeting reserved for non-party comment, while representatives of other interested parties did not give a comment due to their belief that it was prohibited by the agenda. At the conclusion of the meeting, the Committee voted four-to-one to refer the Resolution to the full Council.

¹ The October 16, 2017 meeting is not before this Court on appeal. However, there were several members of the public who attended this meeting, and not all those who attended were able to enter the meeting. Appellees argue that, because many members of the public were prohibited from entering the meeting room due to limited space while Entergy supporters were seemingly allowed immediate entry into the meeting on October 16, 2017, the Council should have anticipated the interest in Entergy's application to build the NOPS, and planned accordingly for the Committee and Council meetings.

A full Council meeting was held on March 8, 2018. Once again, there was a large attendance at the meeting, and some attendees were not given immediate access due to limited space. However, unlike the Committee meeting, all those who wished to observe the meeting and provide comments were eventually given an opportunity to do so. At the conclusion of the meeting, the Council voted six-to-one to approve the construction of the NOPS.

On April 19, 2018, Deep South Center for Environmental Justice, VAYLA New Orleans, Justice and Beyond, 350 New Orleans, Sierra Club, Mr. Theodore Quant, and Ms. Renate Heurich (collectively, the “Appellees”) filed a Petition to Enforce the Louisiana Open Meetings Law, For Declaratory Judgment, Injunction, Attorneys’ Fees and Costs, and Memorandum in Support (“the Petition”) in Orleans Parish Civil District Court. The Appellees asked the trial court to declare that the February 21, 2018 Committee meeting and March 8, 2018 Council meeting violated Open Meetings Law; to declare the Resolution of the March 8, 2018 meeting void; and to enjoin Appellants from constructing the NOPS.

Appellees alleged that, because members of the public were prevented from entering the meeting for observation and comment and supporters of Entergy were given preferential access to the meetings, the Open Meetings Laws were violated at both the Committee and the Council meetings. As attachments to the Petition, Appellees included the affidavits of several individuals who attested to being prevented from observing the meetings and providing comment after being told there was no available space, while also seeing representatives of Entergy being allowed to enter the meeting room. The affidavits attached to Appellees’ Petition also included accounts from individuals who claimed they were made to stand in the hallway outside the Committee meeting for several hours and were threatened

with arrest by security guards if they attempted to enter the meeting. An affidavit of Ms. Heurich, one of the Appellees, stated she attended the Committee meeting and was told there was no available space in the meeting room, but when she snuck past security and entered the room, she was made to leave, even though she observed approximately thirty empty seats inside.

Appellees stated that the agenda for the Committee meeting was changed while the meeting was in progress, in violation of the Open Meetings Law because representatives of parties to Council Docket No. UD-16-02 were allowed to speak during the public comment period at the Committee meeting despite the agenda expressly prohibiting this. They also alleged that the agenda for the Council meeting did not provide a sufficiently specific description of the Council's consideration of the Resolution. On July 7, 2018, Appellees filed an Amended Petition alleging that there were paid actors present at the Committee meeting who prevented community members from entering the meeting and making comments, which was also a violation of Open Meetings Law.

The Council answered the Petition, arguing that both the Committee meeting and the Council meeting complied with the Open Meetings Law as both were open to the public, were streamed live for concerned people to watch online, and allowed for several hours of public comment. The Council argued that the Open Meetings Law does not require that every single person who wishes to observe a meeting of a public body be able to observe it and be present, only that the meetings be reasonably open to the public. The Council further asserted the meetings were reasonably open, but that the rooms in which the meetings were held simply could not accommodate the amount of people who were present. They argued that security was used to keep the meeting from being disrupted and to

ensure adherence to fire codes. The Council also argued that voiding the Resolution would be a disservice to the public interest because of the City's need for the NOPS.

A hearing on Appellees' Petition was held on July 19, 2018. At the conclusion of the hearing, the trial court took the matter under advisement. After several delays,² the trial court rendered judgment on June 14, 2019, in favor of Appellees, declaring the Resolution void because the policy behind the Open Meetings Law was not properly adhered to. The trial court found that actions by Entergy amounted to Open Meetings Law violations at the Committee meeting on February 21, 2018, which the trial court stated was a "necessary component" in the Council's adoption of the Resolution at the Council meeting on March 8, 2018, and which rendered the Resolution void. The trial court found no violations occurred at the Council meeting.

This appeal³ followed.

