

SUPREME COURT OF LOUISIANA

NO. 2020-C-00771

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

V.

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
Defendants-Applicants

On Application for Writ of Certiorari to the Court of Appeal, Fourth Circuit, Case No. 2019-CA-0744 c/w
2019-CA-0775, Honorables James F. McKay III, Paula A. Brown, and Dale N. Atkins; on Appeal from
Civil District Court, Parish of Orleans, Case No. 2018-3843, Honorable Piper D. Griffin, presiding

Civil Proceeding

OPPOSITION TO DEFENDANTS' APPLICATION FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

I. Reasons why Defendants-Applicants' ¹ "conditional" application for writ of certiorari should be denied

On March 13, 2020, Plaintiffs-Respondents² filed a writ application seeking review of the Fourth Circuit Court of Appeal's ("Fourth Circuit") reversal of the Civil District Court for the Parish of Orleans' ("District Court") nullification of the Council of the City of New Orleans' ("City Council") vote to approve Entergy New Orleans, LLC's ("Entergy") construction of a gas-fired power plant in New Orleans East for violation of the Open Meetings Law (La. R.S. 42:11 *et seq.*). On June 16, 2020, the Defendants-Applicants filed a "conditional" writ application, asking that this Court grant certiorari and reverse the Fourth Circuit Court of Appeals' finding that the Utility, Cable, Telecommunications and Technology Committee of the New Orleans City Council ("Council Utility Committee" or "Utility Committee") violated the Open Meetings Law, but only if the Court grants Plaintiffs-Respondents writ application.

At the outset, this Court should note that the Defendants-Applicants' request for a "conditional" writ remarkably illustrates why the Fourth Circuit's decision to deny Plaintiffs-Respondents a remedy for the Open Meetings Law violations constitutes such a grievous error. Defendants-Applicants, according to the writ application, would only contest the finding that it violated the Open Meeting Law if this Court decides to review the judgment that denies a remedy for the violation. Otherwise, Defendants-Applicants make no challenge to the finding that the City Council violated the law. It is apparent that the City Council is unconcerned that it violated the Open Meeting Law, through actions and inactions that denied the rights of New Orleans residents and brought national ridicule on the city, unless there is the possibility of a legal consequence for the violation. This Court must conclude that the City Council lacks any intention of ensuring that residents' rights under the Open Meetings Law are protected when its failure to protect these rights would have no consequence.

Defendants-Applicants provide no ground for this Court to grant writ on its application. Here, again, Defendants-Applicants flout the rules, this time by entirely failing to address why its "conditional" application for writ is appropriate for review by this Court. Defendants-Applicants do not explain how the Fourth Circuit's finding necessitates review by this Court that meets any of the considerations presented in Rule X §1(b), Rules of Supreme Court of Louisiana; nor do Defendants-Applicants present any novel consideration for writ grant.

Defendants-Applicants mischaracterize the Fourth Circuit's conclusions and misinterpret the requirements of both the Louisiana Constitution and the Open Meetings Law. This Court should reject all

¹ Defendants-Applicants are 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, who filed an Original Application for Writ of Certiorari on June 16, 2020.

² Plaintiffs-Respondents include Deep South Center for Environmental Justice, VAYLA New Orleans, Justice and Beyond, 350 New Orleans, Sierra Club, Mr. Theodore Quant, and Ms. Renate Heurich.

of the Defendants-Applicants' contentions. First, Defendants-Applicants claim that the Fourth Circuit erred in rejecting its argument that Entergy's actions could not have led to a violation of the Open Meetings Law.³ This argument completely mischaracterizes the Fourth Circuit's finding regarding the City Council's Utility Committee meeting:

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.⁴

Contrary to the Defendants-Applicants' assertions, the Fourth Circuit correctly applied both the Louisiana Constitution and the Open Meetings Law in reaching its finding. Louisiana guarantees the right of all people to observe the deliberations of public bodies. It is enshrined in the Louisiana Constitution, Article XII, Section 3, 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." Building upon this Constitutional foundation, the Louisiana State Legislature enacted the Open Meetings Law.⁵ Among other things, the Open Meetings Law requires that each public body accept public comment. Thus, each public body is required to allow public comment prior to taking action on an agenda item on which a vote is to be taken.⁶

The Fourth Circuit found that Plaintiffs-Respondents were denied their right to observe the City Council's Utility Committee meeting and were denied their right to comment at that meeting. The actions and inactions by the Utility Committee provide textbook examples of constitutional and Open Meetings Law violations. The City Council cannot be permitted to deflect these failures onto Entergy. The City Council's unabashed abandonment of the responsibilities mandated by the Open Meetings Law is breathtaking, but should not be sanctioned by this Court.

Second, Defendants-Applicants object to the Fourth Circuit's reliance on the evidence provided by Plaintiffs-Respondents. While Defendants-Applicants attached the affidavits it provided to the courts, Defendants-Applicants failed to even mention the **twelve** affidavits filed by the Plaintiffs-Respondents in support of their Open Meetings Law enforcement action.⁷ Both the District Court and the Fourth Circuit considered all the evidence provided by the parties and found that the Plaintiffs-Respondents had

³ Defendants-Applicants, *Original Application for Writ of Certiorari*, pp. 2, 10 (June 16, 2020) ("Defendants-Applicants Application for Writ").

⁴ Fourth Circuit Op., Case No. 2019-CA-0774 c/w 0775, p. 12 (Feb. 12, 2020) ("Fourth Circuit Opinion").

⁵ La. R.S. 42:12(A). *See also Wagner v. Beauregard Par. 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.).

⁶ La. R.S. 42:14(D).

⁷ Several of these affidavits are cited in Petitioners-Respondents, *Application for Writ of Certiorari or Review*, pp. 4, 8–12, 16, 22–23 (Mar. 13, 2020).

established violations of the Open Meetings Law. Both courts are not only entitled but required to make this determination. The fact that Defendants-Applicants disagree with the evidentiary findings by the District Court and the Fourth Circuit does not rise to the character of a consideration for this Court to review Defendants-Applicants' writ application.

Third, Defendants-Applicants argue that there was no violation of the Open Meetings Law based on its view that opponents of the gas plant were "adequately represented" during the Utility Committee meeting.⁸ Defendants-Applicants' contention has no basis in Louisiana law. The right to observe and comment is an *individual* right. The Louisiana Constitution expressly provides that "[n]o person shall be denied the right to observe the deliberations of public bodies..."⁹ The Open Meetings Law undergirds this constitutional requirement and further mandates public comment opportunities at public meetings.¹⁰ Thus, it is irrelevant that some people were able to observe and participate in the meeting when the City Council Utility Committee denied approximately 70 individuals their right to observe and provide comment by preventing these individuals from entering a public meeting, despite the availability of seats in the meeting room. This denial is a clear violation of the Open Meetings Law.

Lastly, Defendants-Applicants contend that the Fourth Circuit erred in ruling that the City Council Utility Committee failed to follow the February 21, 2018 meeting agenda. In order to effectuate the right to observe and comment described above, the Louisiana State Legislature adopted a notice provision. Thus, the Open Meetings Law provides that "[a]ll public bodies . . . shall give written public notice of any regular, special, or rescheduled meeting no later than twenty-four hours . . . before the meeting" and that "[t]he 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."¹¹

On February 16, 2018, the Utility Committee issued a public notice of the agenda for its February 21, 2018 meeting. This notice presented only one meeting agenda item: "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 Timely Relief, Docket No. UD-16-02."¹² The meeting agenda specifically stated that each party to the proceeding on the application would be allowed 15 minutes for

⁸ Defendants-Applicants Application for Writ, p. 2, 8.

