ORIGINAL

IN THE SUPREME COURT OF OHIO

Charles E. Wilson, et al.,	:	
	:	Original Action filed
Relators,	:	pursuant to Ohio Constitution,
	:	Art. XI, §13
v.	:	
	:	**CASE NO.: 2012-0019**
Governor John Kasich, et al.,	:	
	:	
Respondents.	:	

RELATORS' SUPPLEMENTAL REPLY BRIEF

Lloyd Pierre-Louis (Bar # 0068086)
(COUNSEL OF RECORD)
Wesp, Barwell & Pierre-Louis, LLC
6400 Riverside Drive, Suite D
Dublin, OH 43017
Phone: (614) 341-7576 ext. 4
Fax: (614) 388-5693
lpl@wesplaw.com

Dennis E. Murray, Jr. (Bar # 0038509)
Murray & Murray Co., L.P.A.
111 East Shoreline Drive
Sandusky, OH 44870-2517
Phone: (419) 624-3000
Fax: (419) 624-0707
DMJ@murrayandmurray.com

Counsel for Relators

Marc Erik Elias (PHV # 2187-2012)
Perkins Coie LLP
700 Thirteenth Street, NW, Suite 600
Washington, D.C. 20005
Phone: (202) 654-6200
Fax: (202) 654-9126
melias@perkinscoie.com

Kevin J. Hamilton (PHV # 2185-2012)
Abha Khanna (PHV # 2189-2012)
Noah Guzzo Purcell (PHV # 2181-2012)
Perkins Coie LLP
1201 Third Ave., #4800
Seattle, WA 98101
Phone: (206) 359-8000
Fax: (206) 359-9000
khamilton@perkinscoie.com
akhanna@perkinscoie.com
npurcell@perkinscoie.com

Counsel for Relators

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Richard N. Coglianese (Bar # 0066830)
(COUNSEL OF RECORD)
Michael J. Schuler (Bar # 0082390)
Erin-Butcher Lyden (Bar # 0087278)
Assistant Attorneys General
Constitutional Offices
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
(614)466-2872
(614) 728-7592 (fax)
richard.coglianese@ohioattorneygeneral.gov
michael.schuler@ohioattorneygeneral.gov
erin.butcher@ohioattorneygeneral.gov

Counsel for Respondent Husted

Jeannine R. Lesperance (Bar # 0085765)
Renata Staff (Bar # 0086922)
Assistant Attorneys Generals
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
(614) 466-2872
(614) 728-7592 (fax)
jeannine.lesperance@ohioattorneygeneral.gov
renata.staff@ohioattorneygeneral.gov

Counsel for Respondent Yost

Jeannine R. Lesperance (Bar # 0085765)
Sarah Pierce (Bar # 0087799)
Assistant Attorneys General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
(614) 466-2872
(614) 728-7592 (fax)
jeannine.lesperance@ohioattorneygeneral.gov
sarah.pierce@ohioattorneygeneral.gov

Counsel for Respondent Niehaus

Michael DeWine
Ohio Attorney General
John H. Burtch (Bar # 0025815)
(COUNSEL OF RECORD)
E. Mark Braden (Bar # 0024987)
Robert J. Tucker (Bar # 0082205)
Baker & Hostetler, LLP
65 E. State Street, Suite 2100
Columbus, Ohio 43215
(614) 228-1541
(614) 462-2616 (fax)
jburtch@bakerlaw.com
ebraden@bakerlaw.com
rtucker@bakerlaw.com

Special Counsel for Respondents Kasich, Niehaus, and Yost

Pearl M. Chin (Bar # 0078810)
Assistant Attorney General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
(614) 466-2872
(614) 728-7592 (fax)
pearl.chin@ohioattorneygeneral.gov

Counsel for Respondent Kasich

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	THE COURT'S QUESTIONS	1
	A. Does the Ohio Constitution mandate political neutrality in the reapportionment of house and senate districts?	2
	B. What is relators' burden in showing that a reapportionment plan is unconstitutional?	6
	C. Does tension exist among sections 3, 7 and 10 of Article XI of the Ohio Constitution, and if so, how are these sections to be harmonized?	11
III.	CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

Brown v. Thomson,
462 U.S. 835 (1983) 18, 19

Harrold v. Collier,
107 Ohio St.3d 44 (Ohio 2005) 8, 9

Holt v. 2011 Legislative Reapportionment Comm'n,
2012 WL 375298 (Pa. Feb. 3, 2012) 6, 7, 17

In re Colorado General Assembly,
2011 WL 5830123 (Colo. S. Ct. Nov. 15, 2011) 6

In re Legislative Districting of State,
370 Md. 312 (2002) ..... passim

In re Reapportionment of Colorado General Assembly,
45 P.3d 1237 (Colo. 2002) 10

In re: Senate Joint Resolution of Apportionment 1176,
No. SC12-1 (Fla. S. Ct. March 9, 2012) ..... passim

Kirkpatrick v. Preisler,
394 U.S. 526 (1969) 18

Lansdowne v. Beacon Journal Publishing Co.,
32 Ohio St.3d 176 (1987) 8

Larios v. Cox,
300 F. Supp. 2d 1320 (N.D. Ga. 2004) 18, 19

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 21

Purcell v. Gonzalez,
549 U.S. 1 (2006) 6

Reynolds v. Sims,
377 U.S. 533 (1964) 2

State ex rel. Herbert v. Bricker,
139 Ohio St. 499 (Ohio 1942) 1, 3, 5, 9

State ex rel. King v. Rhodes,
11 Ohio St.2d 95 (Ohio 1967) 3

State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.,
111 Ohio St.3d 568 (Ohio 2006) 8

