

**IN THE SUPREME COURT OF OHIO**

|                                |   |   |
|--------------------------------|---|---|
| THE OHIO ORGANIZING            | : | Case No. 2021-1210                      |
| COLLABORATIVE, <i>et al.</i> , | : |   |
|                                | : |   |
| <i>Petitioners,</i>            | : | <b>APPORTIONMENT CASE</b>               |
|                                | : |   |
| v.                             | : | Filed pursuant to S.Ct.Prac.R. 14.03(A) |
|                                | : | and Section 9 of Article XI of the Ohio |
| OHIO REDISTRICTING             | : | Constitution to challenge a plan of     |
| COMMISSION, <i>et al.</i> ,    | : | apportionment promulgated pursuant to   |
|                                | : | Article XI.                             |
| <i>Respondents.</i>            | : |   |
|                                | : |   |

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**RESPONSE TO MOTION TO MOVE THE PRIMARY ELECTION DATE  
OF PETITIONERS THE OHIO ORGANIZING COLLABORATIVE, ET AL.**

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Alicia L. Bannon (PHV 25409-2022)  
Yurij Rudensky (PHV 25422-2022)  
Harry Black (PHV 25544-2022)  
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

Brian A. Sutherland (PHV 25406-2022)  
REED SMITH LLP  
101 Second Street, Suite 1800  
San Francisco, CA 94105  
Tel: (415) 543-8700  
Fax: (415) 391-8269  
bsutherland@reedsmith.com

Peter M. Ellis (0070264)  
*Counsel of Record*  
M. Patrick Yingling (PHV 10145-2022)  
REED SMITH LLP  
10 South Wacker Drive, 40th Floor  
Chicago, IL 60606  
Tel: (312) 207-1000  
Fax: (312) 207-6400  
pellis@reedsmith.com

*Attorneys for Petitioners  
The Ohio Organizing Collaborative, et al.*

(listing of counsel for petitioners continued on next page)

Ben R. Fliegel (PHV 25411-2022)  
REED SMITH LLP  
355 South Grand Avenue, Suite 2900  
Los Angeles, CA 90071  
Tel: (213) 457-8000  
Fax: (213) 457-8080  
bfliegel@reedsmith.com

Brad A. Funari (PHV 3139-2022)  
Danielle L. Stewart (0084086)  
Reed Smith Centre  
REED SMITH LLP  
225 Fifth Avenue  
Pittsburgh, PA 15222  
Tel: (412) 288-4583  
Fax: (412) 288-3063  
bfunari@reedsmith.com  
dstewart@reedsmith.com

*Attorneys for Petitioners  
The Ohio Organizing Collaborative, et al.*

#### **Counsel for Respondents**

C. Benjamin Cooper (0093103)  
*Counsel of Record*  
Charles H. Cooper, Jr. (0037295)  
Chelsea C. Weaver (0096850)  
COOPER & ELLIOTT, LLC  
305 West Nationwide Boulevard  
Columbus, Ohio 43215  
Tel: (614) 481-6000  
Fax: (614) 481-6001  
benc@cooperelliott.com  
chipc@cooperelliott.com  
chelseaw@cooperelliott.com

Erik J. Clark (0078732)  
*Counsel of Record*  
Ashley Merino (0096853)  
ORGAN LAW LLP  
1330 Dublin Road  
Columbus, Ohio 43215  
Tel: (614) 481-0900  
Fax: (614) 481-0904  
ejclark@organlegal.com  
amerino@organlegal.com

*Counsel for Respondent  
Ohio Redistricting Commission*

*Special Counsel for Respondents  
Senator Vernon Sykes and  
House Minority Leader C. Allison Russo*

(counsel for respondents listed on next page)

**Counsel for Respondents  
(Cont.)**

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  
Tel: (513) 381-2838  
Fax: (513) 381-0205  
dornette@taftlaw.com  
bryan@taftlaw.com  
pwilliamson@taftlaw.com