⁹ Louisiana Constitution, Article XII, Section 3 (emphasis added).

¹⁰ La. R.S. 42:14(D).

¹¹ La. R.S. 42:19(A)(1)(b)(i), (ii)(aa).

¹² See Petitioners-Respondents Petition (filed April 19, 2018, District Court, Orleans Parish) ("Petition"), Council Utility Committee Meeting Agenda Notice (Feb. 16, 2017), Ex.7. All exhibits referenced herein were filed with Petitioners-Respondents' Petition in District Court and cited according to their identification in the Petition.

closing argument.¹³ The agenda further stated that “[e]ach public speaker, **not a party**, will be allowed 2 minutes.”¹⁴

During the public comment period, the Utility Committee Chair failed to follow the instructions provided on the meeting agenda. The agenda expressly stated that parties would be given to time to make closing arguments, but were not allowed to speak during the public comment period. The Chair did not enforce this rule or even inquire if the speaker was a party. However, he never announced that this rule limiting who could speak was being abandoned. Thus, several representatives of the parties who were intervenor organizations, including Dr. Beverly Wright, Executive Director of Deep South Center for Environmental Justice, never filled out a comment card and never spoke during the public comment period.¹⁵ However, representatives of Entergy, a party, were allowed to speak during the public comment period.

Importantly, this is not the first time the City Council restricted the parties’ participation in a public meeting. Prior to the start of the October 16, 2017 meeting, Tom Stratton, then Chief of Staff of City Council Utility Regulatory Office, sent an email to the parties to the proceeding with the following instruction:

We are going to hold any comments from intervenors until the end of the hearing, after all non-intervenor members of the public have had an opportunity to speak. Additionally, we would ask that if we have a large turnout, and it appears we are in danger of running out of time, **if/when** we get to the intervenors, please only send one member of your organization up to speak.¹⁶

Due to the overwhelming attendance at the October 16, 2017 meeting, the intervenors were never given the opportunity to speak. Thus, the City Council had previously conducted a public meeting that restricted intervenor organizations from speaking in the proceeding on Entergy’s gas plant application.

Defendants-Applicants concede that the Utility Committee Chair permitted party representatives to speak during public comment period reserved for speakers who were not a party.¹⁷ In response to Plaintiffs-Respondents allegations that this action violated the Open Meetings Law, Defendants-Applicants wrongly assert that Plaintiffs-Respondents misinterpreted the agenda rule as prohibiting representatives from commenting.¹⁸ Tellingly, Defendants-Applicants failed, despite numerous opportunities, to offer an alternative interpretation of this rule. If anyone should know what the City Council Utility Committee actually intended by the phrase “[e]ach public speaker, **not a party**, will be

¹³ *Id.*

¹⁴ *Id.* (emphasis added).

¹⁵ Petition, Ex. 9: Aff. of Dr. Beverly L. Wright, ¶ 7 (“Wright Affidavit”).

¹⁶ Petition, Ex. 1: Email from Tom Stratton, Director, Council Utilities Regulatory Office, to Docket No. UD-16-02 Service List (Oct. 13, 2017) (emphasis added) (“Email from Tom Stratton”).

¹⁷ See Defendants-Applicants Application for Writ, p. 8 (acknowledging that “...some party representatives provided comments at the meeting...”).

¹⁸ *Id.*

allowed 2 minutes,”¹⁹ it would be the City Council. Yet, Defendants-Applicants failed to proffer an interpretation of this agenda rule to either the District Court or the Fourth Circuit.

The Fourth Circuit correctly found that the only reasonable interpretation of the phrase “[e]ach public speaker, **not a party**, will be allowed 2 minutes” is that a party, including representatives of intervenor organizations would not be permitted to speak during the public comment period of the Utility Committee meeting. The Utility Committee Chair did not enforce this rule, instead, he allowed employees of Entergy, a party, as well as some members of intervenor organizations, to speak. All members of the intervenor organizations were not informed of this change within 24 hours of the meeting and were not even informed of the change during the meeting. Failure to inform all parties within 24 hours of the meeting that they would, in fact, be allowed to comment undoubtedly led to many members of these intervening organizations simply choosing either not to attend or speak at the meeting.²⁰ Moreover, the Utility Committee Chair’s failure to at least announce the change at the meeting resulted in members of the intervening organizations not submitting comment cards and thus losing their opportunity to comment. This alteration of this public meeting agenda violated the Open Meetings Law.

Contrary to Defendants-Applicants’ largely unsupported assertions, the Fourth Circuit did not erroneously interpret or apply the Louisiana Constitution or Open Meetings Law concerning its finding that the Council Utility Committee meeting on February 21, 2018 was conducted in violation of both. In applying these constitutional and statutory provisions to the horrendous events at this meeting, the Fourth Circuit came to the only reasonable conclusion that the Council Utility Committee had violated the Open Meetings Law. Therefore, this Court should reject Defendants-Applicants’ writ application.

II. Statement of Facts

This case involves outrageous actions by Entergy to attack the democratic process of the City Council’s public meetings, Entergy’s extraordinary efforts to conceal these acts, and the City Council’s failure to conduct public meetings in compliance with the Article XII, Section 3 of the Louisiana Constitution and the Open Meetings Law. The facts demonstrate the appalling failure of the City Council and Utility Committee to meet their constitutional and statutory obligations, obligations that could have been achieved simply by allowing New Orleans residents to enter the meeting rooms to observe and comment.

Plaintiffs-Respondents presented key facts, which were known to the City Council, of Entergy’s use of paid actors to feign public support for its proposed gas plant at City Council and Utility Committee meetings in an effort to limit dissenting views in opposition to the gas plant from being heard. These facts

¹⁹ Council Utility Committee Agenda Notice (emphasis added).

²⁰ Wright Affidavit ¶ 7.

were later confirmed and further detailed in a written report by an independent investigation that revealed Entergy's declaration of war against opponents of the gas plant and Entergy's use of paid actors.²¹

The two meetings at issue stem from Entergy's request for authorization to build a gas-fired power plant in New Orleans East. On June 20, 2016, Entergy filed its initial application, requesting approval to construct a 226 megawatt unit.²² On November 3, 2016, the City Council issued Resolution No. R-16-506, which set the procedural schedule for Entergy's application. In Resolution No. R-16-506, the City Council asserted its intention to assure public involvement in the decision process, stating that:

...the Council intends to provide the residents of the City of New Orleans with an open and transparent process that will allow for multiple opportunities for the public to communicate its views to ENO and the Council. . . .²³

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 for October 16, 2017.

A. October 16, 2017 Public Hearing²⁴

On October 16, 2017, members of the public, many of whom opposed the Entergy gas plant 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 meeting's scheduled start time.²⁵ Two buses of Entergy supporters arrived around 4:00 pm. The individuals on these buses were immediately permitted to enter the City Council Chambers.²⁶

Many people wanted to speak at the October 16, 2017 public hearing but were not allowed in the room or left when it became clear that, as a result of the large crowd which had been admitted early and remained in their seats throughout the meeting, they would not be able to comment.²⁷

Months later, an actor revealed that he and other actors were recruited and paid to pretend as though they were concerned residents in support of Entergy's proposed gas plant at the October 16, 2017 public hearing.²⁸ Subsequent to this revelation, *The Lens* published an investigative report that exposed significant details regarding the actors' participation in the meeting. These actors were paid \$60 to occupy

²¹ Entergy, Investigation Final Report (Oct. 29, 2018).

