IN THE SUPREME COURT OF OHIO

League of Women Voters of Ohio, *et al.*, Relators, v. Ohio Redistricting Commission, *et al.*, Respondents.	Case No. 2021-1193
Bria Bennett, *et al.*, Relators, v. Ohio Redistricting Commission, *et al.*, Respondents.	Case No. 2021-1198
Ohio Organizing Collaborative, *et al.*, Relators, v. Ohio Redistricting Commission, *et al.*, Respondents.	Case No. 2021-1210

RESPONSE TO ORDER OF FEBRUARY 18

(*Counsel listing on next page)*

Freda J. Levenson (0045916)
ACLU of Ohio Foundation, Inc.
4506 Chester Avenue
Cleveland, Ohio 44103
Tel: 614-586-1972 x 125
flevenson@acluohio.org

David J. Carey (0088787)
ACLU of Ohio Foundation, Inc.
1108 City Park Avenue, Suite 203
Columbus, OH 43206
(614) 586-1972 x2004
dcarey@acluohio.org

Alora Thomas
Kelsey Miller
Julie A. Ebenstein
American Civil Liberties Union
125 Broad Street
New York, NY 10004
(212) 519-7866
athomas@aclu.org
jebenstein@aclu.org

Robert D. Fram (PHV 25414-2021)
Donald Brown
Joshua González (PHV 25424-2021)
Juliana Goldrosen (PHV 25193-2021)
David Denuyl (PHV 25452-2021)
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, CA 94105-2533
(415) 591 6000
rfram@cov.com

James Smith
Megan C. Keenan (PHV 25410-2021)
L. Brady Bender (PHV 25192-2021)
Alexander Thomson (PHV 25462-2021)
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
(202) 662-6000
mkeenan@cov.com

DAVE YOST
OHIO ATTORNEY GENERAL
Bridget C. Coontz (0072919)
Julie M. Pfeiffer (0069762)
30 E. Broad Street
Columbus, OH 43215
Tel: (614) 466-2872
Fax: (614) 728-7592
bridget.coontz@ohioago.gov
julie.pfeiffer@ohioago.gov

Counsel for Respondents
Governor Mike DeWine,
Secretary of State Frank LaRose, and
Auditor Keith Faber

W. Stuart Dornette (0002955)
Beth A. Bryan (0082076)
Philip D. Williamson (0097174)
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut St., Suite 1800
Cincinnati, Ohio 45202-3957
T: (513) 381-2838
dornette@taftlaw.com
bryan@taftlaw.com
pwilliamson@taftlaw.com

Phillip J. Strach (PHV 25444-2021)
Thomas A. Farr (PHV 25461-2021)
John E. Branch, III (PHV 25460-2021)
Alyssa M. Riggins (PHV 25441-2021)
NELSON MULLINS RILEY & SCARBOROUGH LLP
4140 Parklake Ave., Suite 200
Raleigh, North Carolina 27612
phil.strach@nelsonmullins.com
tom.farr@nelsonmullins.com
john.branch@nelsonmullins.com
alyssa.riggins@nelsonmullins.com
T: (919) 329-3812

Counsel for Respondents
Senate President Matt Huffman and
House Speaker Robert Cupp

John Gilligan (Ohio Bar No. 0024542)
Diane Menashe (Ohio Bar No. 0070305)

Anupam Sharma (PHV 25418-2021)
James Hovard (PHV 25420-2021)
Yale Fu (PHV 25419-2021)
COVINGTON & BURLING LLP
3000 El Camino Real
5 Palo Alto Square, 10th Floor
Palo Alto, CA 94306-2112
(650) 632-4700
asharma@cov.com

Madison Arent
COVINGTON & BURLING LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018-1405
(212) 841 1000
marent@cov.com

Counsel for Relators
League of Women Voters et al.