Phillip J. Strach  
Thomas A. Farr  
John E. Branch, III  
Alyssa M. Riggins  
Greg McGuire  
NELSON MULLINS RILEY &  
SCARBOROUGH LLP  
4140 Parklake Ave., Suite 200  
Raleigh, North Carolina 27612  
Tel: (919) 329-3812  
Fax: (919) 329-3799  
phil.strach@nelsonmullins.com  
tom.farr@nelsonmullins.com  
john.branch@nelsonmullins.com  
alyssa.riggins@nelsonmullins.com  
greg.mcguire@nelsonmullins.com

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

OHIO ATTORNEY GENERAL  
Bridget C. Coontz (0072919)  
*Counsel of Record*  
Julie M. Pfeiffer (0069762)  
Michael A. Walton (0092201)  
*Assistant Attorneys General*  
Michael J. Hendershot (0081842)  
*Deputy Solicitor*  
30 E. Broad Street, 16th Floor  
Columbus, OH 43215  
Tel: (614) 466-2872  
Fax: (614) 728-7592  
bridget.coontz@ohioago.gov  
julie.pfeiffer@ohioago.gov  
michael.walton@ohioago.gov  
michael.hendershot@ohioago.gov  
  
*Counsel for Respondents  
Secretary of State Frank LaRose, and  
Auditor Keith Faber*

John W. Zeiger (0010707)  
Marion H. Little, Jr. (0042679)  
Christopher J. Hogan (0079829)  
ZEIGER, TIGGES & LITTLE LLP  
3500 Huntington Center  
41 South High Street  
Columbus, Ohio 43215  
Tel: (614) 365-9900  
zeiger@litohio.com  
little@litohio.com  
hogan@litohio.com

*Counsel for Respondent  
Governor Mike DeWine*

**Counsel for *Amici Curiae***

Subodh Chandra (0069233)  
Donald Screen (0044070)  
*Counsel of Record*  
THE CHANDRA LAW FIRM LLC  
The Chandra Law Building  
1265 West 6th Street  
Cleveland, Ohio 44113  
Tel: (216) 578-1700  
subodh.chandra@chandrafirm.com  
donald.screen@chandrafirm.com

Janette McCarthy Wallace (0066257)  
Anthony P. Ashton\*  
Anna Kathryn Barnes\*  
NAACP  
Office of the General Counsel  
4805 Mount Hope Drive  
Baltimore, MD 21215  
Tel.: (410) 580-5777  
jlouard@naacpnet.org  
aashton@naacpnet.org  
abarnes@naacpnet.org

Jon Greenbaum\*  
Ezra D. Rosenberg\*  
Pooja Chaudhuri\*  
LAWYERS' COMMITTEE FOR CIVIL  
RIGHTS UNDER LAW  
1500 K Street, N.W., Ste. 900  
Washington, D.C. 20005  
Tel.: (202) 662-8600  
jgreenbaum@lawyerscommittee.org  
erosenberg@lawyerscommittee.org  
pchaudhuri@lawyerscommittee.org

\*Not Admitted to the State Bar of Ohio

*Counsel for Amicus Curiae The Ohio  
State Conference of the NAACP*

Stephanie Marie Chmiel (0087555)  
Mary Elizabeth Csarny (0097682)  
THOMPSON HINE LLP  
41 S. High Street, Suite 1700  
Columbus, OH 43215  
Tel.: (614) 469-3247  
Fax: (614) 469-3361  
stephanie.chmiel@thompsonhine.com  
mary.csarny@thompsonhine.com

*Counsel for Amicus Curiae David Niven*

Andrew William Garth (0088905)  
*City Solicitor*  
Emily Smart Woerner (0089349)  
*Deputy City Solicitor*  
Shannon Doyle Price (0100744)  
*Assistant City Solicitor*  
CITY OF CINCINNATI  
801 Plum Street, Room 214  
Cincinnati, Ohio 45202  
Tel.: (513) 352-3307  
Fax: (513) 352-1515  
emily.woerner@cincinnati-oh.gov  
shannon.price@cincinnati-oh.gov

*Counsel for Amicus Curiae City of  
Cincinnati*

Donald C. Brey (0021965)  
Ryan C. Spitzer (0093515)  
ISAAC WILES & BURKHOLDER, LLC  
Two Miranova Place, Suite 700  
Columbus, Ohio 43215-5098  
Tel.: (614) 221-2121  
Facsimile: 614-365-9516  
dbrey@isaacwiles.com