²² On July 6, 2017, Entergy amended its application ("Entergy Application") to request approval for either the 226 MW gas plant or several smaller units totaling 128 MW.

²³ City Council, Resolution No. R-16-506, p. 8 (Nov. 3, 2016).

²⁴ While Petitioners did not bring the action based on the October 16, 2017 public hearing, this meeting demonstrates a pattern of behavior which the City Council should have been aware of and taken action to prevent.

²⁵ Petition, Ex. 2: Aff. of Renate Heurich, ¶ 26 ("Heurich Affidavit").

²⁶ *Id.* ¶ 27.

²⁷ Petition, Ex. 4: Aff. of Michael L. Brown, ¶ 10 ("Brown Affidavit").

²⁸ Subsequent to the October 16, 2017 public meeting, on March 1, 2018, Mr. Andrew Wiseman attended a church meeting and informed the other attendees that he and others had been paid \$120 to wear shirts supporting Entergy, attend the meeting, and fill up the room. Petition, Ex. 5: Aff. of Ted Quant, ¶ 14 ("Quant Affidavit"). See Kristin Pierce, *City Council could face lawsuit following public hearing on Entergy plant*, WWL-TV News (Mar. 7, 2018) ("WWL report"); Petition, Ex. 3: Michael Isaac Stein Article (Oct. 20, 2017) ("The Lens article"); Brown Affidavit, ¶¶ 13, 16 (and accompanying pictures).

seats at the City Council public hearing, and some received up to \$200 for delivering a scripted speech during the public meeting. Those actors seeking speaking roles were required to audition for those roles. The actors selected were required to sign non-disclosure agreements and were expressly directed to “tell nobody you’re being paid.” Finally, the hired actors were instructed to arrive early – “you guys have to be there first thing because as soon as they open the door, we want you guys in there so if there are any protestors we got that whole room filled.”²⁹ Not only did Entergy supporters, who were easily identifiable by their orange pro-gas plant t-shirts, occupy a significant number of seats, but some supporters also placed their signs in other seats, thus further preventing the participation of people waiting outside—most of whom were opposed to the proposed gas plant—in the meeting.³⁰

Moreover, an hour into the public hearing, City Council staff announced that there would not be time for everyone to comment so people should stop filling out comment cards.³¹ 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 comments. However, few, if any, of the Entergy supporters in the orange pro-gas plant t-shirts left.³²

Before the October 16, 2017 public meeting, CURO instructed Petitioners, other public interest organizations, and businesses, who were intervenors in the proceeding on Entergy’s application, that only one representative of their organization or company would be allowed to speak after all members of the public not affiliated with any of the intervenors had spoken, if there was time remaining.³³ Given that the public hearing was scheduled for two hours, from 5:30 pm to 7:30 pm, CURO’s instruction had the effect of preventing all persons representing the intervenors from participating in the public hearing. Exacerbating this restriction is the fact that one or more employees of Entergy, clearly a party to the proceeding on the Entergy application, were allowed to speak at the public hearing.

The facts and circumstances of the October 16, 2017 public hearing demonstrate that prior to the public hearings on February 21, 2018 and March 8, 2018 at issue in this case, the City Council should have been aware of the use of paid actors and its impact on public participation. The October 16, 2017 public meeting also demonstrates that the City Council should have been aware of the large number of people who showed up to attend and comment on Entergy’s proposed gas plant, but were not allowed to enter the room due to limited seating and limited time duration of the meeting; should have been aware of the need for sufficient seating space;³⁴ and should have been aware of the ongoing concern about

²⁹ The Lens article (internal quotation marks omitted).

³⁰ *See id.*

³¹ Petition, Ex. 6: Aff. of Grace Morris, ¶ 18 (“Morris Affidavit”).

³² Brown Affidavit, ¶ 11; Heurich Affidavit, ¶ 29.

³³ Email from Tom Stratton.

³⁴ Amended Petition ¶ 34.

preferential treatment of Entergy supporters, who were allowed in the meeting room before the doors were opened to the public.³⁵

B. February 21, 2018 Council Utility Committee Public Meeting

On February 16, 2018, the Council Utility Committee issued a public notice of the agenda for its February 21, 2018 meeting. This agenda only included one item, “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 Timely Relief, Docket No. UD-16-02.”³⁶ The purpose of the meeting was to decide whether to approve the Entergy application. If approved, the Entergy application would then be considered by the full City Council. The agenda specifically stated that each party to the proceeding would be allowed 15 minutes for closing arguments.³⁷ The agenda further stated that “[e]ach public speaker, **not a party**, will be allowed 2 minutes.”³⁸

Many members of the public and Petitioners-Respondents 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.³⁹ Approximately 50 to 60 people were denied entry to the meeting by security, allegedly because there was no more space in the meeting room.⁴⁰ The majority of these individuals were residents of New Orleans East and the Lower Ninth Ward.⁴¹

VAYLA New Orleans (“VAYLA”), a multi-racial, community-based organization in New Orleans East, organized two buses to transport 67 community members from New Orleans East to the meeting. They arrived at the meeting room at approximately 9:20 am.⁴² However, VAYLA representatives were informed that the room was at capacity and that none of the residents would be admitted.⁴³ According to Ms. Dynisha Hugle, security personnel refused to allow anyone wearing a “No Gas Plant” t-shirt to enter the meeting room.⁴⁴ The residents were not allowed in the meeting even though there were empty seats in the room.⁴⁵

³⁵ Amended Petition ¶ 35; Heurich Affidavit, ¶¶ 26–27.

³⁶ See Council Utility Committee Agenda Notice (Feb. 16, 2017). Exh. 7.

³⁷ *Id.*

³⁸ *Id.* (emphasis added).

³⁹ Petition, Aff. of Margaret “Meg” Logue, ¶ 5 (“Logue Affidavit”); Wright Affidavit, ¶¶ 13, 15.

⁴⁰ Quant Affidavit, ¶¶ 8, 10; Logue Affidavit, ¶ 5; Heurich Affidavit, ¶ 8; Morris Affidavit, ¶ 9; Petition, Ex. 11: Aff. of Patrick Henry Bryant, ¶ 9 (“Bryant Affidavit”), Ex. 14: Aff. of Robert Desmarais Sullivan, ¶ 17 (“Sullivan Affidavit”), Ex. 15: Aff. of Jacob Horwitz, ¶ 7, Ex. 16: Aff. of Andrew Wells, ¶ 8.

⁴¹ Logue Affidavit, ¶ 5; Bryant Affidavit, ¶ 8.

⁴² Petition, Ex. 12: Aff. of Minh Thanh Nguyen, ¶ 16 (“Nguyen Affidavit”), Ex. 10: Hugle Affidavit, ¶ 7 (“Hugle Affidavit”).

⁴³ Nguyen Affidavit, ¶¶ 6, 8; Hugle Affidavit, ¶ 9.

⁴⁴ Hugle Affidavit, ¶ 9. Mr. Happy Johnson also felt that whether an individual was allowed to enter the meeting room depended upon what they were wearing. Petition, Ex. 13: Affidavit of Happy Johnson, ¶ 8 (“Johnson Affidavit”).