TABLE OF AUTHORITIES
(continued)

Page

Twin Falls County v. Idaho Comm'n on Redistricting,
2012 WL 130416 (Idaho 2012) 13, 17, 21

Voinovich v. Ferguson,
63 Ohio St. 3d 198 (Ohio 1992) 10, 11, 13, 16

Voinovich v. Quilter,
507 U.S. 146 (1993) ..... passim

Wesberry v. Sanders,
376 U.S. 1 (1964) 8

CONSTITUTIONAL PROVISIONS

Ohio Const., Article XI ..... passim

U.S. Const., Article I, § 2 18

OTHER AUTHORITIES

Ohio Ballot Board, Ohio Issues Report: State Issues Ballot Information for the November 8, 2005 General Election, *available at* http://www.sos.state.oh.us/sos/upload/elections/2005/ 4

I. INTRODUCTION

Respondents' position is nothing less than astonishing. In their view, the Apportionment Board can baldly ignore or intentionally violate any provision of Article XI—even those they admit are "mandatory"—on "*any rational basis*," including based on "political considerations" or to protect incumbents. Resp. Supp. Br. 2, 8, 41 (emphasis added). In other words, Respondents' view is that they were allowed to violate Article XI whenever doing so was politically convenient. That cannot possibly be the law.

But that is exactly what Respondents did. The plan they adopted based on this fatally flawed premise must be rejected if Article XI is to retain any meaning.

The parties' supplemental briefs crystallize the issues before the Court. Respondents concede, correctly, that this Court has jurisdiction. Given the thorough briefing on this issue and Respondents' concession, Relators will rest on their prior briefing on this issue.

As to the Court's second question, Respondents' view is that the Board may not only consider partisan interests, but may place such interests ahead of the requirements of Article XI. Accepting this view would leave Article XI not worth the paper it is printed on. Respondents cite many cases holding that federal law does not bar partisan gerrymandering, but that is irrelevant to the Court's question. Nothing in Article XI or any case interpreting it suggests that the Apportionment Board may pursue partisan ends, and with good reason: the very purpose of Article XI was "the prevention of gerrymandering." *State ex rel. Herbert v. Bricker*, 139 Ohio St. 499, 509 (1942). At a bare minimum, partisan considerations cannot "'trump' constitutional requirements." *In re Legislative Districting of State*, 370 Md. 312, 369-70 (2002).

Respondents' troubling view of the law continues with their position as to the burden of proof. They claim that a challenge to a plan adopted by the Board must be treated like a facial challenge to a statute passed by the Legislature. But one of the central purposes of Article XI was to take the apportionment process away from the Legislature, *Bricker*, 139 Ohio St. at 508, and a plan adopted by the Board is subject to none of the checks and balances of the legislative

process. Moreover, this is not a facial challenge in which no specific set of facts applies. Here, we have a very particular set of facts—a specific map laying out legislative districts—and it is the Court's duty to apply the law to those facts and hold the Board to the terms of the Constitution, for "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

The need for the Court to play its constitutional role is particularly clear in light of Respondents' astonishing view of the law: that "Relators must first demonstrate a violation of Article XI beyond a reasonable doubt," and then "must also demonstrate beyond a reasonable doubt that the Apportionment Board acted without a rational basis." Resp. Supp. Br. 22. On this approach, the Court would have to uphold any plan—even one that needlessly split every county, city, and ward in the state—so long as the Board offered some "rational" reason for it, such as a desire to protect incumbents. *Id.* at 41. The Framers of our Constitution surely could never have imagined that the detailed rules they adopted in Article XI could be overridden based on any rational thought of the Apportionment Board's. What sort of Constitution would it be that could be so cavalierly disregarded? Even statutes can't be ignored so lightly.

Finally, Respondents' self-serving and selective reading of Article XI seeks to create tension even where there is none and to expand infinitely the Board's discretion, even giving it the power to favor other goals over those actually listed in Article XI. Adopting such a reading would be an insult to the people who carefully drafted Article XI and to the Ohio citizens who rely on it to ensure "[a] fairly apportioned legislature," which "lies at the very heart of representative democracy." *In re Legislative Districting*, 370 Md. at 320.

II. THE COURT'S QUESTIONS

A. Does the Ohio Constitution mandate political neutrality in the reapportionment of house and senate districts?

Respondents begin their response by baldly declaring that "nothing in the Ohio Constitution mandates political neutrality in the reapportionment of house and senate districts."

Resp. Supp. Br. 8. That statement simply ignores the specific, mandatory, and politically neutral standards set forth in Article XI, as well as the history of that provision.

Article XI lays out detailed, politically neutral criteria to be followed in apportionment, never including among those criteria any sort of partisan considerations. And the very first Section of Article XI clearly states that the Board "shall meet and establish *in the manner prescribed in this Article* the boundaries for each of ninety-nine house of representative districts and thirty-three senate districts." Art. XI, § 1 (emphasis added). Respondents' effort to add their preferred criteria to the Constitution without actually amending the document cannot be allowed.

The history of Article XI confirms as much. "Prior to the Constitution of 1851, the apportionments of legislative districts had been made by the General Assembly, with the result that oftentimes political advantage was sought to be gained by the party in power." *Bricker*, 139 Ohio St. at 508. In 1851, however, "Article XI was incorporated in the Constitution for the purpose of correcting the evils of former days." *Id.* The post-1851 version of Article XI gave the apportionment power to three officials elected by partisan ballot: "the Governor, Auditor of State, and Secretary of State." *Id.* at 507. Nonetheless, this Court found that "[t]he objective sought by the constitutional provisions was the prevention of gerrymandering." *Id.* at 509.