DISCUSSION

Although Appellants filed separate briefs and worded their assignments of error differently, they both argue that the district court erred in declaring the actions by the Council violated the Open Meetings Law and in voiding the Resolution for the same three reasons. First, they argue the Open Meetings Law

² The delays were requested by Appellees because the Council had launched an investigation into the allegations of paid actors being at the Committee meeting, and both Appellees and the trial court believed the report from the investigation would be relevant to the trial court's decision. The investigation report was issued in the fall of 2018 and found that, indeed, paid actors were present at the Committee meeting. It further found that Entergy knew or should have known that its contractor, Hawthorn, procured these actors. The report included evidence that Charles Rice, President and CEO of Entergy, discussed in text messages and emails with representatives of Hawthorn about having supporters for the NOPS present at Council meetings, and even discussed costs associated with having them.

³ Though Entergy was not named as a party in the Petition, Entergy moved for an appeal pursuant to La. C.C.P. art. 2086, which allows an appeal when an unnamed party could have properly intervened in the trial court.

applies only to public bodies, and because Entergy is not a public body, any action Entergy may or may not have taken does not render the Resolution voidable because Entergy is a private entity. Second, Appellants argue that any violation which may have occurred at the Committee meeting was cured by the Council meeting, and that the trial court erred in finding that the Committee meeting was a “necessary component” of the Council meeting because the Home Rule Charter does not require the Council to hold a committee meeting. Finally, Appellants argue that, even if there were violations of the Open Meetings Law that were not cured, the trial court abused its discretion in voiding the Resolution. We address each argument in turn.

STANDARD OF REVIEW

Article XII, § 3 of the Louisiana Constitution states that “[n]o person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.” This constitutional provision is meant to ensure that citizens are able to observe deliberations of public bodies and protect them from secret decisions being made without any opportunity for input. *Joseph v. Hosp. Serv. Dist. No. 2 of Par. of St. Mary*, 2001-1951, p. 14 (La. App. 1 Cir. 12/28/01), 805 So.2d 400, 409 (citing *Delta Development Company, Inc. v. Plaquemines Parish Commission Council*, 451 So.2d 134, 138 (La. App. 4 Cir.), writ denied, 456 So.2d 172 (La. 1984).

The Louisiana legislature enacted the Open Meetings Law, La. R.S. 42:11, *et seq.*, to ensure that the protections of Article XII, § 3 are fulfilled. La. R.S. 42:12(A) states the purpose of the Open Meetings Law:

It is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials

and the deliberations and decisions that go into the making of public policy. Toward this end, the provisions of [La. R.S. 42:11 through La. R.S. 42:28] shall be construed liberally.

Under the Open Meetings Law, every meeting of a public body must be open to the public, unless it is one of those few that are closed subject to statutory provisions. La. R.S. 42:14. The provisions of the Open Meetings Law shall be construed liberally. La. R.S. 42:12. Actions taken in violation of the Open Meetings Law are voidable by a court of competent jurisdiction. La. R.S. 42:24.

The trial court's ruling voiding the Resolution based on the finding that the policy behind the Open Meetings Law was not adhered to concerns both issues of interpretation of the Open Meetings Law, as well as its application. "Regarding issues of law, the standard of review of an appellate court is simply whether the court's interpretive decision is legally correct." *Duhon v. Briley*, 2012-1137, p. 4 (La. App. 4 Cir. 5/23/13), 117 So.3d 253, 257-58 (citing *Glass v. Alton Ochsner Medical Foundation*, 2002-412, p. 3 (La. App. 4 Cir. 11/6/02), 832 So.2d 403, 405. "Accordingly, if the decision of the trial court is based upon an erroneous application of law rather than on a valid exercise of discretion, the decision is not entitled to deference by the reviewing court." *Id.* See also *Pelleteri v. Caspian Grp. Inc.*, 2002-2141, 2002-2142, p. 7 (La. App. 4 Cir. 7/2/03), 851 So.2d 1230, 1235; *Ohm Lounge, L.L.C. v. Royal St. Charles Hotel, L.L.C.*, 2010-1303, p. 4 (La. App. 4 Cir. 9/21/11), 75 So.3d 471, 474. Meanwhile, whether the Open Meetings Law has been violated is a question of law, subject to *de novo* review. *Harper v. State ex rel. Its Dep't of Health & Hosps.*, 2014-0110, p. 7 (La. App. 4 Cir. 9/9/15), 176 So.3d 479, 486.