Abha Khanna (PHV 2189-2021)
Ben Stafford (PHV 25433-2021)
ELIAS LAW GROUP
1700 Seventh Ave, Suite 2100
Seattle, WA 98101
akhanna@elias.law
bstafford@elias.law
T: (206) 656-0176
F: (206) 656-0180
Aria C. Branch (PHV 25435-2021)
Jyoti Jasrasaria (PHV 25401-2021)
Spencer W. Klein (PHV 25432-2021)
ELIAS LAW GROUP
10 G St NE, Suite 600
Washington, DC 20002
abranch@elias.law
jjasrasaria@elias.law
sklein@elias.law
T: (202) 968-4490
F: (202) 968-4498

Donald J. McTigue* (Ohio Bar No. 0022849)
**Counsel of Record*
Derek S. Clinger (Ohio Bar No. 0092075)
ICE MILLER LLP
250 West Street, Suite 700
Columbus, Ohio 43215
John.Gilligan@icemiller.com
Diane.Menashe@icemiller.com

Counsel for Respondents
Senator Vernon Sykes and
House Minority Leader Emilia Sykes

Dave Yost
Attorney General
Erik J. Clark (Ohio Bar No. 0078732)
Ashley Merino (Ohio Bar No. 0096853)
ORGAN LAW LLP
1330 Dublin Road
Columbus, Ohio 43215
T: (614) 481-0900
F: (614) 481-0904
ejclark@organlegal.com
amerino@organlegal.com

Special Counsel to Ohio Attorney General
Dave Yost

Counsel for Respondent
Ohio Redistricting Commission

McTigue & Colombo LLC
545 East Town Street
Columbus, OH 43215
dmctigue@electionlawgroup.com
dclinger@electionlawgroup.com
T: (614) 263-7000
F: (614) 368-6961

Counsel for Relators
League of Women Voters et al.

Peter M. Ellis (0070264)
Counsel of Record
M. Patrick Yingling (PHV 10145-2021)
Reed Smith LLP
10 South Wacker Drive, 40th Floor
Chicago, IL 60606
Tel: (312) 207-1000
Fax: (312) 207-6400
pellis@reedsmith.com
mpyingling@reedsmith.com

Brad A. Funari (PHV 3139-2021)
Danielle L. Stewart (0084086)
Reed Smith LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Tel: 412-288-4583
Fax: 412-288-3063
bfunari@reedsmith.com
dstewart@reedsmith.com

Brian A. Sutherland (PHV 25406-2021)
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
Tel: (415) 543-8700
Fax: (415) 391-8269
bsutherland@reedsmith.com

Ben R. Fliegel (PHV 25411-2021)
Reed Smith LLP
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071
Tel: (213) 457-8000

Fax: (213) 457-8080
bfliegel@reedsmith.com

Alicia L. Bannon (PHV 25409-2021)
Yurij Rudensky (PHV 25422-2021)
Michael Li (PHV 25430-2021)
Ethan Herenstein (PHV 25429-2021)
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
Tel: (646) 292-8310
Fax: (212) 463-7308
alicia.bannon@nyu.edu

Counsel for Relators
Ohio Organizing Collaborative et al.

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INTRODUCTION

A contempt finding in this matter is inappropriate. That is true as to the Ohio Redistricting Commission, and certainly as to respondents House Speaker Cupp ("Speaker") and Senate President Huffman ("President"). The Speaker and the President respectfully request the Court decline to take such precipitous action in this matter.

This Court, in its February 7, 2022 order, did not order the Speaker or the President (nor any of the five other Commission members) to do anything; consequently, they have not violated any order. The orders in this case, including the February 7, 2022 order, have ordered the Ohio Redistricting Commission (the "Commission") to act because, as this Court has held, the Commission is the only necessary party in this matter. *See League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-65, ¶ 61.

While it is regretful that the Commission itself was unable to "ascertain and determine" a new general assembly district plan (Article XI, Section 9(B)), it certainly was not for lack of trying. This Court gave the Commission ten days to ascertain an entirely new plan and specifically instructed that it could not use the invalidated plan as a starting point. That left the Democratic plan as the only viable plan to consider during that time period, especially since it had been represented to this Court as a fully constitutional plan and which Democratic staff had been working on for at least a month. The Commission considered that plan and determined that it not only violated the Ohio Constitution, but it also contained indicia of racial gerrymandering that may violate federal law. After rejecting the Democratic plan, no other Commission member brought forward an alternative plan to consider.

Even though the Commission was unable to adopt a plan by February 17, members of the Commission have continued to work on a plan. The Speaker and President anticipate that the Commission will be in a position to vote on a new plan this week. Under these circumstances and

given the good faith effort that the Commission made to try and do so within the 10-day time period, a finding of contempt would be inappropriate.