In the 1960's, Article XI's system of apportionment was deemed unconstitutional for violating the one-person, one-vote rule, as it guaranteed a minimum of one House district per county, regardless of population. *See State ex rel. King v. Rhodes*, 11 Ohio St.2d 95, 96 (Ohio 1967) (describing this history). In response, in 1967 the people of Ohio adopted a new version of Article XI that provided for districts of "substantially equal" population. Art. XI, § 3. The prior version of Article XI had long been understood to bar "gerrymandering." *Bricker*, 139 Ohio St. at 509. Respondents point to no language in the revised version of Article XI, and no case interpreting it, purporting to change that understanding. Nonetheless, Respondents argue that the public must have intended to change that rule because of the "identity of the five individuals tasked with apportioning the General Assembly." Resp. Supp. Br. 8. On their view, "the Ohio Constitution [now] effectively mandates that political considerations will be an

integral part of the process," as "[e]ach member of the Apportionment Board is a partisanly-elected political official." *Id.* Although the argument is revealingly candid about Respondents' motivations, it fails for at least two reasons.

First, "[e]ach member of the Apportionment Board [was also] a partisanly-elected political official" in the Constitution of 1851, so the notion that partisan elected status implies a constitutional right to engage in gerrymandering flies in the face of precedent and history. Indeed, Respondents' view—that elected officials are incapable of applying specific, mandatory, politically neutral standards without letting their partisan political interests overwhelm their Constitutional responsibility—is as incomprehensible as it is cynical. Second, Respondents' argument draws into question the work done by a variety of bodies made up of elected officials or their appointees. Are the county Boards of Elections free to ignore legal standards to impose partisan political judgments? How about the Joint Legislative Ethics Commission or Inspector General? Should we assume that the Ohio Elections Commission, made up of partisan political appointees, is incapable of setting aside partisan interests to apply the law fairly and objectively? State and local governments across the nation are staffed by dedicated officials, commissioners, and employees elected or appointed on a partisan basis yet charged with the fair administration of the law. The suggestion that they cannot do so should be firmly rejected.

Respondents also suggest that by twice rejecting proposals to transfer reapportionment to a different commission, Ohioans showed that they wanted partisan interests to control the process. Resp. Supp. Br. at 10. But this simply does not follow. Ohioans may have rejected a commission system on any number of grounds, including that they believed Article XI already imposed sufficiently detailed and neutral standards to prevent partisan gerrymandering. Indeed, one of the key arguments made against the most recent proposed amendment, Issue 4 in 2005, was that "although today the Ohio Constitution protects your right to vote for someone who represents your community or neighborhood, the proposed amendment would require the commission to focus on political parties" and "expressly allows districts to be gerrymandered." *See* Ohio Ballot Board, Ohio Issues Report: State Issues Ballot Information for the November 8,

2005 General Election, *available at* http://www.sos.state.oh.us/sos/upload/elections/2005/OIR2005.pdf. Given these arguments, it is simply absurd to say that a vote against Issue 4 was necessarily a vote in favor of partisan gerrymandering. And if Respondents are so convinced that the public wants the Board to consider partisan factors, why did they seek at every turn to hide their partisan considerations by renting a private hotel room (the "bunker") to discuss them, using private email accounts to discuss their partisan aims, and never discussing them in a public hearing? Respondents' actions speak louder than their words in terms of what they truly believe Article XI allows.

After their brief arguments as to Ohio law (which provide them no support), Respondents spend page after page arguing that *federal law* does not forbid partisan considerations in redistricting. Resp. Supp. Br. 11-17. But that is irrelevant to the Court's question. The U.S. Constitution contains no provision remotely similar to the Ohio Constitution's Article XI—which contains detailed, mandatory standards for reapportionment—and Relators' claim is brought under Article XI. Relators are not asking the Court to apply some novel theory of federal law; they are asking the Court to enforce the plain language and long-settled understanding of Article XI. Little more need be said. Respondents create a straw man because they have no response to Relators' real argument.

In short, Article XI provides detailed, neutral criteria to govern reapportionment, it never mentions partisan considerations, this Court held 70 years ago that "[t]he objective sought by the constitutional provisions was the prevention of gerrymandering," *Bricker*, 139 Ohio St. at 509, and nothing in the 1967 amendments purported to change that. Therefore, Article XI is best read as barring the Apportionment Board from considering partisan factors.

Even if the Court were to reject that view, however, and hold that the Board may consider partisan factors, it would be utterly inconsistent with Article XI, and indeed with the very notion of a Constitution, to accept Respondents' view that partisan factors may override the express terms of Article XI. To Relators' knowledge, no court, anywhere, has ever held that an apportioning body can pursue partisan factors or other non-constitutional criteria even when

those factors lead to violations of express constitutional mandates. Indeed, countless courts have held to the contrary. *See, e.g.*, *In re Legislative Districting*, 370 Md. at 369-70 ("The constitution 'trumps' political considerations. Politics or non-constitutional considerations never 'trump' constitutional requirements."); *In re Colorado General Assembly*, 2011 WL 5830123, at *3 (Colo. S. Ct. Nov. 15, 2011) ("[N]onconstitutional considerations, . . . may be considered only after all constitutional criteria have been met."); *Holt v. 2011 Legislative Reapportionment Comm'n*, 2012 WL 375298, at *27 (Pa. Feb. 3, 2012) ("It is true, of course, that redistricting has . . . an inevitably political, element; but, the constitutional commands and restrictions on the process exist precisely as a brake on the most overt of potential excesses and abuse."); *In re: Senate Joint Resolution of Apportionment 1176*, No. SC12-1, slip op. at *22 (Fla. S. Ct. March 9, 2012) ("It is this Court's duty . . . to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards constitutionally invalid.").

