

IN THE SUPREME COURT OF OHIO

**LEAGUE OF WOMEN VOTERS OF
OHIO, et al.,**

Petitioners,

v.

**OHIO REDISTRICTING COMMISSION,
et al.,**

Respondents.

Case No. 2021-1193

**Original Action Filed Pursuant to
Ohio Const. Art. XI**

**PETITIONERS' MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION
TO DISMISS AND VACATE**

Freda J. Levenson (0045916)
ACLU OF OHIO FOUNDATION, INC.
4506 Chester Avenue
Cleveland, Ohio 44103
(614) 586-1972
flevenson@acluohio.org

David J. Carey (0088787)
ACLU OF OHIO FOUNDATION, INC.
1108 City Park Avenue, Suite 203
Columbus, OH 43206
(614) 586-1972
dcarey@acluohio.org

Julie A. Ebenstein (PHV 25423-2023)
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
(212) 519-7866
jebenstein@aclu.org

Robert D. Fram (PHV 25414-2023)
COVINGTON & BURLING, LLP
Salesforce Tower
415 Mission Street, Suite 5400

Dave Yost
OHIO ATTORNEY GENERAL

Julie M. Pfeiffer (0069762)
Michael A. Walton (0092201)
Jonathan D. Blanton (0070035)
Michael J. Hendershot (0081842)
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
(614) 466-2872
julie.pfeiffer@ohioago.gov
michael.walton@ohioago.gov
michael.hendershot@ohioago.gov
jonathan.blanton@ohioago.gov

*Counsel for Respondents Ohio Redistricting
Commission, Ohio Governor DeWine, Ohio
Secretary of State LaRose and Ohio Auditor
Faber*

Phillip J. Strach
Thomas A. Farr
John E. Branch, III
Alyssa M. Riggins

San Francisco, CA 94105-2533
(415) 591 6000
rfram@cov.com

Yale Fu (PHV 25419-2023)
COVINGTON & BURLING, LLP
3000 El Camino Real
5 Palo Alto Square, 10th Floor
Palo Alto, CA 94306-2112
(650) 632-4700
yfu@cov.com

Counsel for Petitioners

NELSON MULLINS RILEY & SCARBOROUGH,
LLP
4140 Parklake Ave., Suite 200
Raleigh, North Carolina 27612
(919) 329-3812
phil.strach@nelsonmullins.com
tom.farr@nelsonmullins.com
john.branch@nelsonmullins.com
alyssa.riggins@nelsonmullins.com

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

*Counsel for Respondents Senator Robert
McColley and Representative Jeffrey LaRe*

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

*Counsel for Respondents Senate Minority
Leader Nickie Antonio and House Minority
Leader Allison Russo*

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INTRODUCTION

If the core arguments raised in Respondents Representative Jeff LaRe and Senator Rob McColley’s Motion to Dismiss and Vacate spark an acute sense of déjà vu, it is for good reason. This Court has already heard them, considered them, and squarely rejected them. Respondents are wrong on substance, for the reasons this Court has well explained: Article XI, Section 9 does indeed grant this Court express authority to review freestanding violations of Section 6(B), and to enforce that provision by ordering a new district plan.

Respondents now seek a second bite at the apple—with no principled justification at all, other than that they believe it might taste better this time. They do not dispute the existence of this Court’s prior rulings, or try to distinguish them. They do not pretend to offer any new authority that might justify reconsideration or reversal of those rulings. Nor do they point to any new factual development that might affect the practical workability of those rulings. Their motion simply rehashes the exact arguments that were previously rejected.

Representative LaRe and Senator McColley’s insistence on beating this particular dead horse would be mystifying, except that their strategy here is an open secret. As all are aware, several Justices dissented from the Court’s prior rulings interpreting Article XI, Sections 6 and 9. This Court last ordered Respondents to enact and file a new district plan by June 3, 2022. Instead of complying, Respondents waited fully 483 further days to enact a new plan. While Respondents delayed, this Court’s composition changed, by way of election, retirement, and appointment. Respondents’ subtext is plain: they believe that in the wake of their delay, the former minority of this Court on the interpretation of Article XI is now the majority. They ask the former dissenters to seize the day and muster the votes, simply *because* they can now muster the votes, to vacate rulings with which they disagreed. In effect, Respondents are asking this Court to act like a legislature whose majority has changed hands.