⁴⁵ Brown Affidavit, ¶ 12; Logue Affidavit, ¶ 7; Nguyen Affidavit, ¶¶ 9, 10; Wright Affidavit, ¶ 18; Bryant Affidavit, ¶ 11; Sullivan Affidavit, ¶ 12.

There are numerous instances of residents, including members of the parties to the proceeding, being denied entrance to the meeting room. Mr. Pat Bryant of Justice and Beyond arrived at approximately 9:30 am. He approached security several times and requested to be let into the meeting room, but security refused to allow him to enter the room.⁴⁶

Ms. Renate Heurich, Vice President of 350 New Orleans, a party to the proceeding, arrived at the meeting room at 10:00 am only to be told that she could not enter because the room was at capacity.⁴⁷ At 12:30 pm, she entered the room as someone was leaving. She observed approximately 30 empty seats. The security officer ordered her to leave despite the empty seats. Ms. Heurich left the room.⁴⁸ After several minutes, one of the City Council's Advisors informed the security guard that Ms. Heurich was an intervenor and should be let into the meeting room. The security guard still refused to allow Ms. Heurich into the room.⁴⁹ Several minutes later, the security guard finally told Ms. Heurich she could enter the room.⁵⁰

Chants of "Let us in!" made by people frustrated with waiting outside the meeting room could be heard by the Council Committee members and other attendees inside the meeting room.⁵¹

During the meeting, Councilmembers acknowledged that people had been shut out of the proceeding. Then-Councilmember Susan Guidry observed that Entergy "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."⁵²

At approximately 12:00 pm, security personnel started allowing some people into the meeting room who were previously locked out of the meeting, but offered no explanation regarding how they were determining if and when to admit more people. Many members of the public waited outside of the meeting room for three hours or more without being admitted to the meeting.⁵³ 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 enter the room.⁵⁴

The City Council Utility Committee used a comment card process whereby an individual fills out a card to provide comment and gives that card to a designated City Council employee. During the public comment period, the Chair of the Council Committee used these cards to call individuals up to speak. An

⁴⁶ Bryant Affidavit, ¶ 9.

⁴⁷ Heurich Affidavit, ¶ 7.

⁴⁸ *Id.* ¶ 14.

⁴⁹ *Id.* ¶ 15.

⁵⁰ *Id.* ¶ 16.

⁵¹ Wright Affidavit, ¶ 19; Nguyen Affidavit, ¶ 11; Morris Affidavit, ¶ 10. The February 21 meeting constituted the *third* time that Councilmembers shut the public out of a proceeding. Not only were citizens shut out of the October 16 meeting, but in January, while the City Council considered a resolution promoted as part of the movement known as Boycott, Divest and Sanction, citizens were kept outside the meeting room. See Kevin Litten, *Chamber renovation creates headaches for N.O. City Council*, The Times-Picayune (Mar. 7, 2018) ("The Times-Picayune article").

⁵² See The Times-Picayune article.

⁵³ Logue Affidavit, ¶¶ 9, 10; Quant Affidavit, ¶ 12.

⁵⁴ Nguyen Affidavit, ¶¶ 13–15.

individual who did not fill out a comment card was not permitted to speak during the public comment period.

Many of the individuals who were forced to wait outside of the meeting room 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-Utility 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].”⁵⁵ 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.⁵⁶

There was no audio system outside of the meeting room. Individuals could not hear what was occurring in the meeting room.⁵⁷ Thus, individuals locked out of the room could not hear the names being called to provide comments, and the Utility Committee provided no method designed to inform those forced to wait outside that their name had been called. Moreover, at no time during the meeting were those residents who were outside of the meeting room informed regarding whether they would ever be permitted into the room or whether they would be permitted to speak.

Here again, the evidence demonstrates that professional actors were also recruited and paid to attend the Utility Committee meeting on February 21, 2018 and present public comments as though they were concerned citizens in support of Entergy’s proposed gas plant.⁵⁸ This tactic not only created sham support for Entergy’s proposed gas plant, but it also resulted in taking away from the real concerned residents of New Orleans the seating space in the meeting rooms and the time for comments. In each of the public meetings on October 16, 2017 and February, 21, 2018, real concerned residents were denied access to the meeting room where they could observe and/or make comments for the purported reason that there were no seats available.

Additionally, during the public comment period, the Chair of the Council Utility Committee failed to follow the instructions provided on the meeting agenda.⁵⁹ The agenda expressly stated that parties 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. However, 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 Entergy gas plant proceeding, never filled out a comment card and never spoke during the public comment period because the written

⁵⁵ Morris Affidavit, ¶ 12.

⁵⁶ *Id.*

⁵⁷ Heurich Affidavit, ¶ 12; Hugel Affidavit, ¶ 11.

⁵⁸ See The Lens article.

⁵⁹ See Utility Committee Agenda Notice.

rule on the agenda expressly stated that parties would be prevented from speaking.⁶⁰ Similarly, Ms. Grace Morris of the Sierra Club, another intervenor organization, did not fill out a comment card because her understanding was that intervenor organizations were only allowed to have one person to speak at the public hearing and that was restricted to the closing arguments.⁶¹

Ms. Renate Heurich, Vice President of 350 New Orleans, an intervenor organization, initially did not fill out a comment card because it was also her understanding that as representative of an intervenor organization, she could not comment. However, one of the City Council Advisors informed Ms. Heurich that she could comment, so she filled out a comment card and ultimately was allowed to speak.⁶² 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 Entergy Application proceeding did not attend all or part of the meeting because they believed, based on the agenda notice, that they would not be permitted to speak during the public comment session.

After asking the City Council Advisors questions, each Councilmember delivered remarks, and then voted on the Entergy application. The final vote was 4 to 1 to approve the application. The meeting ended at approximately 6:00 pm.⁶³

Directly after this meeting, Ms. Heurich, sent an email to the City Council regarding how the Council Committee meeting was conducted. Specifically, Ms. Heurich stated in her email that:

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, 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.

Ms. Heurich received no response to her email.⁶⁴

Similarly, Justice and Beyond sent a letter to the City Council after the meeting requesting, among other things, that the March 8, 2018 meeting venue hold at least 500 people.⁶⁵ The City Council did not respond to this request.

⁶⁰ Wright Affidavit, ¶ 23.

⁶¹ Morris Affidavit, ¶ 14.

⁶² Heurich Affidavit, ¶ 19.

⁶³ Nguyen Affidavit, ¶ 14.

⁶⁴ Heurich Affidavit, ¶ 21.

⁶⁵ Bryant Affidavit, ¶ 13.

On March 6, 2018, attorneys representing 350 New Orleans sent a letter to the City Council stating that the manner in which the Utility Committee conducted the meeting on February 21, 2018 constituted a significant violation of the Open Meetings Law. Their letter included the request that the City Council require the Council Utility Committee to conduct a second meeting that complied with the requirements of the law.⁶⁶ The City Council did not respond to this letter.

C. March 8, 2018 City Council Public Meeting

The full City Council considered the Council Utility Committee's approval of the Entergy application at its March 8, 2018 meeting. In contrast to the Utility Committee agenda, the City Council agenda contained a significant number of items.