This Court should not make Ohio unique among states in holding that partisan considerations may override the plain text of the state Constitution. What good would such a Constitution be? Instead, the Court should hold that where, as here, the Apportionment Board chooses to disregard constitutional criteria in favor of partisan interests, the resulting apportionment plan cannot stand. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). How could the public have confidence in apportionment if Article XI can be ignored with impunity?

B. What is relators' burden in showing that a reapportionment plan is unconstitutional?

Respondents' position with respect to the burden of proof is, quite simply, stunning. On Respondents' view, "to demonstrate that an apportionment plan is unconstitutional, Relators must first demonstrate a violation of Article XI beyond a reasonable doubt," and "after meeting such burden, Relators must also demonstrate beyond a reasonable doubt that the Apportionment Board acted without a rational basis when it enacted the challenged plan." Resp. Supp. Br. at 22.

In other words, even if Relators prove, beyond a reasonable doubt, that Respondents violated Article XI, the Court should do nothing unless Respondents' actions were wholly irrational. That cannot be the law.

To begin with, Respondents' argument that Relators must demonstrate a violation of Article XI beyond a reasonable doubt relies on two mistaken premises.

First, Respondents argue that even though an apportionment plan "is not enacted into statute," "it has all the semblance of legislative action," and is therefore entitled to the same deference. Resp. Supp. Br. 18. The only Ohio case they cite for this proposition is Justice Holmes' *concurring* opinion in *Voinovich*. *Id.* at 19. But none of the opinions of the other eight justices adopted that view. The truth, as Respondents recognize, is that the people of Ohio took the map drawing power *away* from the Legislature and gave it to the Apportionment Board, thereby making the process non-legislative. *Id.* And the Board's map drawing process is very different from the legislative process in the General Assembly, containing few if any of its checks and balances. For example, without a super majority, a legislative enactment generally must wait 90 days to take effect, allowing the public to challenge the law by referendum. An Apportionment Board map is not subject to referendum challenge. Before a bill can be voted upon in the Legislature, it must be considered on 3 different days, to give time for consideration by the legislators and the public; no similar requirement applies to an apportionment plan. A legislative enactment must be passed by 2 legislative chambers, with a minimum of 67 combined House and Senate members voting in favor, and one house may reject legislation passed by the other. No similar check exists with the Apportionment Board. Finally, while the Governor can veto a bill, with apportionment, not only does the Governor not get a veto, but the Governor can be outvoted. There is thus no basis to treat an apportionment plan like a statute. *See, e.g.*, *Holt*, 2012 WL 375298, at *17 (declining to treat apportionment plan like a statute because it "is not an act of the General Assembly, i.e., it was not a bill subject to legislative disclosure and debate, a general vote, adoption and presentation to the Governor for approval, or passage by a super-

majority if vetoed"). Indeed, every case Respondents cite in arguing that other states apply a "beyond a reasonable doubt" standard involved a plan passed by a legislature.[1]

The second fundamental flaw in Respondents' position is that even if the apportionment plan should be treated like a statute, Relators are raising the equivalent of an as-applied challenge to the plan, not a facial challenge: Relators are not arguing that every conceivable aspect of the plan is unconstitutional, rather, they are arguing that many specific aspects of the plan the Board enacted are unconstitutional. And in an as-applied challenge to a regular statute, "the challenger must present clear and convincing evidence of the statute's constitutional defect," i.e., "'that measure or degree of proof which is more than a mere "preponderance of evidence," *but not* to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases.'" *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 574 (Ohio 2006) (quoting *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St.3d 176, 180-81 (1987)) (emphasis added). Thus, even if the Court accepted Respondents' flawed argument that the plan must be treated like a regular statute, there is no basis for applying the beyond a reasonable doubt standard. *See, e.g.*, *In re: Senate Joint Resolution of Apportionment 1176*, No. SC12-1, slip op. at *22 (rejecting application of beyond a reasonable doubt standard even to evaluation of legislatively enacted apportionment plan).

Indeed, if the plan were to be evaluated like a statute, it would not be a regular statute, and *Respondents* would face a heavy burden to justify their handiwork. If evaluated like a statute, their map would receive strict scrutiny, for if "legislation impinges upon a fundamental constitutional right, courts must review the statutes under the strict-scrutiny standard." *Harrold v. Collier*, 107 Ohio St.3d 44, 50 (Ohio 2005). The right to elect representatives from districts apportioned in accordance with the Constitution is among the most fundamental rights imaginable. *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in

[1] Resp. Supp. Br. 20-21 (citing *State ex rel. Cooper v. Tennant*, 2012 WL 517520 (W.Va. 2012 Feb. 13, 2012); *Parella v. Montalbano*, 899 A.2d 1226, 1230 (R.I. 2006); *McClure v. Secretary of Commonwealth*, 436 Mass. 614, 618 (Mass. 2002); *Matter of Wolpoff v. Cuomo*, 80 N.Y.2d 70, 75 (N.Y. 1992); *Jamerson v. Womack*, 244 Va. 506, 508, 423 S.E.2d 180 (Va. 1992); *Logan v. O'Neill*, 187 Conn. 721, 722, (Conn. 1982)).

a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."); *In re: Senate Joint Resolution of Apportionment 1176*, No. SC12-1, slip op. at *6 ("[T]he right to elect representatives—and the process by which we do so—is the very bedrock of our democracy."). Thus, if the plan is to be treated like a statute, *Respondents* should have to show that any deviation from Article XI's requirements in the enacted plan "is narrowly tailored to promote a compelling governmental interest." *Harrold*, 107 Ohio St.3d at 50. They have made no effort to do so and cannot satisfy this standard here.