I. Applicability of Open Meetings Law

Appellants argue that Entergy, as a private entity, is not required to comply with the Open Meetings Law and any violations Entergy may have committed cannot properly lead to voiding the Resolution. Appellees counter that the Committee is a public body that must ensure its proceedings comply with the Open Meetings Law. Thus, if the Committee—and by extension, the Council—did not ensure compliance with the Open Meetings Law, it is of no moment how the violations occurred for the action to be voidable. We agree.

La. R.S. 42:13(A)(3) defines a public body:

“Public body” means village, town, and city governing authorities; parish governing authorities; school boards and boards of levee and port commissioners; boards of publicly operated utilities; planning, zoning, and airport commissions; and any other state, parish, municipal, or special district boards, commissions, or authorities, and those of any political subdivision thereof, where such body possesses policy making, advisory, or administrative functions, including any committee or subcommittee of any of these bodies enumerated in this paragraph. (Emphasis added).

Here, it is undisputed that the Council, as a governing authority of the City of New Orleans is a “public body” subject to Open Meetings Law. The Utility, Cable, Telecommunications, and Technology Committee is a committee of the Council and as such is a “public body” under La. R.S. 42:13(A)(3). Therefore, all of the Committee’s meetings, including the meeting of February 21, 2018, must be in compliance with the Open Meetings Law.

As public bodies, both the Committee and the Council have the responsibility of ensuring that their meetings comply with the Open Meetings Law. Under La. R.S. 42:24, if the Committee or the Council do not ensure the Open Meetings Law is not violated at its meetings, the actions taken at the meeting are voidable and the cause of the violation is not relevant. Therefore, we find no merit

to Appellants' argument that Entergy's actions—though they were those of a private entity—could not have led to a violation of the Open Meetings Law.

II. Violations of Open Meetings Law and Ratification

Next, we turn to whether there were, in fact, violations of the Open Meetings Law at either the Committee meeting or the Council meeting. Appellees contend that there were violations of the Open Meetings Law at both meetings. First, they argue that, because citizens were prevented from entering both meetings for observation and comment, Article XII, § 3 of the Louisiana Constitution and the Open Meetings Law were violated because not *all* interested citizens were allowed to observe the deliberations and provide comment. Second, they argue that the agendas were untimely changed in violation of the Open Meetings Law. For the Committee meeting, Appellees argue that, by allowing parties to the proceedings to provide comment during the public comment portion of the meeting despite the explicit wording of the agenda that stated each party to the proceeding would be given fifteen minutes for closing argument and each non-party would be allowed two minutes for comment, the agenda was changed less than twenty-four hours prior to the meeting, in violation of La. R.S. 42:19(A)(1)(b)(ii)(aa). La. R.S. 42:19(A)(1)(b)(ii)(aa) provides that public bodies must give written public notice of meetings, and the notice “shall include the agenda, date, time, and place of the meeting. The agenda shall not be changed less than twenty-four hours, exclusive of Saturdays, Sundays, and legal holidays, prior to the scheduled time of the meeting.” For the Council meeting, Appellees argue that the agenda item regarding the Resolution was not described with reasonable specificity, in violation of La. R.S. 42:19(A)(1)(b)(ii)(bb).

Appellants dispute that there were Open Meetings Law violations at either the Committee meeting or the Council meeting, arguing that there was opportunity for citizens to observe the meetings in person or through television broadcast and online streaming, making the meetings reasonably open. They contend that Appellees' argument that all interested citizens be able to observe meetings in person places an unreasonable expectation on public bodies. Further, Appellants argue it would be unreasonable to expect the Committee or the Council to shut out citizens from attending meetings based on any financial or other motives they may have for being present, or for the Council to be expected to ascertain those motives in advance. Appellants further rely on the trial court's finding that no violation of the Open Meetings Law occurred at the Council meeting to support their argument that the Council meeting "cured" or "ratified" any violations that may have occurred at the Committee meeting.

