

IN THE SUPREME COURT OF OHIO

JULIE ROSE ROWELL : Case No. 11-1053
 Appellant, : Appeal from the Franklin
 County Court of Appeals,
 v. : Tenth Appellate District
 JULIE ANN SMITH : Court of Appeals
 Mother. : Case Nos. 10AP-675 and 10AP-708

MOTHER, JULIE SMITH'S, RESPONSE TO APPELLANT, JULIE ROWELL'S
 MEMORANDUM IN SUPPORT OF JURISDICTION

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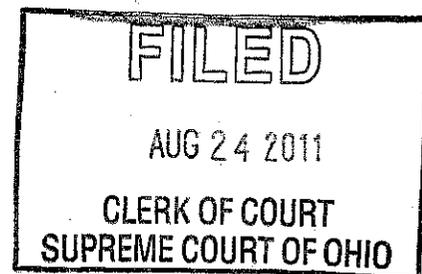


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<p>Appellant’s Proposition No. 1: Within the exercise of its exclusive, Original jurisdiction under R.C. 2151.23 to determine the custody of any child not a ward of another court of this state, a juvenile court has authority under the Rules of Juvenile Procedure to issue and enforce temporary orders that, in the discretion of the court, are reasonably designed to serve the best interests of the minor child during the period of litigation and to maintain the relationships already established with the child prior to the onset of litigation.</p>	
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<p>Appellee’s Position: Parents have a fundamental right to the care, custody and control of their children. Unless and until a court finds that a suitable parent voluntarily entered into a contract with a legal stranger and purposefully relinquished his/her paramount custodial rights, a court may not disturb the parent-child relationship, even on a “temporary” basis.....</p>	
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EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

After nearly three years of repeated motions and appeals, on June 9, 2011, the Tenth District Court of Appeals finally *restored* Appellee-Mother's ("Mother") constitutionally protected exclusive custodial rights to her daughter. While the procedural history of this case might demonstrate that this appeal is of great *personal* interest to the parties, the appeal does not present an issue of public or great general interest.

At its heart, the decision from which the instant discretionary appeal flows, found at *Rowell v. Smith*, 10th Dist. Nos. 10AP-675 and 10AP-708, 2011-Ohio-2809, concludes that a trial court cannot issue a temporary order that it cannot otherwise issue on a permanent basis. See *Rowell* at ¶21. That rule is the foundation of its decision, and the limitation is particularly heightened here by the fact that juvenile courts possess only those powers conferred upon them by the Ohio Generally Assembly since they are courts of limited jurisdiction. *In re Gibson* (1991), 61 Ohio St.3d 168, 172. The 10th District recognized that the trial court here does not have jurisdiction to issue a permanent order of visitation to Appellant because there is no statutory authority to do so. Revised Code §2151.23 only confers jurisdiction to juvenile courts pertaining to the *custody* of a minor child not the ward of another court of this state.

The Appellant has failed to demonstrate a "novel question of law"¹ by providing this Court with any authority that suggests a trial court can exceed the jurisdiction that it has to issue a final order when issuing its temporary orders. The Appellant has not offered any case law in any context – custody or otherwise – wherein an appellate court has upheld a trial court's issuance of temporary orders that exceed the jurisdiction granted to it to issue final orders. Trial

¹ *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94, 540 N.E.2d 1381

courts need no further guidance from this Court to confirm what is a fundamental concept of law – they cannot exceed the jurisdiction granted to them even on a temporary basis.

Moreover, Appellant’s assertion that the public interest would be best served by this Court ignoring centuries of constitutional, statutory and case law, in favor of a Rule of Juvenile Procedure taken out of context is also without merit. The Appellant’s suggestion that an intrusion into a fit parent’s constitutional rights is “permissive” or appropriate is unconscionable; such a suggestion fails to account for the “emotional well-being of minor children” in the event that a trial court issues temporary orders for visitation and “gets it wrong” by forcing a relationship upon the child that *did not and should not* exist. Such action introduces years of instability, acrimony, and uncertainty upon a child before an unrelated person has met his/her burden under the law. Importantly, Appellant also fails to cite to Ohio Rules of Juvenile Procedure Rule 1(C) which specifically states: “*these rules shall not apply in proceedings to determine parent-child relationships.*” Hence, because this matter involves a petition for shared custody by a nonparent, which necessarily determines whether the mother-child relationship will be judicially violated, even the procedural rules upon which Appellant rests the crux of her argument expressly excludes this matter from its purview.