*Counsel for Amicus Curiae Renew Ohio*

**TABLE OF CONTENTS**

**Page**

RESPONSE.....1

I. This Court Has Authority to Direct the Secretary of State to Conduct the Primary Election on a Different Date to Effectuate Its Orders .....2

II. This Court May Wait Until After the Commission Adopts Its New Plan Before Considering Whether and How to Exercise Its Authority to Move the Primary .....3

CONCLUSION.....5

## RESPONSE

Senator Vernon Sykes and House Minority Leader Allison Russo ask this Court to move the primary election date to June 28, 2022, or another date that allows sufficient time for the Ohio Redistricting Commission to adopt a new General Assembly district plan. Petitioners here, The Ohio Organizing Collaborative, et al., agree with Senator Sykes and Leader Russo that this Court has the power to move the primary date and that the primary election for General Assembly offices must be moved because it cannot go forward on May 3, 2022. Petitioners respectfully submit, however, that this Court may await the results of its March 16, 2022 order directing the Commission to enact a new General Assembly district plan before entering any further order directing the Secretary of State to conduct the primary election on a particular date. After the Commission adopts a new plan on March 28, 2022, petitioners will determine whether to file objections. Whether the primary election should go forward on June 28, or some other date, depends on whether the Commission complies with this Court's order and the Ohio Constitution. The Commission's work and statements since March 16 have been encouraging, but whether it will ultimately enact a constitutional plan remains to be seen.

Petitioners here respectfully suggest the following procedure: If petitioners file objections to the new plan that the Commission adopts on March 28, then they will address the need to move the primary election and an appropriate date in their objections and request for relief. Conversely, if none of the challengers in these apportionment cases (Nos. 2021-1193, 2021-1198, and 2021-1210) file objections *and* the General Assembly does *not* set a new primary election date by Monday, April 4, 2022, then this Court should order respondents to show cause, on an expedited basis, why the Court should not order respondent Secretary of State Frank LaRose to conduct the primary election on the next Tuesday that is fifteen weeks after the Court's order.

This procedure would give the General Assembly and this Court time to review and respond to the next district plan and take into account potential further objections, should any be necessary.

We explain these suggestions in greater detail below.

**I. This Court Has Authority to Direct the Secretary of State to Conduct the Primary Election on a Different Date to Effectuate Its Orders**

For the reasons stated in the motion filed by Senator Sykes and Leader Russo, petitioners agree that this Court has the equitable authority to direct the Secretary of State to conduct the primary election on a postponed date. *See* Sykes-Russo Mot. at 3. In fact, this Court’s orders *already* have effectively required the primary election date to be moved to a later date because invalidating the third plan meant that conducting the primary election on May 3, 2022, would be impossible. Ordering the specific date on which the primary election will take place, if the other branches fail to do so, is a logical and necessary corollary of this Court’s constitutional authority to invalidate the General Assembly district plan in the first instance.

As the Secretary of State has recognized, he cannot conduct a primary election with a General Assembly district plan that this Court has declared to be unconstitutional. *See* Secretary LaRose’s Response to Plaintiffs’ Motion for a Temporary Restraining Order to Maintain the Third Plan at 1, *Gonidakis v. LaRose*, No. 2:22-CV-773 (ECF No. 88 Mar. 22, 2022) (acknowledging that this Court “invalidated” the Commission’s third plan, leaving him no choice but to “pause” implementation of that plan). In his federal court filing, Secretary LaRose seems to invite the federal court to order him to implement the Commission’s third plan, but further acknowledges that if the federal court does *not* order him to implement the third plan by close of business on March 23, “he will have to instruct the boards of election to proceed with the 2022 primary election without the state legislative races being part of that election.” *Id.* at 3. There is

no legitimate basis for the federal court to override ongoing state redistricting proceedings, which means the primary election for General Assembly offices cannot take place on May 3.

At the same time, all parties on both sides agree that there will be a primary. If the General Assembly fails to set a new primary date, then this Court should enter an order that is necessary and proper to carry out its constitutional mandate and orders.