More than an hour before the start of the City Council meeting, New Orleans residents formed a long line in the hallway at City Hall that led to the meeting room door. While residents stood in line, Entergy employees and supporters were escorted to a separate entrance (not accessible to the public) and were seated in the meeting room before people waiting in line were allowed in the room.⁶⁷ Mr. Pat Bryant observed the Entergy employees being led into the meeting room through this separate private entrance.⁶⁸ Mr. Bryant and others attempted to enter the room through this same door.⁶⁹ An Entergy employee attempted to physically block Mr. Bryant, but he was able to enter through the back door with others from Justice and Beyond.⁷⁰

Like the February 21, 2018 meeting, many members of the public were prevented from attending the meeting on March 8, 2018.⁷¹ Approximately 20 to 30 individuals were forced to wait outside the meeting room for hours, and some left after waiting for hours.⁷²

D. Actors Paid to Feign Support for Entergy's Proposed Gas Plant at City Council Public Meetings

Subsequent to the City Council's public meetings, disturbing details emerged establishing that professional actors were paid by Entergy contractors to create sham support for Entergy's proposed gas plant at the public meetings convened by the City Council on October 16, 2017, and February 21, 2018. The first report was a WWL-TV News interview with a professional actor who admitted to being paid for his participation in the City Council public hearing on October 16, 2017.⁷³ Actor Andrew Wiseman, who appeared in the HBO series *Treme*, told WWL that he was paid \$120 in cash to attend a City Council meeting concerning Entergy's proposed gas plant. Mr. Wiseman said that he was told to "[j]ust sit down,

⁶⁶ See Petition, Ex. 17: Letter from William P. Quigley, Susan Stevens Miller, and Jill Tauber to the New Orleans City Council (Mar. 6, 2018) ("Letter to New Orleans City Council").

⁶⁷ Johnson Affidavit, ¶ 11.

⁶⁸ Bryant Affidavit, ¶ 14.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Quant Affidavit, ¶ 16; Nguyen Affidavit, ¶¶ 16–17.

⁷² Logue Affidavit, ¶¶ 11–12; Heurich Affidavit, ¶ 24.

⁷³ See WWL report.

wear a t-shirt, don't talk, don't open your mouth.”⁷⁴ Mr. Wiseman “heard about the gig through one of his acting buddies” and said that they “weren't told what they were going to be doing before they walked in the council meeting.”⁷⁵

After seeing this report and based on his impression that some of the comments given by Entergy supporters seemed scripted, Mr. Michael Brown reviewed the video recording of the October 16, 2017 public meeting in an attempt to determine if any of the commenters were actors.⁷⁶ Mr. Brown conducted a basic internet search and discovered that at least three of the commenters were professional actors.⁷⁷

An investigative report published by The Lens revealed that “[a]t least four of the people in orange shirts were professional actors. One actor said he recognized 10 to 15 others who work in the local film industry. They were paid \$60 each time they wore the orange shirts to meetings in October and February. Some got \$200 for a ‘speaking role.’”⁷⁸ The Lens article provides troubling details into how this scheme worked, and its intent to deceive the City Council and the public.

The Lens article also detailed communications that indicate, among other things, that a) participating actors had to sign non-disclosure agreements; b) an actor was told that speaking roles were available; c) an actor was repeatedly instructed to “[t]ell nobody you're being paid”; d) after participating in the City Council's public meeting on October 16, 2017, an actor was told that “[t]here's another project coming up on 2/21”; and e) regarding the February 21, 2018 City Council public meeting, an actor was informed that the “[p]ay site will be about 2 blocks from the meeting spot.”⁷⁹

In response to The Lens article, Councilmember Williams publicly announced the process had been “compromised.”⁸⁰

On May 7, 2018, Deep South Center for Environmental Justice, VAYLA, Justice and Beyond, 350 New Orleans, and Sierra Club submitted a letter to the Louisiana Attorney General, the Louisiana Ethics Administration Program, the Orleans Parish District Attorney, and the City Council requesting an investigation into the paid actor scandal.⁸¹

On May 10, 2018, following The Lens article and the groups' request to governmental authorities for an investigation, Entergy revealed that one of its own subcontractors, Crowds on Demand, recruited, trained, and paid cash to numerous individuals to take up seats and speak from scripts at two public meetings conducted by the City Council on October 16, 2017 and February 21, 2018.⁸² Entergy also

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Brown Affidavit, ¶ 14.

⁷⁷ *Id.* ¶ 16.

⁷⁸ The Lens article.

⁷⁹ *Id.*

⁸⁰ WDSU News report; Advocate staff report, *Entergy 'confirms' it didn't pay actors at council meeting, but will cooperate with probe*, The New Orleans Advocate (May 9, 2018).

⁸¹ May 7, 2018, Investigation Request Letter.

⁸² See Entergy, *Report of Investigation New Orleans Power Station Advocacy*, p. 3 (May 10, 2018) (“We now know, as a result of our investigation, that Crowds on Demand did in fact compensate most, if not

revealed that its contractor, the Hawthorn Group, hired Crowds on Demand.⁸³ The City Council then announced plans for an investigation into the payment of actors to support Entergy’s proposed gas plant at its meetings but did not address the limitations on public participation in its controversial approvals of the gas plant.

E. District Court Decision

On April 19, 2018, Plaintiffs-Respondents filed an Open Meetings Law enforcement action pursuant to La. R.S. 42:25(C). This lawsuit sought remedies for two public meetings held by the City Council and the Council Utility Committee that denied them and other New Orleans residents the right to direct public participation under the Louisiana Constitution, Article XII, Section 3; and the rights to attend a public meeting and to comment on a public meeting agenda item prior to a vote being taken on it by the public body, which are protected by the Open Meetings Law, La. R.S. 42:14(D). In response, Defendants-Applicants filed its opposition on July 3, 2018. The District Court held a hearing in which oral arguments were presented on July 19, 2018.

At a subsequent June 14, 2019 hearing, the District Court orally presented its judgment. The District Court carefully examined the facts and the law and appropriately set the process aside as a violation of the Open Meetings Law. The District Court upheld the rights of New Orleans residents in rendering a judgment “to make sure that . . . citizens voices are heard” at City Council meetings.⁸⁴

On July 2, 2019, the District Court issued the written judgment, which ruled that the Council Utility Committee public meeting on February 21, 2018 violated the Open Meetings Law.⁸⁵ This judgment voided the vote taken by the Council Utility Committee in favor of approving Entergy’s gas plant application and also voided the action taken by the City Council, which adopted Council Committee’s action as it was void *ab initio*.

F. Fourth Circuit Decision

The City Council and Entergy filed an appeal of the District Court’s decision to the Fourth Circuit Court of Appeal.

On February 12, 2020, the Fourth Circuit rendered its decision. The Fourth Circuit found that the Council Utility Committee violated the Open Meetings Law. 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 Utility Committee did not follow the meeting agenda as published. This change to the

all, of the other individuals it recruited to appear at the [October 16, 2017] meeting. . . . [H]owever, we now know that Crowds on Demand also recruited and compensated people to attend this [February 21, 2018] meeting.” (“Entergy Report”).

⁸³ Entergy Report, p. 1.

⁸⁴ Case. No. 2017-5208, *Testimony and Notes of Evidence heard in the above entitled cause of action held in Open Court*, p. 5 (June 14, 2019).

⁸⁵ Case No. 18-3842, *Judgment on Motion for Continuance* (Aug. 1, 2018).

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).