Furthermore, Appellant suggests a conflict among trial courts by attempting to contrast the decision in *Rowell* with *In re LaPiana*, 8th Dist. No. 93691, 2010-Ohio-3606, and this Court’s issuance of a stay order in the discretionary appeal from *In re Mullen*, 185 Ohio App.3d 457, 2009-Ohio-6934. Appellant’s suggestion that those decisions conflict with the decision in *Rowell* is flawed. As the 10th District Court of Appeals correctly pointed out, in neither *La Piana* nor *Mullen* did the parties appeal the temporary orders. In fact, in *LaPiana*, the parties had executed a written custody agreement and were complying with the terms of that agreement. It

was only after the court found that the natural parent had contractually relinquished her exclusive custodial rights in favor of the nonparent did the court find that continued visitation with nonparent was consistent with the arrangement of the parties and in the best interest of the minor children. Similarly, in *Mullen*, this Court issued a stay that reinstated temporary orders that were *not* contested or appealed. See *In re Mullen* (July 2011), Slip Opinion No. 2011-Ohio-3361. In *Mullen*, the trial court issued a visitation order that consisted of only six (6) hours of visitation per week. Again, the mother/parent did not appeal the issuance of said temporary order or the stay. The issuance of a stay order there, much like in this appeal, does not suggest that the reinstated order is valid because a stay order is not a decision “on the merits.” If such were the case, a different decision would have been reached in *Mullen* and Appellant would have already prevailed on her appeal to this Court. Appellant’s reliance upon this Court’s stay order in *Mullen* to suggest a conflict between appellate courts, therefore, is misplaced especially since the “temporary” visitation (fka custody) orders in this case imposed a *substantial interference* on the parent-child relationship and as such, Mother has consistently challenged and appealed the same.

Further, Appellant seemingly asserts this appeal is of public or great general interest by way of a purported threat to the emotional well-being of children of unmarried parents and other “intentionally created” family structures. (See Memorandum in Support of Jurisdiction at 2). As this Court noted in *Mullen*, Ohio law provides unmarried parents and other persons of “intentionally created” family structures with clear guidance as to how a nonparent can secure custody – temporary or permanent--by entering into a valid shared-custody agreement. See *Mullen* at ¶11. The “best way to safeguard both a parent’s *and a nonparent’s* rights with respect to children is to agree in writing as to how custody is to be shared * * *.” *Id.* at ¶21, emphasis added. Importantly, any decision issued by this Court on the issue will not provide any further

guidance to those class of persons cited by Appellant, even on a temporary basis. The underlying law remains the same – nonparents must prove the existence of a contract with a parent and permanent relinquishment by a parent before a juvenile court can even entertain interfering with a parent’s exclusive custodial rights, temporarily or permanently.

Appellant maintains this is a matter of public interest because upholding the Court of Appeals’ decision “would undermine the juvenile court’s interest in managing the behavior of the parties during the litigation.” Thus, according to Appellant, “managing parties’ conduct during litigation” is a more important public policy than safeguarding a fit parent’s exclusive custodial rights to her child. This is contrary to law. In fact, this Court has addressed this question(s) countless times and in so doing has offered a long line of case law recognizing that “the Constitutions of both United States and the state of Ohio afford parents a fundamental right to the custody of their children.” *In Re Brayden James*, 113 Ohio St.3d 420, 2007-Ohio-2335, and *In re Murray et al.* (1990), 52 Ohio St.3d 155, 157. In *In Re Hockstock* (2002), 98 Ohio St.3d 238, this Court clearly set forth the law that must be applied in cases involving custody disputes between a parent and nonparent as follows: “the overriding principle in custody cases between a parent and non-parent is that the natural parents have a fundamental liberty interest in the care, custody, and management of their children * * *. This interest is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by Section 16, Article I of the Ohio Constitution; * * * Since parents have constitutional custodial rights, *any action that affects this parental right*, such as granting custody of a child to a nonparent, must be conducted pursuant to procedures that are fundamentally fair * * *.” It is noteworthy that there is no similar case law protecting a trial court’s interest in “managing parties’ conduct” during litigation when the same must be balanced against a parent’s constitutional parental rights.