The absurdity of Respondents' position does not end with demanding that a detailed challenge to a non-legislative enactment impinging on a fundamental right be treated like a facial challenge to an enacted statute regulating a run-of-the-mill issue like zoning—they go one giant leap further. Respondents argue that even if Relators "demonstrate a violation of Article XI beyond a reasonable doubt," the violation must be upheld unless Relators also prove "beyond a reasonable doubt that the Apportionment Board acted without a rational basis." Resp. Supp. Br. 22. And they include as "rational" goals the Board may pursue both "political considerations" and protecting incumbents. *Id.* at 8, 41. Thus, Respondents' view is that even if they admitted outright—which they effectively have—that they divided a county not for any population reason but rather solely to create a district more favorable to Republicans, or to help a particular incumbent, the district must be upheld. Such a construction would turn Article XI on its head. Respondents cite no Ohio case in support of this bizarre contention, and of course there is none. In fact, the authority is directly to the contrary: This Court has long recognized that "[t]he objective sought by the constitutional provisions was the *prevention* of gerrymandering," *Bricker*, 139 Ohio St. at 509 (emphasis added), not its *encouragement*. Indeed, if this approach to the law were correct, what point would there be in having a Constitution? Instead of going to the trouble of crafting and enacting the detailed provisions of Article XI through a public vote, the Framers of Article XI could have just written their suggestions on a cocktail napkin to be passed down from one Board to the next and ignored or followed as each Board chose. So long

as the Board did not choose a plan through an utterly irrational process—perhaps by consulting a Ouija Board or using a divining rod—the plan would have to be upheld.

In sum, if Article XI is to have any meaning, the Court must reject Respondents' view that they may deviate from Article XI for any rational reason. *See, e.g.*, *In re: Senate Joint Resolution of Apportionment 1176*, No. SC12-1, slip op. at *22 ("It is this Court's duty. . . to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards constitutionally invalid."). There is also no basis for treating the apportionment plan like a statute, and even if there were, the proper standard of review here would be strict scrutiny. The best approach for the Court to take would therefore be to follow the lead of our and other state supreme courts and hold that once Relators make a prima facie showing that a district violates a provision of Article XI, the burden shifts to Respondents to show that the apparent violation was required by co-equal or more important parts of Article XI (or by federal law). *See, e.g.*, *In re Legislative Districting of State*, 370 Md. at 368 ("We hold that the State has failed to meet its burden to establish the constitutionality of the Plan and, in particular, that in its formulation, due regard was given to natural boundaries and the boundaries of political subdivisions."); *In re Reapportionment of Colorado General Assembly*, 45 P.3d 1237, 1249 (Colo. 2002) (requiring apportionment commission to justify division of county by "showing that less drastic alternatives could not have satisfied the equal population requirement of the Colorado Constitution"); *Voinovich*, 63 Ohio St. 3d at 200 (holding that a violation of one provision of Article XI may only be justified on a showing that the provision is "irreconcilable" with a "co-equal" provision of Article XI).

Ultimately, of course, as Relators have pointed out, the Court may not need to determine the burden of proof in this case, other than to reject Respondents' absurd view that they may violate Article XI with impunity. Relators' evidence, including Respondents' admissions of their own violations and Relators' alternative maps confirming them, meets any burden of proof. Moreover, if the Court agrees with Relators that Article XI, Section 7 includes no unwritten exemption for non-contiguous subdivisions, there is no dispute that the enacted plan is invalid

regardless of the burden of proof, for Respondents concede that they made no effort to avoid dividing such subdivisions and did so repeatedly and unnecessarily throughout Ohio. Thus, if the Court adheres to Section 7's plain language, it need not reach the burden of proof question.

C. Does tension exist among sections 3, 7 and 10 of Article XI of the Ohio Constitution, and if so, how are these sections to be harmonized?

Respondents make little effort to directly answer the Court's final question. Instead, they spend many pages providing a hodgepodge of baseless arguments in attempting to defend a map they know is unconstitutional. All of these arguments are aimed at distracting the Court from one simple fact: unlike in *Voinovich*, not a single one of the Article XI violations alleged by Relators was required to comply with another part of Article XI or federal law. This is not a situation where Respondents were forced to choose between "irreconcilable" conflicts between "coequal" provisions of Article XI. *Voinovich*, 63 Ohio St.3d at 200. Indeed, Respondents never even claim as much. Rather, as is now obvious, this is a case where Respondents violated the mandates of Article XI based on political calculation and now, confronted with indisputable proof of doing so, ask the Court to grant them "discretion" to ignore these requirements. The Constitution bars such requests. Respondents should not be allowed to strip Article XI of meaning merely to defend their own improper conduct. Our Constitution deserves better.