Additionally, the Fourth Circuit found that members of the public were deprived of the opportunity to observe the Council Utility Committee meeting and provide comments during the public comment period 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 for hours. Specifically, the Fourth Circuit found that:

[t]he 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.⁸⁶

With regard to the full City Council meeting held on March 8, 2018, the Fourth Circuit found that no violation of the Open Meetings Law occurred at this meeting.⁸⁷ The Fourth Circuit ultimately held that there was no remedy available for the violation of the Open Meetings Law.⁸⁸

III. Argument

A. The Fourth Circuit's Finding that the Council Utility Committee Violated the Open Meetings Law Should Not Be Reversed Because It Follows the Constitutional and Statutory Guarantees of the Right to Observe Deliberations of Public Bodies and the Right to Comment on an Issue Prior to the Public Body Taking Action on the Issue

Notwithstanding its holding that a remedy is not available to Petitioners-Respondents, the Fourth Circuit was correct in its finding that the Council Utility Committee violated the rights to observe public meetings and make comments prior to a public body taking action. 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, except in cases established by law.” Building upon this Constitutional foundation, the Louisiana State Legislature enacted the Open Meetings Law.⁸⁹ 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.

The Open Meetings Law requires that “[e]very meeting of any public body shall be open to the public,” with limited exceptions.⁹⁰ Public bodies have been defined to include the board of any political

⁸⁶ *Id.* at 12.

⁸⁷ *Id.* at 12–13.

⁸⁸ Fourth Circuit Opinion, p. 18.

⁸⁹ La. R.S. 42:12(A). *See also Wagner*, 525 So. 2d, 169 (The Open Meetings Law was enacted to ensure the rights of citizens to observe and participate in the deliberations of public bodies.).

⁹⁰ La. R.S. 42:14(A).

subdivision, and any committee or subcommittee thereof.⁹¹ The Louisiana Attorney General has determined that the City Council, as well as any committee or subcommittee of the City Council, is a “public body” for purposes of the Open Meetings Law.⁹²

A meeting of a public body occurs when a quorum, or a simple majority of the total membership of the public body, convenes to deliberate or act on any matter over which the public body has supervision, control, jurisdiction, or *advisory power*.⁹³

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 for the purpose of serving any official function, including advisory matters, constitutes a meeting as defined in La. R.S. 42:13. *See* La. Atty. Gen. Op. No. 16-0170 (La. A.G. Dec. 5, 2016); *see also Tectrans, Inc. v. New Orleans Aviation Bd.*, 695 F. Supp. 2d 313 (E.D. La. 2010), *aff’d*, 464 Fed. Appx. 199 (5th Cir. 2010).

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.⁹⁴ 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.⁹⁵

In order to effectuate the right to observe and comment described above, the Louisiana State Legislature adopted the notice provision. Thus, the Open Meetings Law provides that “[a]ll public bodies . . . shall give written public notice of any meeting no later than twenty-four hours . . . before the meeting” and that “[t]he 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.”⁹⁶

B. The Fourth Circuit’s Finding that the Council Utility Committee Violated the Open Meetings Law by Barring People from Attending Public Meetings and Denying People Their Right to Comment Is Correct and Should Not Be Reversed

Under the Open Meetings Law, the public has a right to observe public meetings and is entitled to direct participation in deliberations.⁹⁷ For public meetings, the Louisiana Constitution and Open Meetings Law make it clear beyond question: the public **must** be given the opportunity to comment on an agenda item before the City Council or the Council Utility Committee takes action on it (La. R.S. 42:14(D)); **all** members of the public who wish to address the City Council or Council Utility Committee must be given

⁹¹ La. R.S. 42:13(A)(2), (A)(3) (emphasis added).

⁹² La. Atty. Gen. Op. No. 10-0121 (La. A.G. June 7, 2010).

⁹³ La. R.S. 42:13(A)(2), (A)(4) (emphasis added).

⁹⁴ La. R.S. 42:14(D).

⁹⁵ *Prest v. Parish of Caddo*, 41,039 (La. App. 2d Cir. 6/2/06); 930 So. 2d 1207, 1211.

⁹⁶ La. R.S. 42:19(A)(1)(b)(i), (ii)(aa).

⁹⁷ *See, e.g., Wagner*, 525 So. 2d, 169.

the opportunity to speak (*Id.*); and **all** members of the public have the constitutional right to observe a City Council or Council Utility Committee meeting (La. Constitution Article XII, Section 3).

The City Council and the Council Utility Committee violated the Open Meetings Law when members of the public were excluded from the meetings at issue. Denying members of the public entrance to a public meeting and denying them opportunity to comment are clear and egregious violations of fundamental rights guaranteed to Louisiana citizens—rights that are “essential to the maintenance of a democratic society.”⁹⁸

The record clearly shows that the public’s rights to observe and comment were egregiously violated by the Council Utility Committee. This Council Utility Committee failure to protect the rights of New Orleans residents is illustrated by the following, among other things: (1) Councilmembers were aware during the Council Utility Committee meeting that residents were shut out of the proceeding and took no steps to remedy the situation; (2) City Council staff informed residents who were locked out of the Council Utility Committee meeting that their comment cards would not be accepted and that there was no way to facilitate everyone having the opportunity to comment at the meeting; (3) the City Council failed to resolve the issue of residents being locked out of public meetings on Entergy’s gas plant application despite the repeated occurrence of this violation; (4) prior to its meeting on March 8, 2018, the City Council received at least three written complaints about residents being denied the opportunity to participate in the February 21, 2018 meeting, but failed to take any corrective action on this violation of the Open Meetings Law and ensure that no violation would occur in future meetings; and (5) the City Council and/or its staff provided favorable treatment to Entergy employees and supporters by permitting them to enter the room and obtain seats prior to allowing residents who were waiting in line to enter the meeting room.

C. Defendants-Applicants’ Application for Writ of Certiorari Asks This Court to Sanction Clear Violations of the Rights Guaranteed by the Louisiana Constitution and Protected by the Open Meetings Law

Defendants-Applicants’ writ application essentially asks this Court to sanction clear violations of the Open Meeting Law that would eviscerate the fundamental bulwark against undemocratic decision-making in Louisiana. This writ application disregards the legal obligations that the City Council and the Council Utility Committee have to protect the public’s rights to observe and comment at public meetings.

The Court should note that the Open Meetings Law violations at the February 21, 2018 Council Utility Committee meeting were the *third* known instance in just a four-month period in which residents were denied access to a City Council public meeting.⁹⁹ Rather than take steps to resolve these violations

⁹⁸ La. R.S. 42:12(A).

⁹⁹ Not only were citizens shut out of the October 16 meeting, but in January, while the City Council considered a resolution promoted as part of the movement known as Boycott, Divest and Sanction, citizens were kept outside the meeting room. *See* The Times-Picayune article.

of the law despite requests to do so,¹⁰⁰ 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.

The protections afforded by the Open Meetings Law, the right of citizens to observe and comment at public meetings, were eviscerated by the actions of the Council Utility Committee and the City Council. Every New Orleans resident has a stake in the performance of and governance by its City Council, and their views must be heard on an agenda item before taking any action on it. The egregious facts in the record show that the Council Utility Committee rendered public participation in the February 21, 2018 meeting a sham, thereby depriving residents of their constitutionally and legally protected rights.