Appellant's assertion that juvenile courts should be permitted to impose shared custody arrangements on fit parents in order "to manage parties' conduct during litigation" is a self-serving assertion. Appellant is asking this Court to accept her unproven assertions that she is *entitled* to parent-like status before ever having to prove the existence of a contract and that Mother permanently relinquished her exclusive custodial rights. Appellant is also asking this Court to agree that juvenile courts can impose a forced shared custody arrangement on a fit parent "temporarily" based on the court's own notion of "the status quo" or "managing the parent's behavior" or "the best interest of the child," or whatever standard the court decides to use irrespective of whether Mother purposefully relinquished her exclusive custodial rights by voluntarily entering into a contract with Appellant. Appellant makes this request knowing that once a court "temporarily" forces a shared custodial arrangement, that same court will more than likely find in favor of continuing the relationship in the eventual custodial determination. This, again, places Appellant in a role superior to that of Mother, who is supposed to receive all deference and protection afforded by law, because any grant of visitation, even temporarily, necessarily interferes with and diminishes the parent-child relationship. Here, Appellant is seeking this superior status even though this Court has already determined a same sex partner is not entitled to the same constitutional protections and rights as natural parents. See *In Re Bonfield*, 97 Ohio St 3d 287, 2002-Ohio-6660 and *Mullen*, supra.

STATEMENT OF THE CASE AND FACTS

This case presents a complicated and extensive procedural history, but the determinative facts are very simple. The Mother herein is the single mother and sole parent of a minor child, whose rights were challenged by a shared custody petition brought by Appellant as an

unrelated third party and legal stranger to the child. Without holding a hearing to determine whether the parties entered into a legally-enforceable contract and whether Mother purposefully relinquished any of her rights as a parent, the trial court accepted jurisdiction and ordered Mother to yield her constitutionally-protected exclusive custodial rights to this legal stranger. Since October 2008, therefore, the juvenile court has imposed a shared custody arrangement on Mother, while calling it “temporary,” through a series of orders granting extensive custody and visitation rights to Appellant. Indeed, the juvenile court’s actions have forced Mother, unwilling to cede her exclusive rights to her daughter even temporarily, to pursue relief by filing numerous motions and appeals. Recently, the 10th District Court of Appeals validated Mother’s pleas and restored her constitutional rights to their rightful and *paramount* status.

Now, Appellant is asking this Court to take the extraordinary action of once again prioritizing her *alleged* relationship, not yet proven or protected by law, over that of Mother’s constitutionally protected relationship with her daughter. Appellant asks this Court to provide her with the requested relief *before* she has met the heightened burden of proof established by this Court in *Mullen*. Appellant asks this Court to take this action while Mother has no adequate remedy at law for the premature / “temporary” infringement upon her constitutionally-protected rights. Appellant makes this request despite the fact that a trial on the merits has commenced.²

It is also critical to note that although the parties dispute some facts regarding their relationship, there are many *undisputed* facts that must be considered in light of

² The Appellant’s assertion that Mother is any way responsible for delay in this trial is without merit. Indeed, this case has been scheduled for trial several days throughout the course of the last year. The last 18 days of trial were rescheduled due to a death in Appellant’s family, illness of family members of *both* attorneys for Appellant and the unexpected retirement of the Magistrate. Further, of the six days this trial has been scheduled before the new Magistrate, two days were missed and two days ended early due to the illness or lack of preparedness of counsel for Appellant. The appeals of Mother have not been the source of delay of the final trial in this matter, as evidenced by the fact that the trial court is proceeding during the pendency of this appeal.