The Committee Meeting on February 21, 2018

Based on our review of the record, we find, as the trial court did, that the Committee violated the Open Meetings Law at its February 21, 2018 meeting. The record reflects that the Committee published its agenda for the February 21, 2018 meeting on February 16, 2018. The agenda included one item: the Resolution and Order Regarding the Application of Entergy New Orleans, Inc. for Approval to Construct the NOPS, Docket No. UD-16-02. The agenda further provided that each party to the proceeding would be allowed fifteen minutes for closing argument and that "[e]ach public speaker, not a party, will be allowed two minutes" during a public comment period. The Committee did not follow the agenda for the meeting as published. The record shows, however, that the procedure for allowing public comment was altered—apparently *ad hoc* as the meeting was in progress—to allow

anyone, including parties to the proceeding, to make comments during the open comment period. As a result, some representatives of parties who attended the meeting attempted to adhere to the procedure stated in the agenda and not make comments during the public comment period, while representatives of Entergy, who was also a party, were allowed to make comments during the public comment period in addition to making closing arguments. This change to the procedure of the agenda was made less than twenty-four hours before the meeting, in violation of La. R.S. 42:19(A)(1)(b)(ii)(aa), which prohibits the change of an agenda “less than twenty-four hours, exclusive of Saturdays, Sundays, and legal holidays, prior to the scheduled time of the meeting.”

Appellants contend that, even if the agenda was not completely adhered to, this amounted to only a “technical” violation of the Open Meetings Law. We disagree. The notice requirement in La. R.S. 42:19(A)(1)(b)(ii)(aa) serves to advance the purpose of the Open Meetings Law because it “ensure[s] that if a member of the public wants to be heard on a matter or observe a public body’s deliberations on an issue, he or she can check the agenda posted twenty-four hours in advance to see if the matter is scheduled for consideration.” La. Op. Att’y Gen. No. 15-0122 (2016). In this instance, the agenda procedure also served to help ensure that those who wanted to provide comments at the Committee meeting were given that opportunity and were aware of when they could or could not speak.

Not only was the agenda untimely changed in violation of the Open Meetings Law, but the record reflects that members of the public were deprived of the opportunity to observe the meeting and provide comments during the public comment period at the Committee meeting due to both the change in procedure and the barring of comments from members of the public who were made to wait in the

hallway due to limited space. The record shows that members of the public who attended the meeting were prohibited from entering the meeting room and were told that there was no available space. They were also told they could not fill out comment cards to provide comments unless they were in the meeting room. The record also reflects that the individuals whom Entergy paid to attend the meeting and show support for the NOPS did not leave the meeting room once they made comments, and many members of the public left without having the opportunity to observe the Committee meeting or provide comment because they believed they would not be able to enter the meeting at all. The purpose of the Open Meetings Law is to allow members of the public to observe the meetings of their governing bodies and voice their opinions in the decision-making process, and this purpose was not served at the Committee meeting. La. R.S. 42:12(A); *Joseph*, 2001-1951, p. 14, 805 So.2d at 409; *Delta Development Company, Inc.*, 451 So.2d at 138. Thus, we find that the Committee violated the Open Meetings Law at its February 21, 2018 meeting.

The Council Meeting on March 8, 2018

Next, we address the alleged violations that occurred at the Council meeting. Appellees contend that the Council violated the Open Meetings Law by: (1) again preventing members of the public from entering the meeting and providing comment as the Committee did in its meeting of February 21, 2018; and (2) publishing an agenda that was not specific enough under La. R.S. 42:19(A)(1)(b)(ii)(bb). We disagree.

First, unlike the Committee meeting, the record does not reflect that members of the public were barred from observing the Council meeting or providing comment. The record shows that the Council made efforts before the

meeting to ensure that the Open Meetings Law requirements were met, including broadcasting the meeting and streaming it online, as well as stating that it would remedy the issues that arose at the Committee meeting by providing an opportunity for observation and comment to everyone. While the Council meeting was widely attended and not all members of the public who wished to enter the meeting were able to at first, the record reflects that, eventually, all those citizens who attended the meeting and wished to observe it and provide comment were given the opportunity, as the Council said. The record also reflects that the Council allowed those citizens who were waiting in the hallway to fill out comment cards to provide comment and that the Council allowed comments for several hours at the Council meeting.