STATEMENT OF FACTS

The Commission met on Thursday, February 17, 2022 to consider remedial general assembly district plans proposed by members of the Commission. The day before, February 16, 2022, the Democratic members provided their latest final version of a proposed plan to the Commission. (ORC February 17, 2022 Meeting Tr. 3:18-4:15). This plan, or some prior version of it, had been represented to this Court as a fully constitutional plan.

The Commission took up the plan proposed by the Democratic members. An examination of the plan first revealed that it clearly targeted Republican incumbents with surgical precision. In the house plan, for example, the plan paired 10 Republican incumbents in 5 districts and in another district it paired a Republican incumbent and a Democratic incumbent in a Democratic-leaning district. (*Id.* at 7:19–8:3). Thus, all of the pairings disfavored the Republican party, while none disfavored the Democratic party. (*See id.*). Similarly, the senate plan proposed by the Democratic members would eliminate 5 Republican incumbents. (*Id.* at 8:15–18:24). That was accomplished by assigning incumbent Republicans to different districts so that they would not be in a district they could run in or that was up for election, thereby eliminating them from the Senate. (*Id.*). The adverse assignments again affected only the Republican party and not the Democratic party. (*See id.*).

It was also revealed that attempting to draw a plan that unduly favored Democrats and achieve strict proportionality created numerous bizarre, non-compact districts, in violation of Section 6(C) of Article XI. For example, House District 35 started in the very southern part of Summit County, then headed all the way across southern Portage County to the Mahoning County

border, turned north and ended up in Geauga County. (*Id.* at 42:3–43:24). Another example was all of the house districts in Cuyahoga County which were winding, narrow, and bizarrely-shaped to try and increase the number of Democratic-leaning districts in that county. (*Id.* at 43:25–45:9).

Further scrutiny revealed that attempting to add more Democratic-leaning districts resulted in the wholesale splitting of numerous political subdivisions. In the house map, for example, the first plan submitted by Senator Sykes split the 4 cities of Toledo, Cleveland, Dayton, and Cincinnati into 12 house districts. (*Id.* at 51:23–52:5). However, in the Democratic plan the Commission considered on February 17, the number of splits of those same 4 cities increased to at least 19 house districts. (*Id.* at 52:6–52:12). And in the senate map, the major cities of Toledo, Cleveland, Akron, Dayton, and Cincinnati, went from being split in 6 senate districts to 12 senate districts. (*Id.* at 54:16–22).

Finally, some Democratic-leaning districts appeared to be using race as a proxy for partisanship. One example was proposed Senate District 18, which (in addition to splitting cities and lacking compactness), split the city of Akron and took historically African-American populations and attached them to Portage County and a part of Geauga County to create a Democratic leaning district. (*Id.* at 68:8–24). Another example was proposed Senate District 25, which took historically African-American populations in the east Cleveland area and attached them to Lake County to create a Democratic leaning senate district. (*Id.* at 66:10–67:21). And a third example was House District 44 which took inner-city neighborhoods in from the City of Toledo and attached them to Ottawa County to create a Democratic leaning house district. (*Id.* at 67:22–68:7). For all of these various reasons, the Commission voted 5-2 to reject the Democratic plan. No other Commission member, including the Democratic members, proposed another plan. As a result, the Commission adjourned.

ARGUMENT

Contempt is inappropriate under the circumstances of this case.

1. Standard of Review

Chapter 2705 *et seq.* of the Ohio Revised Code governs contempt of court. Specifically, a "court . . . may summarily punish a person guilty of misbehavior in the present of or so near the court or judge as to obstruct the administration of justice." R.C. § 2705.01. "Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer" is punishable by contempt. R.C. § 2705.02(A).

The elements of civil contempt are: (1) "a prior order of the court," (2) "proper notice to the alleged contemnor," and (3) "failure to abide by the court order." *Armco, Inc. v. United Steel Workers of Am.*, No. 00-CA-95, 2001 WL 1773858, at *3 (3rd Dist. June 21, 2001); *see also Abernethy v. Abernethy*, 2010-Ohio-435, 2010 WL 457133, ¶ 27 (5th Dist. Feb. 11, 2010) (internal citations omitted). The standard of proof for a civil contempt charge is clear and convincing evidence. *Brown v. Exec. 200, Inc.*, 64 Ohio St. 2d 250, 253, 416 N.E.2d 610, 613 (1980).