Defendants-Applicants attempt to lay its own failure to control its public meetings and to conduct those public meetings in an appropriate manner at the feet of Entergy, a company it has the authority to regulate. While Entergy's conduct certainly was despicable, the City Council itself is responsible for ensuring that all its meetings comply with the Open Meeting Law's requirements. The fact that the City Council lost control of its meetings, and to an entity it is supposed to regulate no less, does not excuse the City Council's failure to follow the requirements of the Open Meeting Law.¹⁰¹

After the October 16, 2017 public hearing and during the Council Utility Committee meeting on February 21, 2018, the City Council was aware of Entergy's use of paid actors and paid supporters to fill the meeting rooms and show sham support for the proposed gas plant.¹⁰² Once the disturbing facts of the manipulation of the public process came to light, the City Council should have re-started the process in compliance with the Open Meetings Law. Instead, the City Council plowed ahead, effectively acquiescing to and affirming Entergy's mendacious strategy. Rather than take the required corrective action, the City Council gave preferential treatment to Entergy that allowed its employees and supporters to enter the meeting room before the doors were opened to the public on March 8, 2018.¹⁰³ Even after receiving the investigation report detailing the appalling actions taken by Entergy to limit dissenting views by concerned residents from being heard at these public meetings, the City Council refused to take corrective action.¹⁰⁴

¹⁰⁰ Heurich Affidavit, ¶ 21; Bryant Affidavit, ¶ 13.

¹⁰¹ In the writ application, Defendants-Applicants alluded to the fact that the Open Meetings Law implements a constitutional provision that is subject to exceptions "in cases established by law." However, Defendants-Applicants fail to argue how its actions met any of the exceptions listed in the Open Meetings Law. The phrase "established by law" means "provided by legislation." *See, e.g., St. Mary Anesthesia Assocs., Inc. v. Hosp. Serv. Dist. No. 2 of Par. of St. Mary*, 2001-2852, p. 10 (La. App. 1 Cir. 12/20/02); 836 So. 2d 379, 387. The Council Utility Committee's actions do not come within any of the statutory exceptions.

¹⁰² Kevin Litten, *Meet the man who exposed ENO's paid actor scandal*, The Times-Picayune/NOLA.com (June 28, 2018) (reporting that during the February meeting, Danil Faust notified Councilmembers that people were paid to show support for the proposed ENO gas plants).

¹⁰³ Bryant Affidavit, ¶ 14.

¹⁰⁴ *See* Deep South Center for Environmental Justice, et al., *Motion to Complete the Record or, in the Alternative, Take Judicial Notice and Incorporated Memorandum*, District Court, Case No. 18-3471, pp. 4-5 (Apr. 23, 2019) (explaining that while Councilmembers publicly expressed support for reconsidering the vote to approve Entergy's gas plant application in light of the fact that New Orleans residents were

The City Council and the Council Utility Committee took the action of voting on Entergy's gas plant application at public meetings that were not open, as a practical matter, to New Orleans residents and did not allow all residents to make comments. Further aggravating this situation was Entergy's use of paid actors to obstruct residents, who opposed the gas plant, from having their voices heard by the City Council and the Council Utility Committee. Defendants-Applicants cannot change these appalling facts on which the Fourth Circuit found violations of the Open Meetings Law. Instead, they seek to reverse this finding with arguments that, if accepted by this Court, would eviscerate the Open Meetings Law.

Louisiana jurisprudence demonstrates that compliance with the Open Meetings Law turns on the question of how a public meeting is, in fact, conducted from the public notice, the public comments received, and the action taken by the public body. *See, e.g. Delta Development Co. v. Plaquemines Parish Commission Council*, 451 So. 2d 134, 137 (La. App. 4th Cir. 1984) (finding that the steps taken by a public body, which included adequate public notice and agenda, public comment and discussion, and action to pass a resolution, were in full compliance with the Open Meetings Law); *Jackson v. Bd. of Comm'rs for Hous. Auth. of New Orleans*, 514 So. 2d 628 (La. App. 4th Cir. 1987) (finding that the steps taken by a public body to vote on a contract that was not on the public agenda, which meeting attendees protested against, were in violation of the Open Meetings Law).

Contrary to Defendants-Applicants' assertions, the Fourth Circuit correctly applied both the Louisiana Constitution and the Open Meetings Law in reaching its finding that the Council Utility Committee violated the Open Meetings Law. The Fourth Circuit found that Plaintiffs-Respondents were denied their right to observe the Council Utility Committee meeting and were denied their right to comment at that meeting. The City Council's unabashed abandonment of its responsibilities under the Open Meetings Law is breathtaking, and should not be sanctioned by this Court.

As noted above in Section I, Defendants-Applicants also object to the Fourth Circuit's reliance on the evidence provided by Plaintiffs-Respondents. While the City Council attached the affidavits it provided to the courts, the City Council failed to even mention the **twelve** affidavits filed by the Plaintiffs-Respondents in support of their petition. Both the District Court and the Fourth Circuit considered all the evidence provided by the parties and found that the Plaintiffs-Respondents had established violations of the Open Meetings Law. Both courts are not only entitled but required to make this determination. The fact that Defendants-Applicants disagree with these findings does not justify this Court's granting of their writ application.

denied the opportunity to observe and make comments at the public meetings, the City Council ultimately refused to take any such action).

Finally, Defendants-Applicants contend that the opponents of the gas plant were “adequately represented” during the Council Utility Committee meeting. Defendants-Applicants’ contention has no basis in Louisiana law. The right to observe and comment is an *individual* right. The Louisiana Constitution expressly provides that “[n]o person shall be denied the right to observe the deliberations of public bodies.”¹⁰⁵ The Open Meetings Law implements this constitutional requirement and further mandates public comment opportunities at public meetings.¹⁰⁶ Neither the clear text of this constitutional provision nor “cases established by law” permit the denial of people’s right to observe the deliberations of public bodies so long as the meeting was observed by some. Thus, it is irrelevant that some people were able to observe and participate in the meeting. The Council Utility Committee denied approximately 70 individuals their right to observe and provide comment by preventing these individuals from entering a public meeting, despite the availability of seats in the meeting room. This denial violates the Open Meetings Law.

The Open Meetings Law prohibits a public body from taking an action, such as a vote, at a meeting at which people are denied their right to be heard. La. R.S. 42:14(D); *see also Jackson*, 514 So. 2d, 629–630 (affirming the decision to void the actions of the Board that “denied the interested public their right to be heard and to effectively participate in the decision-making process”). Here, the meeting conducted by the Council Utility Committee was clearly in violation of the Open Meetings Law, as people were not allowed to observe the meeting and make comments; however, the Council Utility Committee nonetheless voted. There is no doubt that Entergy’s purposeful obstruction certainly aggravated the situation, but the Council Utility Committee was not prevented from following its duty under the Open Meetings Law and should have refrained from taking a vote at this meeting in which so many members of the public were denied their right to be heard and to participate in the decision-making process effectively.

This Court should find that Defendants-Applicants failed to establish that the Fourth Circuit erred when it determined that the Council Utility Committee violated the Open Meetings Law by barring residents from entering the February 21, 2018 public meeting room and denying those same residents their right to comment. The Court should, therefore, deny the writ application.

D. The Council Utility Committee’s Alteration of the Public Meeting Agenda Violated the Open Meetings Law

Defendants-Applicants contend that the Fourth Circuit erred in ruling that the Council Utility Committee failed to follow the February 21, 2018 meeting agenda. In order to effectuate the right to observe and comment described above, the Louisiana State Legislature adopted the notice provision.

¹⁰⁵ Louisiana Constitution, Article XII, Section 3 (emphasis added).