Second, the record contradicts Appellees' argument that the agenda for the Council meeting was not specific enough under La. R.S. 42:19(A)(1)(b)(ii)(bb). In support of their argument, Appellees cite *Hayes v. Jackson Par. Sch. Bd.*, 603 So. 2d 274 (La. App. 4th Cir. 1992). In *Hayes*, the administrative body of the Jackson Parish Head Start Educational Program submitted a proposal to the school board for additional space for the program. The proposal was to be taken up at the school board's regular bi-monthly meeting, and the agenda item for the proposal read "[c]onsider request from Pine Belt Multi-Purpose Agency for additional space for the Head Start Program." *Id.* at 274. This Court held that the agenda item description was not sufficiently specific under the Open Meetings Law because it did not alert the public that part of the proposal was the decision to close an elementary school and merge it with another school to provide the additional space for a Head Start Program. This Court found that "the primary solution to the problem [of finding space for the program] entailed closing one school and

consolidating it with another, [which] exceeded the scope of the agenda item as posted." *Id.* at 276.

Here, item number forty-five on the published agenda for the Council meeting provided:

RESOLUTION - NO. R-18-65 BY: COUNCILMEMBERS
WILLIAMS, HEAD, GUIDRY, BROSSETT AND GRAY

Brief:

APPLICATION OF ENTERGY NEW ORLEANS, INC. FOR APPROVAL TO CONSTRUCT NEW ORLEANS POWER STATION AND REQUEST FOR COST RECOVERY AND TIMELY RELIEF RESOLUTION AND ORDER REGARDING THE APPLICATION OF ENTERGY NEW ORLEANS, INC. FOR APPROVAL TO CONSTRUCT NEW ORLEANS POWER STATION AND REQUEST FOR COST RECOVERY AND TIMEL RELIEF DOCKET NO. UD-16-02.

Unlike the description found in *Hayer*, the description of the Council's agenda item to consider the construction of the NOPS is sufficiently specific under La. R.S. 42:19(A)(1)(b)(ii)(bb). It describes the Resolution number, the Applicant (Entergy), and the subject of the application, *i.e.* "approval to construct" the NOPS. Given that the Council went on to consider (and approve) the construction of the NOPS under the Resolution, the agenda item adequately states the scope of the action taken by the Council. Additionally, because the record reflects that there was a substantial amount of people present at the meeting to comment on this particular item, the statement in the agenda was sufficient to give the public notice of what the Council would be considering. Unlike the Committee meeting, there is nothing in the record to suggest that the Council did not adhere to its agenda, or that the Council did not otherwise comply with the mandates of the Open Meetings Law.

Appellants argue that, because there was no violations of the Open Meetings Law at the Council meeting, the Council meeting cured or ratified the violations that occurred at the Committee meeting. Alternatively, Appellants argue that, because only the Council had the authority to approve the Resolution, the Committee and its recommendation were not necessary to adopt the Resolution, and thus could not be a "necessary component" of the adoption process, as the trial court ruled.

As this Court held in *Delta Development Company, Inc.*, 451 So.2d at 137 (La. App. 4th Cir. 1984), when a public body takes an action in such a way to violate the Open Meetings Law, the injury caused by the prior violation "may be corrected by ratification provided the ratification is adopted after full compliance with the law." Ratification occurs when the public body "reconsider[s]...action taken at a previous meeting which was in violation of the open meetings law." *Wagner v. Beauregard Par. Police Jury*, 525 So.2d 166, 170 (La. App. 3rd Cir. 1988). Alternatively, the public body can also "reconsider, repudiate and recall the earlier improper action." *Id.*

The Rules and Regulations of the Council provides at Rule 39 that the Committee is a "standing committee." Rule 39 further provides that, as a standing committee, the Committee "shall make recommendations to the full Council on Council...Resolutions...and such other reports as in their judgment will advance the interests of...the people of the City of New Orleans." (Emphasis added). Rule 39A(2) states that recommendations made by committees "shall be adopted by the Council in a regular or special meeting...A committee only makes recommendations to the full Council." Further, the Home Rule Charter of the City of New Orleans does not require that the City Council's utility orders first be

approved by the Committee. Pursuant to Charter Section 3-130(6), orders of the City Council in utility matters "shall be upon a resolution or an ordinance in open council meeting and passed by an affirmative vote of a majority of all members of the Council." Thus, Appellants correctly point out that, under the Rules and Regulations of the Council and the Home Rule Charter, the Committee's action had no binding effect on the Council, as it was only a recommendation to the Council on the Resolution.