Appellant's extraordinary requests and in the context of *Mullen*. Specifically, Mother initiated the process of having the minor child through artificial insemination *prior* to meeting Appellant. The Mother and Appellant never entered into or executed any written custody agreement. The Mother and Appellant never entered into or executed a life partnership agreement or had any "commitment ceremony." The Mother never executed: (1) revocable durable or healthcare powers of attorney relative to Appellant; (2) revocable guardianship papers relative to Appellant; (3) revocable last will in testament relative to Appellant; or (4) revocable living will relative to Appellant. Further, Mother's name is the only name that appears on the child's *only* birth certificate and her birth announcement. Furthermore, Appellant has presented no evidence of purposeful relinquishment in the form of a knowing, voluntary and intelligent waiver and/or a contract between she and Mother as set forth in her affidavits or deposition testimony but rather, has made such ambiguous statements such as "it was just understood that we would co-parent."

Notwithstanding the above, when Mother refused to comply with the interim orders because she believed them to be invalid and not in her daughter's best interest, the trial court found her in contempt of the interim orders. The trial court sentenced Mother to a term of incarceration and issued other sanctions against her. The Mother appealed the contempt findings and the Tenth District Court of Appeals issued its decision on June 9, 2011. See *Rowell*, *supra*. The decision reversed the contempt finding against Mother and, most importantly, restored her paramount and constitutionally protected right to the exclusive custody of her minor daughter.

ARGUMENT IN SUPPORT OF APPELLANT'S POSITION

The Appellant advances the argument here that a juvenile court has authority under the Rules of Juvenile Procedure to issue and enforce temporary orders during the period of litigation when it is exercising jurisdiction to determine custody of a child under R.C. §2151.23. Further,

Appellant contends that the imposition of temporary orders in such a case is a permissible intrusion into the constitutional protection otherwise afforded to parents regarding their exercise of care and control over their children. The Tenth District Court of Appeals rejected Appellant's arguments and concluded that a juvenile court cannot issue and enforce such temporary orders.

Mother's Position Regarding Proposition No. I: Juvenile Courts are courts of limited jurisdiction and thus cannot exercise authority beyond that which is granted to them by the Ohio General Assembly.

Juvenile courts are courts of limited jurisdiction whose powers are created solely by statute." *Carnes v. Kemp*, 104 Ohio St.3d 629, 2004-Ohio-7107, 821 N.E.2d 180, ¶25.

Specifically, as this Court held in *Gibson*, a "juvenile court possesses only the jurisdiction that the General Assembly has expressly conferred upon it." *Gibson*, supra, citing Ohio Const., Art. IV, § 4(B); *Seventh Urbcan, Inc. v. University Circle Property Dev.* (1981), 67 Ohio St.2d 19, 22, 423 N.E.2d 1070. Thus, in the absence of a specific statute conferring jurisdiction, the juvenile court "cannot go beyond the statutes and find jurisdiction on some other basis." *Id.* at 172-73, citing *In re Fore* (1958), 168 Ohio St. 363, 370, 155 N.E.2d 194.

As the Tenth District correctly determined, this last statement from *Gibson* forecloses the possibility that a juvenile court could base its jurisdiction to grant visitation rights on a procedural rule as Appellant advocates. Courts cannot grant themselves jurisdiction by a procedural rule, even jurisdiction to issue temporary orders. Instead, under *Gibson*, if there is no specific statute that expressly confers upon juvenile courts the jurisdiction to grant visitation rights to nonparents in a particular circumstance, such jurisdiction does not exist. *Id.* at 172-73. Further and most importantly, the Rules of Juvenile Procedure, upon which Appellant relies, specifically state: "these rules shall not apply in proceedings to determine parent-child relationships." Juv.R. 1(C). Thus, even the Ohio Rules of Juvenile Procedure recognize the

sanctity of parent-child relationships and defer to the Ohio General Assembly to dictate the parameters and “permissive intrusions” into these constitutionally-protected relationships.

In addition, none of the statutes that expressly grant juvenile courts jurisdiction to order visitation apply to the present case. In fact, the statute upon which Appellant relies in instituting this action, R.C. §2151.23(A)(2), does not confer upon the juvenile court the jurisdiction to grant visitation rights. Even if it did, the grant of jurisdiction would be unconstitutional under the Due Process Clause of the Fourteenth Amendment. There are only three statutes in the Ohio Revised Code that explicitly govern the granting of visitation rights to non-parents; none of these apply to the present circumstances. See *Gibson* at 169-70. The first two of these statutes apply only to relatives of the child – R.C. §3109.11 provides for visitation by relatives if the parent of a minor child is deceased, and R.C. §3109.12(A) authorizes visitation by relatives if a minor child was born to an unmarried woman. The third statute, R.C. §3109.051(B)(1), allows for visitation by a relative or other person but applies only to cases of “divorce, dissolution of marriage, legal separation, annulment, or child support proceeding that involves a child.” As this Court explained, “visitation rights of nonparents under this third statute do not vest until the occurrence of a disruptive precipitating event, such as parental death or divorce.” *Id.* at 169.