As Chief Justice Kennedy has noted elsewhere, for this Court to accept Respondents’ invitation would constitute a very real threat to its integrity. “[A] perception that changes in the law result solely from changes in court composition would threaten our legitimacy as a court of law, as opposed to a court of individuals, and would invite defiance of our prior decisions by subordinate courts whenever such a change has occurred.” *State v. Braden*, 158 Ohio St. 3d 462, 2019-Ohio-4204, 145 N.E.3d 235, ¶ 34 (Kennedy, J., dissenting). To be sure, it is one thing for a court to undo a decision that has proven infeasible over a period of years or decades, and where the removal would cause no undue hardship. In such a case, this Court’s jurisprudence has mechanisms which are appropriately exacting—even “onerous.” *Id.* (internal citation omitted). But it is another thing entirely to allow the meaning of the Ohio Constitution to shift with the political winds, as Respondents now request. Such a naked imposition of power, absent satisfaction of this Court’s tests for overturning its own decisions, would betray both the public’s trust in the impartiality of its judiciary, and the public’s reliance that the rule of law withstands politics.

In response, Petitioners ask this Court to do no more than enforce the law as it has already done. Respondents’ motion should be denied.

ARGUMENT

I. This Court Has Correctly Found Subject Matter Jurisdiction

A. Across Multiple Rulings, This Court Has Consistently Held That It Has Jurisdiction and Enforcement Power Over Freestanding Section 6 Claims

The linchpin of Respondents’ motion is their assertion that Article XI, Section 9(D)(3) limits this Court’s jurisdiction over claims arising from Article XI, Section 6(B). They contend that Section 6(B)’s requirements are unenforceable nullities unless they are combined with a claimed violation of Section 2, 3, 4, 5, or 7. Even further, they claim that the Commission’s

bipartisan approval of the 2023 Plan immunizes that plan from Section 6(B) claims. *See* Motion to Dismiss at 6–7.

These precise issues have been raised, argued, and fully litigated before this Court in this case. This Court’s January 12, 2022 opinion succinctly recounts those arguments, and by extension summarizes Respondents’ current motion:

[Respondents] argue that Article XI, Section 9(D)(3) limits our jurisdiction and remedial power by permitting us to invalidate a plan *only* when the plan violates Section 2, 3, 4, 5, or 7. Section 6, they contend, comes into play only if we are reviewing a four-year plan adopted under Section 8(C). And they argue that even then, we may review only whether the plan complies with Section 6(B)—and still only if there was a predicate violation of Section 2, 3, 4, 5, or 7. Thus, they contend that Article XI does not allow this court to invalidate a plan when the challengers allege only a failure to comply with Section 6.

January 12, 2022 Order, 167 Ohio St.3d 255, 2022-Ohio-65, ¶ 92.

This Court went on to reject Respondents’ argument in no uncertain terms, finding that it “misunderstands the scope of our jurisdiction and general remedial power under Article XI, Section 9.” *Id.* at ¶ 93. The plain language of Section 9(A), this Court held, provides a “broad grant of jurisdiction” that “is not limited to claims alleging violations of certain sections of Article XI.” Section 9(B), in turn, empowers the Court to “declare a district plan invalid in the exercise of Section 9(A) jurisdiction.” *Id.* Neither 9(A) nor 9(B) contains limitations on when the Court may do so, thus allowing “review of a district plan for compliance with *any* provision in Article XI, including Section 6.” *Id.* at ¶ 94.