## **II. This Court May Wait Until After the Commission Adopts Its New Plan Before Considering Whether and How to Exercise its Authority to Move the Primary**

Because the May 3 primary election date inevitably must change to a later appropriate date, if this Court determines that moving the date now is necessary to effectuate its orders, petitioners would not oppose or object to that course of action. But petitioners respectfully suggest that the Court may wait for further developments and limited briefing relating to those developments, if necessary, before it acts. The Commission has scheduled public meetings every day from March 23 through March 28.<sup>1</sup> It has hired independent mapmakers to assist the Commission in drafting a fourth plan.<sup>2</sup> And it has accepted the assistance of two mediators from the Sixth Circuit to help the Commission reach consensus on a new plan.<sup>3</sup> On March 28, the Commission may adopt a constitutional plan. If and when it does so, the General Assembly can be expected to set an appropriate primary election date. In that scenario, this Court would not need to exercise its authority to set the primary election date.

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<sup>1</sup> <https://redistricting.ohio.gov/meetings>.

<sup>2</sup> <https://www.wcbe.org/wcbe-news/2022-03-22/redistricting-commission-agrees-to-consultants-for-latest-effort-to-redraw-maps>; <https://ohiocapitaljournal.com/2022/03/22/ohio-redistricting-commission-adds-two-new-mapmakers>.

<sup>3</sup> <https://www.news5cleveland.com/news/election-2022/ohio-redistricting-commission-adds-federal-mediators-to-work-with-mapmakers>.



It is also possible, however, that the Commission may not enact a constitutional plan. If the Commission were to default or enact an unconstitutional plan, then litigation would continue. In that circumstance, the June 28, 2022 primary election date proposed by Senator Sykes and Leader Russo likely would come too soon. For instance, Ohio law requires candidates to file a declaration of candidacy and requires the Secretary of State to certify the form of ballots to be used in the primary election, together with the names of candidates to be printed on the ballots. Rev. Code § 3513.05. The General Assembly has the power to modify these deadlines and to delegate authority to the Secretary of State to adjust them (*see* 134th General Assembly, H.B. 93, Section 4), but regardless of statutory deadline, the Secretary of State and county boards of elections will need time to receive updates to declarations of candidacy, certify ballots, and print and mail absentee ballots.

How much time? Judging by the Secretary of State's directive to county boards to conduct the May 4, 2022 primary election based on the February 24, 2022 plan,<sup>4</sup> 69 days (the difference between these dates) is sufficient time to prepare for a primary election after adopting a new plan. Thus, if litigation concerning the fourth plan continues in this Court, then the primary election should be held about 69 days after further litigation could be expected to conclude. For example, if litigation were expected to conclude on June 15, then a primary election on August 23, 2022, would afford the State and counties sufficient time to conduct the primary on that later date. Because these calculations based on further litigation are currently hypothetical, however, the Court may make its determination, if necessary, with further input from the parties based on the outcome of the Commission's redistricting proceedings on March

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<sup>4</sup> *See* Ohio Secretary of State, Directive No. 2022-26 (Feb. 26, 2022), <https://www.ohiosos.gov/globalassets/elections/directives/2022/directive-2022-26.pdf>.

28. Petitioners would address the proper date for the primary election in any objections to the fourth plan and respondents would have an opportunity to respond.

Finally, as noted, if the Commission enacts a plan on March 28 and petitioners do *not* file objections to the plan, the possibility that the General Assembly would fail to set a new primary election date would remain. In that scenario, the Court would need to act to carry out its orders invalidating the third plan, which effectively postponed the May 3 primary *sine die*, so that Ohioans can vote in a primary election for General Assembly seats in 2022. Petitioners suggest that in that scenario, the Court should order respondents to show cause why Secretary of State LaRose should not conduct the primary election on the next Tuesday fifteen weeks after the Court issues its order. If it issued such an order on April 5, 2022, for example, the proposed primary election date (subject to the Secretary's response) would be July 19, 2022.

### **CONCLUSION**

Petitioners respectfully submit that this Court has authority to move the primary date and do not oppose the motion, but respectfully suggest that this Court may await the outcome of its March 16 ruling before deciding whether and how to exercise its authority.