In this case, Appellant is not related to the child. Therefore, neither R.C. §3109.11 nor R.C. §3109.12(A) apply. Further, because there has been no divorce or other “precipitating” event under R.C. §3109.051(B)(1), that statute does not apply here either. Consequently, for the juvenile court to have jurisdiction to order visitation rights to Appellant, it would have to be expressly granted that jurisdiction by some other statute.

Appellant's petition for shared custody in the underlying case was brought under R.C. §2151.23(A)(2), which confers upon juvenile courts the jurisdiction “to determine the custody of

any child not a ward of another court of this state." This statute has been broadly interpreted to apply to all custody disputes between parents and nonparents, no matter what the basis of the nonparent's claim. See *In re Perales*, 52 Ohio St.2d 89, 369 N.E.2d 1047. It does not, however, under any interpretation, give the juvenile court jurisdiction to grant visitation rights.

In *Gibson*, a grandparent sued for visitation rights under R.C. §2151.23(A)(2). The Court denied their petition, explicitly holding that the statute did not confer jurisdiction to grant visitation rights to nonparents seeking only visitation. *Gibson* at 172. Because *Gibson* only concerned visitation and not custody, the Court declined to express an opinion about the juvenile court's jurisdiction to grant visitation rights in a custody proceeding. *Id.* at 172.

However, there are two basic principles from *Gibson* that provide guidance as to the type of custody proceedings in which the juvenile court will have jurisdiction to grant visitation rights and the type of custody proceedings in which it will have no such jurisdiction. The first relevant principle from *Gibson* has already been discussed: a juvenile court has no jurisdiction which is not expressly granted to it by statute. *Id.* at 172. The second relevant principle is that "[v]isitation' and 'custody' are related but distinct legal concepts" *Id.* at 171. Indeed, they are distinct enough, according to *Gibson*, that the jurisdiction to award the one does not by itself confer the jurisdiction to award the other. These simple and basic concepts have been correctly applied in multiple other jurisdictions without difficulty.³

The Tenth District Court of Appeals correctly found that former same sex partners have no statutory right to visitation nor a statutory remedy to assert an alleged right to visitation,

³ *In re C.C.*, Second App. No. 21707, 2007-Ohio-3696; *Parr v. Winner* (June 30, 1993), Ashtabula App. No. 92-A-1759, 1993 Ohio App. LEXIS 335, unreported; *Young v. Young* (Nov. 20, 1998), Licking App. No. 98 CA 48, 1998 Ohio App. LEXIS 5704, unreported.

holding that “[i]n sum, appellant has no statutory right to visitation nor a statutory remedy to assert her alleged right to visitation. Should the legislature determine that companionship or visitation rights should be extended to lesbian and/or homosexual partners, such a determination must be left to the legislature, not this court. Until the General Assembly determines that persons other than grandparents and those relatives defined in R.C. 3109.051 and 3109.12 are entitled to visitation rights, this court shall refrain from doing so. *Liston v. Pyles* (Aug. 12, 1997), Franklin App. No. 97APF01-137, unreported.

Gibson stands for the proposition that jurisdiction to determine *custody* does not by itself confer jurisdiction to determine *visitation*. Rather, a juvenile court will have jurisdiction to order a parent to allow visitation by a nonparent in a custody case only if the statutes governing that particular case also include a distinct and express basis for that expanded jurisdiction. Here, however, R.C. §2151.23(A)(2), the underlying statute relied upon for jurisdiction in this case, contains no such basis for jurisdiction to order visitation. Thus, the principles set forth in *Gibson* preclude a finding of jurisdiction to award visitation rights in a custody action brought under R.C. §2151.23(A)(2). This statute does no more than confer jurisdiction to determine *custody* of any child not a ward of another court of this state. Moreover, it is not supplemented by any other statute that even *implies* jurisdiction to determine *visitation*. The application of this statute to shared custody disputes between parents and nonparents is not even itself a function of the statute, but rather of later judicial interpretation. See *Perales*, supra. A statute that does not even expressly grant jurisdiction to determine shared custody in the present circumstances cannot be held to expressly confer the additional jurisdiction to determine visitation, as *Gibson* would require.