Respondents’ latest motion offers nothing of substance beyond what this Court has already considered and rejected. For example:

- Respondents argue that Section 6 requires only an “attempt[.]” to do something, which they contend somehow “make[s] it clear” that Section 6 should be unenforceable on its own. Motion at 5–6. This Court held that Section 9 should be interpreted so as to “give[.]

meaning” to Section 6’s “mandatory language,” consistent with the canon that “we should avoid any construction that makes a provision ‘meaningless or inoperative[.]’” *Id.* ¶ 94 (internal citation omitted).

- Respondents argue that the provisions of Section 6 call for “subjective determinations that the Court is not in a position to make.” Motion at 7. But this Court has already found Section 6 to be actionable. The fact that there may exist some hypothetical circumstance in which the ultimate *merits* question is difficult does not change that holding about this Court’s ability to examine evidence to assess Section 6 violations. *See, e.g.*, January 12, 2022 Order at ¶ 123–127 (determining that partisan intent, rather than compliance with objective map-drawing criteria, motivated an asymmetrical plan); April 14, 2022 Order, 168 Ohio St.3d 374, 2022-Ohio-1235, ¶ 54 (noting lack of evidence for Respondents’ assertion that compactness, rather than partisanship, caused asymmetry).
- Respondents argue that when the Commission adopts a “unanimous, bipartisan plan,” that plan is immune from Section 6 review. Motion at 8. This Court has held that Section 6(B) does not merely “require the majority-party members of the commission to try to draw a plan that is acceptable to the minority-party members of the commission or vice-versa.” January 12, 2022 Order at ¶ 111. It applies to “all members of the commission ... even if commission members of the minority party agreed to a proposed plan[.]” *Id.*
- Respondents argue that Section 9(D)(3)’s particular remedies for violations of Sections 2, 3, 4, 5, or 7 implies that Section 6 is excluded by implication, and thus is not enforceable on its own. Motion at 9. This Court has already disagreed, holding that Section 9(D)(3) simply provides alternative remedies—remedial options other than wholesale invalidation of a district plan—in the event of a Section 2, 3, 4, 5, or 7 violation. *Id.* at ¶ 96.

This Court’s January 12, 2022 opinion left no room for doubt on the issue of subject matter jurisdiction. Even if it had, the Court reiterated in a subsequent ruling that Article XI grants it the jurisdiction to review freestanding Section 6 violations, and that Section 9(B) empowers it to order an entirely new plan. *See* February 7, 2022 Order, 168 Ohio St.3d 28, 2022-Ohio-342, ¶ 35. Respondents’ motion raises nothing that was not already resolved by the express terms of this Court’s previous rulings.

B. This Court Retained Jurisdiction to Review the 2023 Plan

Respondents also claim that Petitioners have not properly invoked this Court’s jurisdiction because the allegations in the original Complaint “have nothing to do with the Plan adopted this year.” Motion at 3. They do concede that this Court’s rules require only, in relevant part, that a complaint identify “that the case involves a challenge to redistricting or a plan of redistricting,” and they do not dispute that this requirement was met in this case. *Id.* at 2 (citing S.Ct. Prac. R. 14.03(A)). They also concede that Ohio courts may take judicial notice of certain facts outside the complaint—but bizarrely, they seem to suggest that this Court can take notice only of the bipartisan vote adopting the 2023 Plan, not the existence and nature of the Plan itself. They also fail to note that Respondents themselves have filed that Plan with the Court. *Id.* at 3 n.4.

This Court has repeatedly retained jurisdiction in this action to review new district plans that it ordered to be drawn. January 12, 2022 Order at ¶ 139; February 7, 2022 Order at ¶ 68; March 16, 2022 Order at ¶ 45; April 14, 2022 Order at ¶ 79; May 17, 2022 Order at ¶ 6. Respondents ignore all of these decisions, did not timely object or seek reconsideration of any of them, and cite no authority to do so now. Most recently, this Court expressly retained jurisdiction to review the district plan that it ordered the Commission to submit by June 3, 2022. In seeking leave to file objections to the 2023 Plan, Petitioners have done no more than follow the Court’s

instructions in its May 17, 2022 Order: submitting the matter for the Court’s review pursuant to the jurisdiction that the Court has expressly retained.