The distinction between the purposes of and actions taken by the Committee and the Council is precisely why actions taken at the Council meeting could not serve to "ratify" the actions taken at the Committee meeting: the two meetings served two different purposes and two different actions were taken. The Committee meeting was meant to provide the full Council with a recommendation on Entergy's application for the NOPS construction, and the Committee took the action of making such a recommendation, as it is required to do under the Council's own regulations. Though the Council was free to accept, reject, or modify the recommendation of the Committee, the Council meeting was meant to put the recommendation of the Committee to full vote, adopting the Resolution and giving Entergy approval to build the NOPS. Even if the Council meeting was in full compliance with Open Meetings Law, the actions taken at the Committee and Council meetings were different and served different purposes. Therefore, the actions taken at the Council meeting could not ratify those taken at the Committee meeting.

III. Voiding the Resolution

When the Open Meetings Law is violated, a court of competent jurisdiction may void the action. La. R.S. 42: 24. La. R.S. 42:26 states that:

A. In any enforcement proceeding the plaintiff may seek and the court may grant any or all of the following forms of relief:

- (1) A writ of mandamus.
- (2) Injunctive relief.
- (3) Declaratory judgment.
- (4) Judgment rendering the action void as provided in R.S. 42:24.
- (5) Judgment awarding civil penalties as provided in R.S. 42:28.

Trial courts are vested with great discretion in deciding to grant or to deny declaratory relief and, on appellate review, the judgment of the trial court is reviewed under an abuse of discretion standard. *Delta Admin. Servs., L.L.C. v. Limousine Livery, Ltd.*, 2015-0110, p. 6 (La. App. 4 Cir. 6/17/15), 216 So.3d 906, 910 (citing *Edgar Benjamin Fontaine Testamentary Trust v. Jackson Brewery Marketplace*, 2002-2337, pp. 4-5 (La. App. 4 Cir. 5/7/03), 847 So.2d 674, 677).

Based on our review of the record, we find that the trial court should not have voided the Resolution. As discussed, while we agree the Open Meetings Law was violated at the Committee meeting, we also find that there were no Open Meetings Laws violations at the Council meeting. Though the Council's committee procedure disingenuously implies to the public that the Committee's decisions are binding on the Council, the Council's Rules and Regulations and the Home Rule Charter make it clear that the Council is not bound by the actions of the Committee. The Council is free to accept, modify, or reject any or all of the Committee's recommendations. Therefore, the trial court erred in determining that the Committee meeting was a "necessary component" of the Resolution's passage, and violations that occurred at the Committee meeting could render the Resolution voidable. Because it is only the Council's decision which ultimately has binding

effect, and no violations occurred at the Council's meeting, no remedy is necessary where no violations occurred.

DECREE

For the foregoing reasons, we affirm the trial court's finding that there was a violation of the Open Meetings Law at the Committee meeting and reverse the trial court's judgment voiding the Council's vote to approve the Resolution at the Council meeting.

AFFIRMED IN PART AND REVERSED IN PART

Appendix B
Orleans Parish Civil District Court,
Judgment in Case No. 18-3843 (July 2, 2019)

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

CASE NO. 18-3843

DIVISION "T"

Section 14

THE SOUTHERN CENTER FOR ENVIRONMENTAL JUSTICE, INC. d/b/a DEEP SOUTH
CENTER FOR ENVIRONMENTAL JUSTICE, VAYLA NEW ORLEANS,
JUSTICE AND BEYOND, 350 NEW ORLEANS, SIERRA CLUB,
MR. THEODORE QUANT, AND MS. RENATE HEURICH

VERSUS

THE COUNCIL OF THE CITY OF NEW ORLEANS, THE UTILITY, CABLE,
TELECOMMUNICATIONS AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS
CITY COUNCIL, JASON R. WILLIAMS, HELENA MORENO, JOSEPH I. GIARRUSSO,
JAY H. BANKS, KRISTIN GISLESON PALMER, JARED C. BROSSETT, AND CYNDI
NGUYEN

FILED: _____

Deputy Clerk

JUDGMENT

Petitioners' Amended Petition to Enforce the Louisiana Open Meetings Law, for Declaratory Judgment, Injunction, and Attorneys' Fees and Costs came before this Court for hearing on July 19, 2018.

Present at the hearing in court were:

William Quigley, Monique Harden, Alexander Bollag, Susan Stevens Miller, and
Jill Tauber, for petitioners; and

Corwin St. Raymond, William Goforth, and Cherrell S. Taplin, for defendants.