Mother's Position Regarding Proposition No. II: Parents have a fundamental right to the care, custody and control of their children. Unless and until a court finds that a suitable parent voluntarily entered into a contract with a legal stranger and purposefully relinquished his/her paramount custodial rights, a court may not disturb the parent-child relationship, even on a "temporary" basis.

Allowing juvenile courts to grant visitation under R.C. §2151.23(A)(2), even temporarily, without first requiring a showing that the child's parent purposefully / contractually relinquished the right to the exclusive care, custody, and control of their child would run afoul of this Court's recent ruling in *Mullen*. In *Mullen*, this Court held that a parent cannot be deprived of the care custody and control of their child unless a preponderance of the evidence reveals a *contract* and purposeful and permanent relinquishment. Similarly, in *Perales*, this Court held that a juvenile court has no jurisdiction to deprive a parent of her custodial rights in favor of a nonparent unless the court first finds the parent to be unsuitable. *Id.* at syllabus. Because a court cannot order visitation to a nonparent without depriving a parent of exclusive custody to her child, *Perales* would also prohibit a visitation award to a nonparent without mandating such a finding.

This same principle has been affirmed by the United States Supreme Court, specifically in the visitation context. In *Troxel v. Granville* (2000), 530 U.S. 57, the Court affirmed the Washington Supreme Court's nullification of a state statute which allowed juvenile courts to grant visitation rights to nonparents without: 1) requiring any factual findings regarding harm or potential harm to the child, 2) requiring any showing of unfitness on the part of the parent, and 3) giving any deference to the parent's determination of her child's best interests with respect to visitation. *Id.* The Court explained that, because the nonparental visitation statute required nothing more than the judge's belief that a visitation decision better than the parent's decision could be made, and because the statute placed "no limits on either the persons who may petition

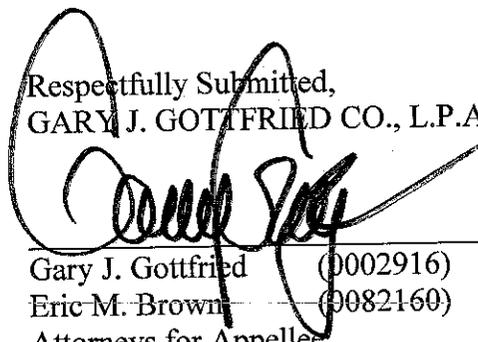
for visitation or the circumstances in which such a petition may be granted," the statute infringed upon these fundamental parental rights. *Id.* at 73.

As a "visitation" statute, R.C. §2151.23(A)(2) suffers from even more deficiencies than the statute in *Troxel*. The statute fails even to mention visitation; much less does it place any limits upon the persons who may petition for visitation or the circumstances in which such a petition may be granted. Moreover, even if such a statute could serve as the basis for jurisdiction to order visitation--which under *Gibson* it cannot – it could not, under either *Perales* or *Troxel*, grant any such jurisdiction absent a factual finding on the merits pursuant to *Mullen*.

CONCLUSION

The Tenth District Court of Appeals decision restoring Mother's constitutionally protected rights to a paramount and rightful status was the correct decision. An award of visitation, forcing a suitable parent to relinquish exclusive control of her child to a person with no legal relationship to the child, is not permitted by constitutional, statutory, procedural or Ohio case law. More importantly, it is a serious infringement upon a fit parent's constitutionally-guaranteed exclusive custodial rights and introduces instability and confusion into the lives of minor children. As such, Mother respectfully requests that this Honorable Court deny jurisdiction of this appeal and dismiss this action.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing *Memorandum in Response* was served upon the following via regular U.S. mail, postage prepaid, this 24 day of August 2011:

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