The fact that the Commission submitted its latest district plan more than a year after the Court’s deadline does not somehow divest this Court of its expressly retained power to conduct review, nor does it render Petitioners’ proffered objections improper.

II. Respondents Offer Only Political Opportunism as a Basis to Revisit Prior Rulings

A. Respondents Invite This Court to Reverse Its Rulings Merely Because It Can

Respondents argue that this Court *can* revisit its prior rulings in this case. But conspicuously absent is any principled reason why this Court *should* do so. Respondents hardly stand out from legions of disappointed litigants in believing that they should have prevailed the first time around. But they cite no new authority, offer no new merits arguments, and point to no change in factual circumstances that would justify revisiting this Court’s rulings. The substance of their motion is most akin to a hollow and (extremely) untimely motion for reconsideration. *See* S.Ct. Prac. R. 18.02 (motion for reconsideration “shall not constitute a reargument of the case,” and must be filed within ten days of the judgment entry).

To be sure, some Justices of this Court did dissent from the Court’s previous rulings in this case, including on the enforcement of Article XI, Section 6 through Section 9. *See, e.g.*, January 12, 2022 Order at ¶¶ 216–219 (Kennedy, J., dissenting); ¶¶ 284–85 (Fischer, J., dissenting); February 7, 2022 Order at ¶ 88 (Kennedy and DeWine, JJ., dissenting); March 16, 2022 Order, 168 Ohio St.3d 309, 2022-Ohio-789, ¶ 65 (Kennedy and DeWine, JJ., dissenting) (“The majority finds violations of only Section 6, so it has no authority to invalidate the second revised plan”); April 14, 2022 Order, 168 Ohio St.3d 374, 2022-Ohio-1235, ¶ 91 (Kennedy, J., dissenting); *id.* at ¶ 133 (DeWine, J., dissenting) (“There is nothing in the Constitution that gives this court authority to order the commission to create a new district plan based on violations of

Section 6”); May 17, 2022 Order, 168 Ohio St.3d 522, 2022-Ohio-1727, ¶ 30 (Kennedy, J., dissenting) (“Section 9(D)(3) requires a predicate violation of ... Section 2, 3, 4, 5, or 7 before this court may invalidate a plan”).

Those were, of course, *dissenting* opinions. Respondents now cite them as though they should be binding. *See* Motion at 7 (citing March 16, 2022 dissent). In baldly recycling rejected arguments, Respondents’ intent is plain. They are asking the previous minority of this Court on this issue—which they now perceive to be the majority, owing to changes in the Court’s composition—to turn the reasoning of their dissents into controlling law. They offer no further analysis except their belief that the Court has the power to do so, as though that were reason enough. *See* Motion at 10-12.

B. Respondents Make No Attempt to Reconcile Their Demand with This Court’s Jurisprudence or the Rule of Law

Even aside from its broader implications—which are troubling enough—Respondents’ demand for a do-over is without merit. As noted in parallel litigation to this one, this Court’s prior rulings constitute the law of the case. *See* Bennett Petitioners’ Motion for Leave to File *Instant* Objections to the September 2023 Plan, *Bennett v. Ohio Redistricting Comm’n*, No. 2021-1198 (filed Oct. 5, 2023). Though reconsideration is provided for in this Court’s rules, this Court “will not ... grant reconsideration when a movant seeks merely to reargue the case at hand.” *Dublin City Schools Bd. of Educ. v. Franklin Cty. Bd. of Revision*, 139 Ohio St.3d 212, 2014-Ohio-1940, 11 N.E.3d 222, ¶ 9; *see also State v. Gonzales*, 150 Ohio St. 3d 276, 2017-Ohio-777, 81 N.E.3d 419, ¶ 34 (Kennedy, J., dissenting) (quoting *Dublin City Schools*). Respondents’ motion is the very definition of reargument.