1. Respondents' Misrepresentations of Ohio Law

Respondents begin by asserting that only a select few provisions of Article XI are "mandatory," while the remainder are "discretionary," claiming: "The distinction can be recognized from the use of the word 'shall' in certain sections as opposed to language providing for flexibility." Resp. Supp. Br. 25. This is the very heart of Respondents' case and explains the many constitutional violations in their map: they feel that they do not have to follow the constitutional mandates of Article XI. For example, in Section 7(A), Respondents argue that the first sentence is mandatory, but the second is discretionary: "To the extent consistent with the requirements of Section 3, the boundary lines of districts shall be so drawn as to delineate an area

containing one or more whole counties." But making Section 7(A) subject to the requirements of Section 3 does not convert 7(A) from mandatory to discretionary.

Similarly, Respondents argue that Section 7(B) is entirely discretionary: "Where the requirements of section 3 of this Article cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of governmental units." Their rationale: use of the word "feasibly" turns the provision from mandatory to discretionary. This is absurd. The plain language of 7(B) provides that if a district cannot be drawn from a whole county or counties due to the population requirements of Section 3, then the district "shall be formed by combining the areas of governmental units." This is clearly mandatory, not discretionary.

Moreover, Respondents' own examples refute their self-serving definition. For example, Respondents claim that virtually all of Section 7 is "discretionary" even though that Section repeatedly uses the word "shall." *See, e.g.*, Art. XI, § 7(B). By contrast, Respondents claim that Section 10 is mandatory even though it explicitly says that it gives way to other provisions: "The standards prescribed in sections 3, 7, 8, and 9 of this Article shall govern the establishment of House of Representatives districts, which shall be created and numbered in the following order *to the extent that such order is consistent with the foregoing standards*." Art. XI, § 10 (emphasis added). Indeed, even the equal population requirement in Section 3, which Respondents call "mandatory," Resp. Supp. Br. 26, says only that "each house of representatives district shall be *substantially* equal" to the ideal population and provides an exception "in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9." Art. XI, § 3 (emphasis added).

In truth, the only reason Respondents call some provisions "discretionary" is that they know they violated them and they hope this definition will allow them to get away with it. But even a provision that allows the exercise of some discretion can be violated: A speed limit of 65 miles per hour allows you to drive 60 or 55, but not 90. Similarly, Section 7(A) requires the Board to keep counties whole "to the extent consistent with the requirements of Section 3." This

means the Board may divide counties to comply with population requirements, not that it may do so for any reason it wants. *See, e.g.*, *Twin Falls County v. Idaho Comm'n on Redistricting*, 2012 WL 130416, at *4-5 (Idaho 2012) ("In performing its duties, the commission must exercise discretion in various matters. However, . . . Article III, section 5, limits the commission's discretion. It does not give the commission unbridled discretion in deciding how many counties to divide. . . . This constitutional provision is a restriction on the commission's discretion, not a grant of discretion. The commission can certainly exercise discretion to the extent that it is not limited by the Constitution or by statute, but it does not have the discretion to exceed the limits imposed by either the Constitution or a statute.").

Respondents next describe this Court's holding in *Voinovich* and argue that in the 2012 apportionment process, the Board faced one difficulty—drawing Senate districts in northeast Ohio—that met the *Voinovich* standard of irreconcilable conflict between co-equal provisions of Article XI. Resp. Supp. Br. 27-28. What Respondents fail to mention here, but have acknowledged previously, is that Relators *do not challenge* the decision the Board made as to how to resolve that conflict. Resp. Merits Br. 1-2 (describing "violation in northeast Ohio, which Relators are not challenging"). Notably, this is the only example Respondents provide that they even claim meets the *Voinovich* standard of irreconcilable conflict between co-equal provisions of Article XI. This is with good reason, for none of the districts Relators actually challenge can be justified under this standard.

Respondents do allege that "*tensions* often exist among the provisions of Sections 3, 7, and 10" that are "similar to" those in *Voinovich*, Resp. Supp. Br. 28 (emphasis added), but the plain language of these sections refutes their argument. held "that Sections 4, 9, and 11 of Article XI are coequal," 63 Ohio St.3d at 200, but those sections are crucially different from Sections 3, 7, and 10. Unlike Sections 4, 9, and 11, Sections 3, 7, and 10 explicitly say how they interact. Section 3 establishes a nearly inviolable rule that population of districts must be between 95% and 105% of the ideal, Section 7 requires the Board to avoid splitting political subdivisions "to the extent consistent with" Section 3, and Section 10 provides the order for

creation of districts "*to the extent that such order is consistent with the foregoing standards*," including sections 3 and 7. Art. XI, §10 (emphasis added). Meanwhile, although Section 4 creates a population rule similar to Section 3's, Section 9 never explains how it interacts with other provisions, and Section 11 provides a number of inviolable rules for the creation of Senate districts, with no language like that in Section 10 saying that its rules need only be followed "to the extent . . . consistent with" any other sections. In short, Sections 3, 7, and 10 explain how they interact, while sections 4, 9, and 11 do not.