After considering the pleadings and memoranda filed with this Court, the evidentiary record, and the arguments of counsel, this Court announced its ruling in open court on June 14, 2019. The Court explained this judgment is to make sure that "citizens voices are heard" at City Council meetings. Regarding the February 21, 2018 meeting of the Utilities, Cable, Telecommunications and Technology Committee of the New Orleans City Council ("UCTTC") and the March 8, 2018 meeting of the New Orleans City Council (the "Council"), the Court found that the Council "did nothing wrong." The Court acknowledged the Council's own investigatory findings that, as a result of Entergy New Orleans' actions, "paid citizens were present" at public

meetings held on October 16, 2017 and February 21, 2018. The Court further found that “Entergy’s actions undermined” the Open Meetings Laws, La. R.S. 42:11, *et seq.* Finally, the Court found that “the Open Meetings Laws were not adhered to as relates to the meaning and policy behind the Open Meetings Laws.”

Regarding the February 21, 2018 meeting of the Utilities, Cable, Telecommunications and Technology Committee of the New Orleans City Council, the Court finds that the Open Meetings Law was violated.

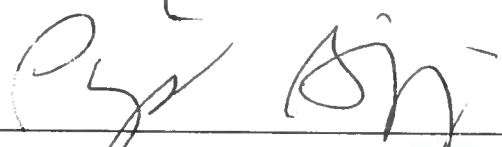
Regarding the March 8, 2018 meeting of the New Orleans City Council, the Court *does not* find that the Open Meetings Law was violated. However, the February 21, 2018 action was a necessary component of the full council’s decision to adopt Resolution No. 18-65. As such, the full council’s vote to adopt the resolution was void *ab initio*.

IT IS ORDERED, ADJUDGED AND DECREED that, for the reasons stated in open court on June 14, 2019, there be judgment in FAVOR of petitioners, The Southern Center for Environmental Justice, Inc. d/b/a Deep South Center for Environmental Justice, VAYLA New Orleans, Justice and Beyond, 350 New Orleans, Sierra Club, Mr. Theodore Quant and Ms. Renate Heurich, and AGAINST defendants, The Council of the City of New Orleans, the Utility, Cable, Telecommunications, and Technology Committee of the New Orleans City Council, Jason R. Williams, Helena Moreno, Joseph I. Giarrusso, Jay H. Banks, Kristin Gisleson Palmer, Jared C. Brossett, and Cyndi Nguyen; and


IT IS FURTHER ORDERED, ADJUDGED and DECREED that, for the reasons stated in open court on June 14, 2019, the action of the then-sitting members of the UCTTC at its February 21, 2018 meeting is VOID; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, for the reasons stated in open court on June 14, 2019, the action of the then-sitting members of the New Orleans City Council adopting Council Resolution No. R-18-65 at a March 8, 2018 meeting is VOID.

New Orleans, Louisiana, this 2nd day of July 2019.



THE HONORABLE PIPER D. GRIFFIN
DISTRICT COURT JUDGE, DIVISION “T”

A TRUE COPY


DEPUTY CLERK, CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

Appendix C
Excerpt of District Court Hearing Transcript
(June 14, 2019)

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

ALLIANCE FOR AFFORDABLE ENERGY, ET AL NO.2017-5208
VERSUS CIVIL ACTION
THE COUNCIL FOR THE CITY OF N.O. DIVISION "I"

Testimony and Notes of Evidence heard in
the above entitled cause of action held in Open Court
before the HONORABLE PIPER D. GRIFFIN, judge
presiding in Division "I" on FRIDAY, the 14th day of
JUNE of 2019.

Reported By:

SHANNON DERUISE'
Official Court Reporter

1 * * * A T T O R N E Y S * * *

2
3
4 REPRESENTING PLAINTIFF:

5 Attorney Monique Harden

6 FOR DEEP SOUTH CENTER FOR

7 ENVIRONMENTAL JUSTICE

8 Attorney Susan Stevens MILLER

9 FOR ALLIANCE FOR AFFORDABLE

10 ENERGY AND 350-NEW ORLEANS

11
12 REPRESENTING DEFENDANTS:

13 Attorney Basile J. Uddo

14 Attorney Pressley R. Reed, Jr.

15 FOR THE CITY OF NEW ORLEANS

16
17 Attorney W. Raley W. Alford, III

18 FOR ENTERGY NEW ORLEANS

1 * * * P R O C E E D I N G S * * *

2 FRIDAY, JUNE 14, 2019

3
4
5
6 THE COURT:

7 We're going to
8 deal with 2 cases today, everybody knows
9 that. We're going to deal with both the
10 Alliance for Affordable Energy et al versus
11 The City Council of New Orleans, 2018-03471
12 as well as 2018-03843, Deep South Center
13 for Environmental Justice versus The
14 Council for The City of New Orleans. First
15 I was going to have you guys say which one
16 you wanted to hear first, One is a written
17 judgment and I know that I've taken quite a
18 bit of time because I wanted to get it what
19 I considered right.