Even beyond law of the case, rulings on substantive law are not to be set aside when a litigant is “merely seeking another bite at the apple.” *Id.* at ¶ 38 (Kennedy, J., dissenting). As

Justice Fischer pointed out earlier in this litigation, “if a change in the current law is the basis for their argument, the respondents should have at least cited to a case such as *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 47, in support of their argument.” *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 166 Ohio St. 3d 1444, 184 N.E.3d 133, 134, 2022-Ohio-957, ¶ 5 (Fischer, J., concurring). Chief Justice Kennedy has also opined that *Galatis* is appropriately applied where the Court is considering whether to reverse constitutional precedent. *See also State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶¶ 94–95 (Kennedy, J., dissenting) (regarding interpretation of Ohio’s Equal Protection Clause, observing that “[a]lthough the lead opinion ignores [prior] cases, glaringly absent from the lead’s opinion is the rigorous three-step analysis required before this court may overturn a prior decision”).

Respondents have not attempted to demonstrate that the rigorous *Galatis* inquiry is met here, but even if they had, they would have failed. *Galatis* allows this Court to overrule its prior decisions only where “(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.” *Galatis*, 2003-Ohio-5849, ¶ 48.

First, none of this Court’s decisions on Section 9 were wrongly decided. That the Court has jurisdiction to consider and redress Section 6 violations is clear from the text of Article XI, Section 9 alone. Section 9(A) gives this Court “exclusive, original jurisdiction in all cases arising under this article,” without limitation. And Section 9(B) confirms that the Court has the authority to order a remedy of violations of Article XI by providing a global remedy that, “notwithstanding any other provisions of this constitution,” applies to *any* “general assembly district plan made by

the Ohio redistricting commission” that is “determined to be invalid.” *See generally* Petitioners’ Objection to the Ohio Redistricting Commission’s September 29, 2023 Revised General Assembly Plan, filed October 5, 2023 (explaining that the text and history of Article XI confirm that Section 6 is enforceable).

Second, this Court’s prior orders are perfectly workable, especially the mathematical inquiry called for by Section 6(B). That Respondents—a group of public officials—would elect to defy the Court says nothing about the feasibility of the Court’s ruling. That defiance is to Respondents’ shame, as one Justice of this Court pointed out in a different context:

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. ... 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[.] [...]

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.

DeRolph v. State, 93 Ohio St.3d 309, 338, 2001-Ohio-1343, 754 N.E.2d 1184 (Douglas, J., concurring); *see also DeRolph v. State*, 97 Ohio St.3d 434, 2002-Ohio-6750, 780 N.E.2d 529, ¶ 6 (“we are not unmindful of the difficulties facing the state, but those difficulties do not trump the Constitution.”).

Third, were this Court to allow Respondents’ intransigence to serve as a basis to perversely overturn *the very rulings that they defy*, it would not only abandon the Court’s role as final arbiter of the Ohio Constitution, but would also impose immense undue hardship on the state. Ohioans’ recent struggle against partisan gerrymandering—the “antithetical perversion of representative democracy,” *Adams v. DeWine*, 167 Ohio St.3d 499, 2022-Ohio-89, 195 N.E.3d 74, ¶ 2—is only the latest battle in a war that has lasted for generations, dating at least to the

Constitution of 1851. *See State ex rel. Herbert v. Bricker*, 139 Ohio St. 499, 508, 41 N.E.2d 377, 382 (1942). Article XI, Section 6 was meant to do away with precisely the problems this Court found with previous anti-gerrymandering efforts. *See generally* Petitioners’ Objection to the Ohio Redistricting Commission’s September 29, 2023 Revised General Assembly Plan, filed October 5, 2023, at 8–9 (recounting the history of modern Article XI). Ohio voters’ efforts finally began to bear fruit with the enactment of Article XI and this Court’s rulings in this case.