2. The Speaker and the President have not been ordered to do anything and have therefore not violated any order.

This Court did not order the Speaker nor the President to do anything and they have therefore not violated any order. *Abernethy*, 2010-Ohio-435, at ¶ 27 ("The prima facie elements of civil contempt include the existence of a court order and the party's noncompliance with the terms of that order.) The orders in this case have been directed at the Commission only. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinions Nos. 2022-Ohio-65, 2022-Ohio-342. That is consistent with this Court's previous opinion, which held that the Commission is the only necessary party in this matter. *League of Women Voters of Ohio v. Ohio Redistricting*

Comm., Slip Opinion No. 2022-Ohio-65, ¶ 61. Accordingly, neither the Speaker nor the President failed to comply with any order of this Court directed to them.

In any event, neither the Speaker nor the President have the ability to force other Commission members to propose any plan or vote for any particular plan. Assuming, arguendo, that this Court could order individual Commission members such as the Speaker or the President to propose a plan or vote a particular way, neither the Speaker or the President could force any other Commission member to vote for that plan. And because they are acting in a legislative capacity on the Ohio Redistricting Commission, they are immune from action by this Court.

As the United States Supreme Court has observed, "It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities." *Bogan v. Scott Harris*, 523 U.S. 44, 46, 118 S. Ct. 966, 969 (1998). The same is true under both the federal and Ohio Speech and Debate Clauses. *See Costanzo v. Gaul*, 62 Ohio St.2d 106, 403 N.E.2d 979 (1980) (per curiam) (noting how the speech and debate provisions of the Ohio and federal constitutions are similar); *Kniskern v. Amstutz*, 144 Ohio App. 3d 495, 496, 760 N.E.2d 876, 877 (8th Dist. 2001) (noting Ohio's speech and debate constitutional provision is "nearly identical to Section 6, Article I of the United States Constitution[.]"); *Dublin v. State*, 138 Ohio App.3d 753, 742 N.C.2d 232 (10th Dist. 2000) (noting that the federal and Ohio constitutional speech and debate provisions are comparable).

The Commission is performing an exclusively legislative function in redistricting. *See Wilson v. Kasich*, 134 Ohio St. 3d 221, 228, 2012-Ohio-5367, 915 N.E.2d 814, ¶ 20 ("In effect, the apportionment board is performing what was previously a legislative function.", quoting *Ely v. Klahr*, 403 U.S. 108, 114 (1971) ("districting and apportionment are legislative tasks in the first instance"). Thus, the Speaker and the President have immunity regarding their actions and votes

regarding the Commission's work. *See Incorporated Village of Hicksville v. Blakeslee*, 103 Ohio St. 508, 518, 134 N.E. 445, 449 (1921) (applying legislative privilege to protect a municipal legislator from liability). They cannot be coerced in the performance of these duties.

Nor can the Court do so through a threat of contempt. If it could, it could simply order every Commission member to vote in a certain way, even if it violated the conscience of the member, and render the Commission itself—a constitutionally created body—a nullity. This would raise serious separation of powers issues under the Ohio Constitution. The Commission is a constitutionally created body with the same status as this Court and the general assembly. Indeed, it is exercising the legislative authority in the area of redistricting. *See Kasich*, 2012-Ohio-5367, ¶ 20.

Not even four years ago, this Court recognized the limits of the judicial contempt power in the face of discretionary authority delegated to a coordinate branch. In *City of Toledo v. State*, this Court held that "a court cannot enjoin the legislature from passing a law." 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, ¶ 28 (internal citation omitted). The Court explained:

> In framing the Ohio Constitution, the people of this state conferred on the General Assembly the legislative power. This lawmaking prerogative cannot be delegated to or encroached upon by the other branches of government. . ..
>
> The separation-of-powers doctrine therefore precludes the judiciary from asserting control over "the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control." *Grendell*, 86 Ohio St.3d at 633, 716 N.E.2d 704. A court can no more prohibit the General Assembly from enacting a law than it can compel the legislature to enact, amend, or repeal a statute— "the judicial function does not begin until after the legislative process is completed." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469, 715 N.E.2d 1062 (1999) . . ..
>
> Accordingly, we agree with the prevailing rule that under a tripartite form of government, "a court cannot enjoin the legislature from passing a law. 'This is true whether such action by the legislature is in disregard of its clearly imposed constitutional duty or is the enactment of an unconstitutional law.'"