Nonetheless, Respondents claim a near limitless discretion to "address[] the [alleged] tensions" between Sections 3, 7, and 10 however they want. Resp. Supp. Br. 29. In particular, Respondents argue that "the population requirements of Section 3 must be balanced against the various formation requirements of Section 7." *Id.* In their view, the Board has complete discretion to divide political subdivisions whenever doing so would allow even the slightest reduction in population deviations between districts, e.g., the Board could split a county in half merely to reduce a district's population deviation from .03% to .02%. *Id.* That is emphatically not what Article XI says. Section 3 makes clear that the population of districts must be within 5% more or less of the "ideal" population, and Section 7 makes clear that it is only "[w]here the requirements of section 3 . . . *cannot feasibly be attained* by forming a district from a whole county or counties," or from other whole "governmental units," that a county or other governmental unit may be divided. Art. XI, §7(B)-(C) (emphasis added). In other words, the Board has no discretion to ignore county and city boundaries merely to achieve marginally more equal populations within Section 3's allowed deviation; indeed, if that were the rule, the Board could ignore county and city boundaries altogether, for it is always possible to reduce population deviation between districts at least a little bit by ignoring subdivision lines. Instead, as the plain language of Section 7 says, the rule is that a political subdivision may be divided only "[w]here the requirements of section 3 . . . *cannot feasibly be attained* by forming a district from a whole county or counties," or from other whole "governmental units." Art. XI, §7(B)-(C) (emphasis

added). Thus, the Board has no discretion to split a county or city where it could "feasibly attain" the requirements of Section 3 while keeping the county or city whole.

Respondents also repeatedly misrepresent both the plain meaning of Section 7(D) and Relators' position as to its application. Respondents claim that Section 7(D) requires the Board "to keep districts similar to the prior plan" even where those districts fall outside the population requirements of Section 3. Resp. Supp. Br. 30. But that is not what 7(D) says. As Relators have explained, Merits Reply Br. at 11-12, Section 7(D) says that if a prior district's population is "reasonably consistent with the requirements of Section 3," then the "district boundaries established by the preceding apportionment *shall be adopted.*" Art. XI, § 7(D) (emphasis added). If the district's population is not "reasonably consistent with the requirements of Section 3," then 7(D) imposes no requirement about how the district should look. It says nothing about creating districts "similar to" the prior plan. Thus, where a prior district's population falls outside Section 3's boundaries, Section 7(D) has nothing to say about how a new district is drawn to replace it.

Respondents' error is not merely semantic, for they use it to justify patent violations of Article XI. For example, Respondents concede that "the two house districts in Mahoning County"—Districts 58 and 59—"could have been drawn without dividing any governmental units," and that the prior districts in Mahoning County fell outside of Section 3's population requirements and thus had to be changed. Resp. Merits Br. 26. But they claim that Section 7(D) required them to divide Austintown Township to keep District 58 "similar to" its prior shape. *Id.*; Resp. Supp. Br. 30. This argument cannot prevail, for it would mean that any claimed effort to "sort of" comply with something Section 7(D) does not even say could justify a clear violation of the explicit terms of 7(B) and (C).

Along the same lines, Respondents admit that they violated Section 7(D) by changing the boundaries of the two Lake County House districts (new districts 60 and 61), but they claim they did so to get the populations closer to the ideal. *Id.* at 29. Reducing population deviations would be perfectly fine except that in doing so Respondents violated the plain language of Section 7(D),

which says that "district boundaries established by the preceding apportionment *shall be adopted* to the extent reasonably consistent with the requirements of section 3." There is no question that the previous Lake County districts were "reasonably consistent with the requirements of section 3"; Respondents never even claim otherwise, and they could not, for as they admit, those districts fell within the 5% deviation permitted by Section 3. Resp. Supp. Br. 29. As the *Voinovich* case admonished, the Apportionment Board cannot violate one mandate under Article XI if districts could be drawn without violating any constitutional provision. And the McDonald maps demonstrate what Respondents admit: the Lake County districts can be drawn in compliance with both Sections 3 and 7 without violating any other constitutional provision. Therefore, they must be drawn in compliance with both: the Board cannot violate one section based on its mistaken interpretation of another.

Respondents also misrepresent Relators' position as to Section 7(D), claiming that Relators believe it requires every single district that falls within Section 3's population limits to remain the same regardless of all other constitutional requirements. Resp. Supp. Br. 30. But as Relators have already explained, Merits Reply Br. at 11, it is clear that the subdivisions of Section 7 are in priority order: Section (A) requires that counties be kept intact whenever possible; when that is impossible, Section (B) says that whole governmental units must be added in a specific order; if that is impossible, Section (C) provides that only one unit may be split between districts; and finally, Section (D) requires that preexisting "district boundaries . . . be adopted to the extent reasonably consistent with the requirements of Section 3." Because (D) comes last, deviations from it may be required to comply with Sections 7(A)-(C). For example, if a prior district falls within Section 3's population requirements but also splits a county, and population changes now allow the county to be kept whole, Section 7(D) would give way to Section 7(A): it would make no sense to require maintenance of a prior district that split counties or cities if such splits were no longer necessary under current population patterns. Thus, Respondents' argument that Professor McDonald's alternative maps somehow contradict Relators' position as to Section 7(D) is simply false. Resp. Supp. Br. 30. The McDonald plans

only change prior districts that fell within Section 3's requirements where doing so was necessary to comply with Sections 7(A)-(C). That is why both McDonald plans leave 11 districts unchanged from the prior plan, while Respondents' plan leaves only 6.