For the Court now to reverse itself and declare Section 6 irreparably broken—unsuited to Ohioans’ express purpose in enacting it—would invite equal parts chaos and despair, and throw the legitimacy of Ohio elections into further doubt. Doubly so if Ohioans perceive that this Court’s reversal was a cynical one, brought about not by a principled reexamination of the law after years or decades of changed circumstances, but “solely from changes in court composition” over the past year. *State v. Braden*, 158 Ohio St. 3d 462, 2019-Ohio-4204, 145 N.E.3d 235, ¶ 34 (Kennedy, J., dissenting). As Chief Justice Kennedy noted in *Braden*, if the law is subject to the shifting whims of a shifting court, lower courts—and public officials, such as Respondents—will not only be left confused about what the law actually is, but will likely be tempted to defy this Court in anticipation of the next election. *Id.* That cynical outcome is all that Respondents have to offer. They do not apply *Galatis*, nor do they even deign to explain why they might believe *Galatis* does not apply.

And even if neither the law of the case nor *Galatis* itself were strictly applicable, Respondents’ request would remain a profoundly lawless one. “Overruling precedent is never a small matter.” *Kimble v. Marvel Entertainment*, 576 U.S. 446, 455 (2015). “[I]t is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a ‘special justification’—over and above the belief ‘that the

precedent was wrongly decided.” *Id.* at 455–56 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). Respondents’ motion provides nothing akin to such a justification, and so stands contrary to the purposes of both the law of the case and stare decisis doctrines. Adherence to previous rulings “permits society to presume that bedrock principles are founded in law rather than the proclivities of individuals, and thereby contribute[] to the integrity of our constitutional system of government, both in appearance and in fact.” *State v. Hubbard*, 167 Ohio St. 3d 77, 2021-Ohio-3710, 189 N.E.3d 720, ¶ 44 (Kennedy, J.) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986)). This Court should not take the bait.

CONCLUSION

For the foregoing reasons, Respondents’ Motion to Dismiss and Vacate should be denied.

Dated: October 29, 2023

Respectfully submitted,

Robert D. Fram (PHV 25414-2023)
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, CA 94105-2533
(415) 591 6000
rfram@cov.com

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

Yale Fu (PHV 25419-2023)
3000 El Camino Real
5 Palo Alto Square, 10th Floor
Palo Alto, CA 94306-2112
(650) 632-4700
yfu@cov.com

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

Julie A. Ebenstein (PHV 25423-2023)
American Civil Liberties Union
125 Broad Street
New York, NY 10004
(212) 519-7866
jebenstein@aclu.org

Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Freda J. Levenson, hereby certify that on October 30, 2023 I caused a true and correct copy of the foregoing to be served by email upon the counsel listed below:

Julie M. Pfeiffer, julie.pfeiffer@ohioago.gov
Michael A. Walton, michael.walton@ohioago.gov
Jonathan D. Blanton, jonathan.blanton@ohioago.gov
Michael J. Hendershot, michael.hendershot@ohioago.gov

Counsel for Respondents Ohio Redistricting Commission, Ohio Governor DeWine, Ohio Secretary of State LaRose and Ohio Auditor Faber

Phillip J. Strach, phil.strach@nelsonmullins.com
Thomas A. Farr, tom.farr@nelsonmullins.com
John E. Branch, III, john.branch@nelsonmullins.com
Alyssa M. Riggins, alyssa.riggins@nelsonmullins.com

W. Stuart Dornette, dornette@taftlaw.com
Beth A. Bryan, bryan@taftlaw.com
Philip D. Williamson, pwilliamson@taftlaw.com

Counsel for Respondents Senator Robert McColley and Representative Jeffrey LaRe

C. Benjamin Cooper, benc@cooperelliott.com
Charles H. Cooper Jr., chipc@cooperelliott.com
Chelsea C. Weaver, chelseaw@cooperelliott.com

Counsel for Respondents Senate Minority Leader Nickie Antonio and House Minority Leader Allison Russo

/s Freda J. Levenson