Dated: March 23, 2022

Respectfully submitted,

*/s/ Brian A. Sutherland*

---

Alicia L. Bannon (PHV 25409-2022)  
Yurij Rudensky (PHV 25422-2022)  
Harry Black (PHV 25544-2022)  
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

Brian A. Sutherland (PHV 25406-2022)  
REED SMITH LLP  
101 Second Street, Suite 1800  
San Francisco, CA 94105  
Tel: (415) 543-8700  
Fax: (415) 391-8269  
bsutherland@reedsmith.com

Peter M. Ellis (0070264)  
*Counsel of Record*  
M. Patrick Yingling (PHV 10145-2022)  
REED SMITH LLP  
10 South Wacker Drive, 40th Floor  
Chicago, IL 60606  
Tel: (312) 207-1000  
Fax: (312) 207-6400  
pellis@reedsmith.com

Ben R. Fliegel (PHV 25411-2022)  
REED SMITH LLP  
355 South Grand Avenue, Suite 2900  
Los Angeles, CA 90071  
Tel: (213) 457-8000  
Fax: (213) 457-8080  
bfliegel@reedsmith.com

Brad A. Funari (PHV 3139-2022)  
Danielle L. Stewart (0084086)  
Reed Smith Centre  
REED SMITH LLP  
225 Fifth Avenue  
Pittsburgh, PA 15222  
Tel: (412) 288-4583  
Fax: (412) 288-3063  
bfunari@reedsmith.com  
dstewart@reedsmith.com

*Attorneys for Petitioners  
The Ohio Organizing Collaborative, et al.*

**CERTIFICATE OF SERVICE**

I, Danielle L. Stewart, hereby certify that on March 23, 2022, I caused a true and correct copy of the foregoing RESPONSE TO MOTION TO MOVE THE PRIMARY ELECTION DATE OF PETITIONERS THE OHIO ORGANIZING COLLABORATIVE, ET AL. to be served by email upon the counsel listed below:

**Counsel for Respondents**

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  
Tel: (513) 381-2838  
Fax: (513) 381-0205  
dornette@taftlaw.com  
bryan@taftlaw.com  
pwilliamson@taftlaw.com

Phillip J. Strach  
Thomas A. Farr  
John E. Branch, III  
Alyssa M. Riggins  
Greg McGuire  
NELSON MULLINS RILEY &  
SCARBOROUGH LLP  
4140 Parklake Ave., Suite 200  
Raleigh, North Carolina 27612  
Tel: (919) 329-3812  
Fax: (919) 329-3799  
phil.strach@nelsonmullins.com  
tom.farr@nelsonmullins.com  
john.branch@nelsonmullins.com  
alyssa.riggins@nelsonmullins.com  
greg.mcguire@nelsonmullins.com

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

*(counsel listing continued on next page)*

Erik J. Clark (0078732)  
*Counsel of Record*  
Ashley Merino (0096853)  
ORGAN LAW LLP  
1330 Dublin Road  
Columbus, Ohio 43215  
T: (614) 481-0900  
F: (614) 481-0904  
ejclark@organlegal.com  
amerino@organlegal.com

*Counsel for Respondent  
Ohio Redistricting Commission*

OHIO ATTORNEY GENERAL  
Bridget C. Coontz (0072919)  
*Counsel of Record*  
Julie M. Pfeiffer (0069762)  
Michael A. Walton (0092201)  
*Assistant Attorneys General*  
Michael J. Hendershot (0081842)  
*Deputy Solicitor*  
30 E. Broad Street, 16th Floor  
Columbus, OH 43215  
Tel: (614) 466-2872  
Fax: (614) 728-7592  
bridget.coontz@ohioago.gov  
julie.pfeiffer@ohioago.gov  
michael.walton@ohioago.gov  
michael.hendershot@ohioago.gov

*Counsel for Respondents  
Secretary of State Frank LaRose, and  
Auditor Keith Faber*

C. Benjamin Cooper (0093103)  
*Counsel of Record*  
Charles H. Cooper, Jr. (0037295)  
Chelsea C. Weaver (0096850)  
COOPER & ELLIOTT, LLC  
305 West Nationwide Boulevard  
Columbus, Ohio 43215  
Tel: (614) 481-6000  
Fax: (614) 481-6001  
benc@cooperelliott.com  
chipc@cooperelliott.com  
chelseaw@cooperelliott.com