Id. at ¶¶ 26–28 (some internal citations omitted). Similarly, courts also cannot order "the General Assembly to adopt joint resolutions. In this regard, the judicial function is limited to a determination of the effect and validity of joint resolutions adopted by the General Assembly." *State ex rel. Slemmer v. Brown*, 34 Ohio App. 2d 27, 28, 295 N.E.2d 434, 435 (10th Dist. 1973) (dismissing a mandamus action asking the court to command the General Assembly, president pro tempore of the Ohio Senate, and speaker of the Ohio House to pass certain joint resolutions on the grounds that such a writ would violate separation of powers principles). Here the Commission is performing legislative tasks that historically were functions of the general assembly; therefore, courts are not in a position to be able to command the Commission members to perform any particular action.

A concurrence in *DeRolph III* addresses separation of powers issues inherent in cases involving judicial mandates about legislative action. In discussing the options available to the Ohio Supreme Court in a dispute over school funding, Justice Douglas discussed the possibility of using the Court's contempt power to ensure compliance:

> Contempt has been a widely discussed option but, I hasten to forcefully and unequivocally state, never within the court itself. As this is being written, I just received a call from a man identifying himself as being from Carroll County. His message was the same as various members of the court have received over the last four years. "Don't cave in to the General Assembly. Find them in contempt and put them in jail."
>
> While that option has never been seriously discussed among us, let us explore that option for the benefit of those who would advocate such a malevolent course of action. Admittedly, if the General Assembly had failed to comply with the prior court orders and craft a funding formula that passes constitutional muster, this court (like other courts) is vested with the power to enforce its orders. But how? Enforcement of any court order poses concerns. The judicial branch has no concrete powers like the sword (executive) or the purse (legislative) with which to carry its judgments into effect. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is* (1994), 83 Geo.L.J. 217, 219. In fact, the judicial branch has been referred to as the "least dangerous" branch of government. The Federalist Papers No. 78 (Hamilton 1788) (Wills Ed.1982), at 393. Courts do not possess their

> own army or a police department to enforce their orders and judgments. Instead, as Hamilton observed, the judiciary is dependent upon the executive department for the efficacy of its judgments. *Id.* at 393–394. *See, also*, Paulsen, 83 Geo.L.J. at 219.
>
> These practical problems of enforcement remain the same, and are, in fact, exacerbated because today we live in different times. We hear from certain members of the General Assembly that we can say whatever we want but those pronouncements will be ignored. We hear some members of the General Assembly saying that impeachment of one or more justices might be in order and, in fact, we have one self-proclaimed constitutional law expert, a professor, advocating our impeachment or removal from office and stating that the General Assembly has a duty to ignore court orders that he says we have no right to issue, notwithstanding that we are doing what we believe the oath means when we swear "to support the constitution of the United States and the constitution of this state" and "to administer justice without respect to persons." R.C. 3.23.
>
> Are we afraid? No. We fear not for ourselves but for those who would forget their place in our constitutional system of governance and ignore the wisdom of our founding fathers. Are we practical? Yes. We recognize that we have no army and no police force to send. We have only our ability to reason, persuade, and even plead with the Governor and General Assembly to do what is right and best for schoolchildren in Ohio.

DeRolph v. State, 93 Ohio St. 3d 309, 2001-Ohio-1343, 754 N.E.2d 1184, 1211–12 (Douglas, J., concurring), *rec'd*, 93 Ohio St. 3d 628, 758 N.E.2d 1113, 2001-Ohio-1896, *and vacated on reconsideration by*, 97 Ohio St. 3d 434, 2002-Ohio-6750, 780 N.E.2d 529.

What is clear from all of this is that this Court may not hold in contempt individual members of the constitutionally created Ohio Redistricting Commission who have themselves violated no order directed at them. Such a precipitous action would raise grave separation of powers issues that this Court should decline to confront. In any event, it may be unnecessary as the Speaker and the President anticipate the Commission will vote on a new plan this week.

CONCLUSION

For the reasons stated above, any contempt finding against the Speaker or the President would be inappropriate.

Respectfully submitted this the 23rd day of February, 2022.