20 During the process
21 I learned a lot, a lot about the process
22 that the City and the City Council goes
23 through. I've learned that the citizens of
24 New Orleans are deeply concerned about,
25 both the City Council and the citizens of
26 New Orleans are deeply concerned about
27 making sure that we not only have the
28 appropriate energy necessary to power the
29 City but that we also do everything in an
30 appropriate way. I'm going to first, I
31 think the counsels in front of me, some of
32 whom are different from the other case,

1 deal with 2018-38436. That's the one that
2 deals with, among other things, the issue
3 of the open meetings laws. One thing I did
4 determine, and I will applaud and ya'll can
5 take it the way you wish to take it, I do
6 applaud the City Councilmembers who were
7 there who did their due diligence and make
8 sure that ya'll understand the City
9 understands that my judgment, though
10 applauding the City, does rule against the
11 City. And let me explain to you why. The
12 Open Meetings Laws were designed and
13 continue to be designed to ensure that the
14 citizens, that their voices be heard and
15 that they have an opportunity to have a
16 seat at the table when decisions are made
17 by those that they've elected to make those
18 decisions. My review of that, I don't get
19 to decide whether I agree or disagree,
20 that's not the issue. The issue upon
21 appeal is whether or not there was a
22 substantial compliance, the City Council,
23 and I guess my judgment won't make sense to
24 everybody since I'm going to make this
25 statement because I will make this
26 statement, I don't see that they did
27 anything wrong, but even though they did
28 nothing wrong the reality becomes this;
29 the citizens of New Orleans have to believe
30 in the process and trust the process. And
31 to believe in and trust the process they
32 have to have an appreciation that the

1 process itself is one in which their voices
2 are heard. The City's investigation showed
3 they were paid citizens, that those paid
4 citizens were present and to some extent
5 may have skewed the presentation, that does
6 not mean that, again, that the Council did
7 anything wrong or that the views
8 ultimately, that the decision ultimately
9 made by the Council was at all wrong, but
10 in making this decision I have to look at
11 and have in my own opinion and looking at
12 whether there is substantial compliance
13 make sure that there is...there is in fact
14 adherence to the policy behind the Open
15 Meetings Laws. And so after having
16 reviewed all the record, and I'm only
17 vacating the judgment because I want to
18 make sure that as the City Council has the
19 meetings that there is no, that the
20 citizen's voices are heard, that the
21 citizen's voices are in the room to the
22 extent they choose to be in the room and
23 that there is a true appreciation for both
24 the pros, cons and in essence what I'm
25 saying is that Energy's actions undermined
26 the Public Meetings Laws. I can't say it
27 any differently. That being said, that is
28 my judgment in that case. I would ask that
29 Petitioners simply prepare a judgment that
30 vacates the original ruling finding that
31 the Open Meetings laws were not adhered to
32 as relates to the meaning and policy behind

1 the Open Meetings Laws.

2 We now move on to
3 2018-03471, and that's a written judgment
4 and we will give, who are the attorneys in
5 that? Let's change seats. We are copying
6 that judgment, that judgment is 26 pages
7 long, it's taking a minute. I'm going to
8 do for purposes, you will get the judgment,
9 Tawanda is making one of my staff members
10 is making a copy. In that instance, in
11 that case involved whether or not the
12 City's determination and the Council's
13 determination in allowing Entergy to build
14 the plant in some what violated the due
15 process rights of the Petitioners, it did
16 not. And in that instance I rule squarely
17 in favor of the City and find that the
18 City, in looking at the Resolution and the
19 settlement agreement and all of the history
20 that, and you, ya'll will have, the lawyers
21 will have my judgment to look at. The
22 reality is this, from what I could see the
23 City did a very good job of making sure
24 notice of hearings were had, the City in
25 it's concern for what was clearly taking
26 place in the industry meaning that in the
27 energy industry there were these agreements
28 there were being massaged, is probably the
29 best word to say, but they were being dealt
30 with as Entergy the Corporation bought
31 several subsidiaries and subsequently
32 figured out a way to make sure that these