*Special Counsel for Respondents*  
*Senator Vernon Sykes and*  
*House Minority Leader C. Allison Russo*

John W. Zeiger (0010707)  
Marion H. Little, Jr. (0042679)  
Christopher J. Hogan (0079829)  
ZEIGER, TIGGES & LITTLE LLP  
3500 Huntington Center  
41 South High Street  
Columbus, Ohio 43215  
Tel: (614) 365-9900  
zeiger@litohio.com  
little@litohio.com  
hogan@litohio.com

*Counsel for Respondent*  
*Governor Mike DeWine*

### **Counsel for *Amici Curiae***

Subodh Chandra (0069233)  
Donald Screen (0044070)  
*Counsel of Record*  
THE CHANDRA LAW FIRM LLC  
The Chandra Law Building  
1265 West 6<sup>th</sup> Street  
Cleveland, Ohio 44113  
Tel: (216) 578-1700  
subodh.chandra@chandraLaw.com  
donald.screen@chandraLaw.com

Janette McCarthy Wallace (0066257)  
Anthony P. Ashton\*  
Anna Kathryn Barnes\*  
NAACP  
Office of the General Counsel  
4805 Mount Hope Drive  
Baltimore, MD 21215  
Tel.: (410) 580-5777  
jlouard@naacpnet.org  
aashton@naacpnet.org  
abarnes@naacpnet.org  
\*Not Admitted to the State Bar of Ohio

*Counsel for Amicus Curiae The Ohio*  
*State Conference of the NAACP*

Stephanie Marie Chmiel (0087555)  
Mary Elizabeth Csarny (0097682)  
THOMPSON HINE LLP  
41 S. High Street, Suite 1700  
Columbus, OH 43215  
Tel.: (614) 469-3247  
Fax: (614) 469-3361  
stephanie.chmiel@thompsonhine.com  
mary.csarny@thompsonhine.com

*Counsel for Amicus Curiae David Niven*

Andrew William Garth (0088905)  
*City Solicitor*  
Emily Smart Woerner (0089349)  
*Deputy City Solicitor*  
Shannon Doyle Price (0100744)  
*Assistant City Solicitor*  
CITY OF CINCINNATI  
801 Plum Street, Room 214  
Cincinnati, Ohio 45202  
Tel.: (513) 352-3307  
Fax: (513) 352-1515  
emily.woerner@cincinnati-oh.gov  
shannon.price@cincinnati-oh.gov

*Counsel for Amicus Curiae City of*  
*Cincinnati*

Jon Greenbaum\*  
Ezra D. Rosenberg\*  
Pooja Chaudhuri\*  
LAWYERS' COMMITTEE FOR CIVIL  
RIGHTS UNDER LAW  
1500 K Street, N.W., Ste. 900  
Washington, D.C. 20005  
Tel.: (202) 662-8600  
jgreenbaum@lawyerscommittee.org  
erosenberg@lawyerscommittee.org  
pchaudhuri@lawyerscommittee.org  
\*Not Admitted to the State Bar of Ohio

*Counsel for Amicus Curiae The Ohio  
State Conference of the NAACP*

Dated: March 23, 2022

By: /s/ Danielle L. Stewart  
Danielle L. Stewart  
Ohio Sup. Ct. Reg. No. 0084086  
Reed Smith LLP  
Reed Smith Centre  
225 Fifth Avenue  
Pittsburgh, PA 15222  
Tel: 412-288-4583  
Fax: 412-288-3063  
dstewart@reedsmith.com

*Attorneys for Petitioners  
The Ohio Organizing Collaborative, et al.*

Donald C. Brey (0021965)  
Ryan C. Spitzer (0093515)  
ISAAC WILES & BURKHOLDER, LLC  
Two Miranova Place, Suite 700  
Columbus, Ohio 43215-5098  
Tel.: (614) 221-2121  
Facsimile: 614-365-9516  
dbrey@isaacwiles.com

*Counsel for Amicus Curiae Renew Ohio*