/s/ Phillip J. Strach
Phillip J. Strach (PHV 25444-2022)*
phillip.strach@nelsonmullins.com
Thomas A. Farr (PHV 25461-2022)*
tom.farr@nelsonmullins.com
John E. Branch, III (PHV 25460-2022)*
john.branch@nelsonmullins.com
Alyssa M. Riggins (PHV 25441-2022)*
alyssa.riggins@nelsonmullins.com
NELSON MULLINS RILEY & SCARBOROUGH LLP
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
Telephone: 919-329-3800

W. Stuart Dornette (0002955)
dornette@taftlaw.com
Beth A. Bryan (0082076)
bryan@taftlaw.com
Philip D. Williamson (0097174)
pwilliamson@taftlaw.com
TAFT STETTINUS & HOLLISTER LLP
425 Walnut St., Suite 1800
Cincinnati, OH 45202-3957
Telephone: 513-381-2838

Counsel for Respondents Huffman and Cupp
**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of February, 2022, I have served the foregoing document by email:

Freda Levenson
flevenson@acluohio.org
David J. Carey
dcarey@acluohio.org
Alora Thomas
athomas@aclu.org
Julie A. Epstein
jepstein@aclu.org

Robert D. Fram
rfram@cov.com
Joshua Gonzalez
Jgonzalex@cov.com
Megan C. Keenan
Mkeenan@cov.com
Anupam Sharma
asharma@cov.com
Madison Arent
marent@cov.com

Counsel for LWVO Relators

Abha Khanna
Ben Stafford
akhanna@elias.law
bstafford@elias.law
Aria C. Branch
Jyoti Jasrasaria
Spencer W. Klein
abranch@elias.law
jjasrasaria@elias.law
sklein@elias.law

Donald J. McTigue
Derek S. Clinger
dmctigue@electionlawgroup.com
dclinger@electionlawgroup.com
Counsel for Bennett Relators

Peter M. Ellis
pellis@reedsmith.com

Erik Clark
ejclark@organlegal.com
Ashley Merino
amerino@organlegal.com

Counsel for Respondent Ohio Redistricting Commission

John Gilligan
John.Gilligan@icemiller.com
Diane Menashe
Diane.Menashe@icemiller.com

Counsel for Respondents Senator Vernon Sykes and House Minority Leader Emilia Sykes

Bridget Coontz
Bridget.Coontz@ohioAGO.gov
Michael Walton
Michael.Walton@ohioAGO.gov
Julie Pfieffer
Julie.Pfieffer@ohioAGO.gov

Counsel for Respondents Ohio Governor Mike DeWine, Ohio Secretary of State Frank LaRose, and Ohio Auditor Keith Faber

Emily Smart Woerner
Emily.woerner@cincinnati-oh.gov
Shannon Price
Shannon.price@cincinnati-oh.gov

Counsel for Amicus Curiae City of Cincinnati

Stephanie M. Chimiel
Stephanie.chimiel@thompsonhine.com
Mary E. Csarny
Mary.Csarny@thompsonhine.com

Counsel for Amicus Curiae David Niven

M. Patrick Yingling
MPYingling@ReedSmith.com
Natalie R. Salazar
NSalazar@reedsmith.com
Brian A. Sutherland
bsutherland@reedsmith.com
Ben R. Fliegel
bfliegel@reedsmith.com

Alicia L. Bannon
Alicia.bannon@nyu.edu
Yurji Rudensky
rudenskyy@brennan.law.nyu.edu
Ethan Herenstein
herensteine@brennan.law.nyu.edu

Attorneys for Ohio Organizing Collaborative Relators

Rob Weiner
rweiner@campaignlegalcenter.org
Chris Lamar
CLamar@campaignlegalcenter.org
Valencia Richardson
vrichardson@campaignlegalcenter.org

Steven Kaufman
skaufman@ulmer.com
Dolores P Garcia Prignitz
dgarcia@ulmer.com
Sara S Dorland
sdorland@ulmer.com

Counsel for Amicus Curiae Campaign Legal Center

Jon Greenbaum
jgreenbaum@lawyerscommittee.org
Ezra Rosenberg
erosenberg@lawyerscommittee.org
Pooja Chaudhuri
pchaudhuri@lawyerscommittee.org
Subodh Chandra
Subodh.chandra@chandralaw.com
Donald Screen
Donald.screen@chandralaw.com
Janette McCarthy Wallace
jlouard@naacpnet.org
Anthony P. Ashton
aashton@naacpnet.org
Anna Kathryn Barnes
abarnes@naacpnet.org

Counsel for Amicus Curiae Ohio State Conference of the NAACP

John M. Haseley
Haseley@goconnnorlaw.com
Counsel for We Are Ohio

4874-9803-5472 v.2