¹⁰⁶ La. R.S. 42:14(D).

Thus, the Open Meetings Law provides that “[a]ll public bodies . . . shall give written public notice of any meeting no later than twenty-four hours . . . before the meeting” and that “[t]he 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.”¹⁰⁷

On February 16, 2018, the Council Utility Committee issued the notice of the agenda for the February 21, 2018 meeting. This agenda specifically stated that each party to the proceeding would be allowed 15 minutes for closing argument. The agenda notice further stated that “[e]ach public speaker, **not a party**, will be allowed 2 minutes.”¹⁰⁸

Importantly, this is not the first time the City Council restricted the parties’ participation in a public meeting. Prior to the start of the October 16, 2017 meeting, Tom Stratton, then Chief of Staff of CURO, sent an email to parties, including the intervenors, stating that:

We are going to hold any comments from intervenors until the end of the hearing, after all non-intervenor members of the public have had an opportunity to speak. Additionally, we would ask that if we have a large turnout, and it appears we are in danger of running out of time, **if/when** we get to the intervenors, please only send one member of your organization up to speak.¹⁰⁹

Due to the overwhelming attendance at the October 16, 2017 meeting, the intervenors were never given the opportunity to speak. Thus, the City Council had previously conducted a public meeting that restricted intervening organizations from speaking.

Thus, based on previous experience, members of intervenor organizations followed the explicit instruction contained in the February 21, 2018 meeting agenda, and did not fill out comment cards because pursuant to the agenda instructions they would not be permitted to speak.¹¹⁰

As discussed above in Section I, during the public comment period, the Council Utility Committee Chair failed to follow the instructions provided in the official agenda notice. The Chair did not enforce the rule that parties would not be allowed to speak during the public comment period, or even inquire if the speaker was a party. Moreover, he never announced that the provision of the agenda notice limiting who could speak was being abandoned. Thus, several members of the organizational parties, including Dr. Beverly Wright, Executive Director of the Deep South Center for Environmental Justice, never filled out a comment card and never spoke during the public comment period.

Defendants-Applicants concede that the Chair permitted party representatives to speak during the February 21, 2018, meeting. In response to Plaintiffs-Respondents allegations that this action violated the Open Meetings Law, Defendants-Applicant assert that Plaintiffs-Respondents incorrectly interpreted the

¹⁰⁷ La. R.S. 42:19(A)(1)(b)(i), (ii)(aa).

¹⁰⁸ See Utility Committee Agenda Notice (emphasis added).

¹⁰⁹ Email from Tom Stratton (emphasis added).

¹¹⁰ Heurich Affidavit, ¶ 19; Morris Affidavit, ¶ 14; Wright Affidavit, ¶ 23.

agenda directive as prohibiting representatives from commenting at the February 21, 2018 meeting. Tellingly, Defendants-Applicants failed, despite numerous opportunities, to offer an alternative interpretation of this statement. If anyone should know what the Council Committee actually intended by the phrase “[e]ach public speaker, **not a party**, will be allowed 2 minutes” it would be the City Council. Yet, Defendants-Applicants failed to proffer an interpretation of this agenda directive to either the District Court or the Fourth Circuit.

The Fourth Circuit correctly found that the only reasonable interpretation of the phrase “[e]ach public speaker, **not a party**, will be allowed 2 minutes” is that members of the intervenor organizations would not be permitted to speak during the public comment period of the Council Utility Committee meeting. The Chair did not enforce this prohibition, instead allowing employees of Entergy, a party, as well as members of intervening organizations, to speak. Members of intervenor organizations were not informed of this change within 24 hours of the meeting and were not even informed of the change during the meeting. Failure to inform all parties within 24 hours of the meeting that they would, in fact, be allowed to comment undoubtedly led to many members of these intervening organizations simply choosing either not to attend or speak at the meeting.¹¹¹ The failure of the Chair to at least announce the change at the meeting resulted in members of the intervening organizations not submitting comment cards and thus losing their opportunity to comment.

Moreover, altering the rules for the public meeting set forth in an agenda defeats the purpose of prior notification. Advanced notice of a meeting agenda ensures that if a member of the public wants to be heard on a matter, he or she can check the agenda posted twenty-four hours in advance to see if the matter is scheduled for consideration.¹¹² This is more than a technical violation of the notice requirement. Rather, this violation resulted in several parties losing the opportunity to provide public comment. In this instance, members of the Deep South Center for Environmental Justice, the Sierra Club, and 350 New Orleans complied with the agenda, and did not make comments. The Council Utility Committee Chair’s decision to abandon the agenda without notice as required by law created an unfair process for public comments, which barred some and allowed others who were parties to the Entergy gas plant proceeding to speak during the public comment portion of the public meeting. It is impossible to know how many members of these organizations did not attend all or part of the meeting because they believed that based on the meeting agenda, they would not be permitted to speak.

This Court should find that the Fourth Circuit correctly ruled that the Council Utility Committee’s failure to follow the rules for the meeting set forth on the agenda violated the Open Meetings Law. This Court should, therefore, deny Defendants-Applicants’ writ application.

¹¹¹ Wright Affidavit , ¶ 7.

¹¹² La. Atty. Gen. Op. No. 15-0122 (La. A.G. Jan. 8, 2016).

IV. CONCLUSION

Democracy, in order to survive, must be vigorously defended. Democracy needs the strong support of all three branches of government. The City Council, after publicly excoriating Entergy for flagrantly corrupting the democratic process by using paid actors to lie and displace actually impacted citizens from hearings,¹¹³ now asks this Court to consider endorsing the same process and reverse the decision of the Fourth Circuit.

Defendants-Applicants; position is contrary to law and contrary to democracy itself. Defendants-Applicants shamefully ignore that approximately 70 residents were barred from attending a public meeting and shamefully assert that the individual right to public comment does not matter. Defendants-Applicants then proceeds to ask this Court to disregard a key right of public participation. Furthermore, the Defendants-Applicants' position in this case is diametrically opposed to its own open public lamentations about the corruption and perversion of the same public process that they now defend on brief. The right of New Orleans residents to have their voices heard at City Council meetings must be protected. Democracy must be defended.

For the reasons set forth in this opposition, the Court should deny Defendants-Applicants' writ application.

Respectfully submitted by:

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¹¹³ The President of the City Council has referred to the paid actor scandal as "a perversion of the public process" and recognized the need to "defend our democratic process in the wake of the use of paid actors." WGNO News, *City Council to Investigate Entergy's Use of Paid Actors*, (May 18, 2018), Alex Woodward, *New Orleans City Council introduces new public comment card system*, Gambit (June 4, 2018). Moreover, in its official statements to the public, the City Council denounced Entergy's use of paid actors to create sham support for the gas plant at public meetings. The City Council decried the tactic as "fly[ing] in the face of the dignity, courtesy, and respect of traditional public discourse vital to our democratic process" and being "in contravention to the true democratic deliberative process." Council of the City New Orleans, *Joint Statement from Council President and Vice President Regarding Entergy New Orleans Astroturfing Investigation*, (May 11, 2018), Council of the City New Orleans, *City Council President Jason Williams to Outline Plan of Action that Addresses Entergy's Use of Paid Actors*, (May 17, 2018).

CERTIFICATE OF SERVICE

I hereby certify that I have on this 1st day of July, 2020, served a copy of the foregoing to all known counsel of record in this matter by electronic mail.

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RULE XLII, § 5 Statement

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

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/s/
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