Finally, in applying their view of state law to the merits of this case, Respondents make the startling claim that "nothing in Article XI . . . limit[s] the number of counties that may be divided" or "the number of governmental units that may be split." Resp. Supp. Br. 42, 43. But Sections 7(B) and (C) say explicitly that political subdivision may be divided only "[w]here the requirements of section 3 . . . *cannot feasibly be attained* by forming a district from a whole county or counties," or from other whole "governmental units." Art. XI, §7(B)-(C) (emphasis added). Thus, while Section 7 may not state a specific number of counties or cities that may be split—that will vary from one apportionment cycle to the next based on population patterns—it quite clearly limits the number of counties and subdivisions that can be divided to those that must be divided to satisfy Section 3. Thus, Respondents are simply wrong to say that "Relators merely take issue with when and where the 2012 Plan divided counties" and cities. Resp. Supp. Br. 43. In fact, Relators' position, which is confirmed by Respondents' own admissions, LPL Aff. 828, and the alternative plans prepared by Professor McDonald, is that Respondents split far more counties and political subdivisions than they needed to in order to comply with other parts of Article XI or federal law, and thus that Respondents violated Article XI. *See, e.g.*, *Twin Falls*, 2012 WL 130416, at *3 ("If one plan that complies with the Federal Constitution divides eight counties and another that also complies divides nine counties, then the extent that counties must be divided in order to comply with the Federal Constitution is only eight counties. It could not be said that dividing one more county was necessary to comply with the Constitution."); *Holt v. 2011 Legislative Reapportionment Comm'n*, 2012 WL 375298, at *35 (Pa. Feb. 3, 2012) (striking down apportionment plan because alternative "plan shows that a redistricting map could readily be fashioned which maintained a roughly equivalent level of population deviation . . . while employing significantly fewer political subdivision splits").

2. Respondents Misunderstand or Misrepresent Federal Law

Finding little solace in Article XI, Respondents—for the first time in this case—also seek to justify their map by arguing that federal law imposes a higher standard for population equality than does Article XI, Section 3. Resp. Supp. Br. 31. But this contention cannot withstand scrutiny. It is true that in drawing congressional districts, the Supreme Court has held that Article I, Section 2 of the U.S. Constitution requires states to "make a good-faith effort to achieve precise mathematical equality." *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). In drawing *state legislative* districts, however, the Supreme Court has made clear that "deviations from population equality" of up to 10%—such as those contemplated in Section 3—are presumptively allowed "to permit the States to pursue . . . legitimate objectives such as maintaining the integrity of various political subdivisions," i.e., the very goals contained in Section 7. *Brown v. Thomson*, 462 U.S. 835, 842 (1983).[2] Indeed, in *Voinovich v. Quilter*, 507 U.S. 146 (1993), the Supreme Court specifically held that Ohio's constitutional "policy of preserving the boundaries of political subdivisions" could justify deviations even greater than 10%. *Id.* at 161. Shockingly, despite their extensive discussion of the interaction between federal and Ohio rules on population equality, Respondents never once cite this case. Whether they are unaware of it or simply hoping the Court misses it, the result is the same: Respondents simply have the law wrong.

Respondents cite *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), for the proposition that there is no "safe harbor" of acceptable population deviations for state legislative districts. But this is an oversimplification, and *Larios* is perfectly consistent with the Supreme Court cases cited above holding that "deviations from population equality" of up to 10% are *presumptively* allowed "to permit the States to pursue . . . *legitimate* objectives such as maintaining the integrity of various political subdivisions." *Brown*, 462 U.S. at 842 (emphasis

[2] *See also, e.g.*, National Conference of State Legislatures, *Redistricting Law 2010* at 28-55 (2009), *available at* http://www.sos.state.oh.us/sos/upload/reshape/RedistrictingLaw2010.pdf; *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836, 840 (Tenn. 1983) (rejecting redistricting plan that divided county lines in order to reduce population deviations beyond what was constitutionally required because "[a] state constitutional mandate that county boundaries be preserved in reapportioning the Legislature has been recognized by the United States Supreme Court as a legitimate, rational state policy that will justify deviations from population equality").

added). The *Larios* Court acknowledged this presumption, but found that the plaintiffs had overcome the presumption by showing that the population deviations in Georgia's legislative plan—9.98%—"were not driven by any traditional redistricting criteria such as compactness, contiguity, *and preserving county lines*," but rather were adopted solely to protect Republican incumbents and certain regions of the state. *Larios*, 300 F. Supp. 2d at 1342 (emphasis added).

Thus, rather than helping Respondents, the *Larios* case actually puts them in a real bind. If their decisions were motivated by "legitimate objectives such as maintaining the integrity of various political subdivisions," then deviations of up to 10% are presumptively fine, and they had no basis to violate Section 7 to reduce deviations further. *Brown*, 462 U.S. at 842. But to eliminate the 10% presumption, Respondents must admit that population deviations in their plan were driven by illegitimate objectives, such as protecting their favored incumbents (Respondents essentially make such an admission, Resp. Supp. Br. 41). And if that is the case, not only is there no 10% safe harbor under federal law, but there is no safe harbor at all. *Larios*, 300 F. Supp. 2d at 1342. In other words, to prove that they were required by federal law to achieve smaller population deviations, Respondents must admit that they were creating deviations for improper reasons, which would automatically invalidate those deviations. Thus, under *Larios*, Respondents' plan either violates Section 7 by unnecessarily dividing cities and counties, or it violates federal law by creating population deviations for improper partisan purposes.

In short, federal law provides no defense whatsoever for the Article XI violations Relators allege here. For example, Respondents cite federal law in attempting to justify their division of the city of Mentor between districts 60 and 61. Resp. Supp. Br. 32. They admit that the City did not need to be divided to comply with Section 3, but they claim that the City "was divided to make [districts 60 and 61] more substantially equal." *Id.* There are three fundamental problems with this argument, however. First, as already explained, federal law required no further reduction in population deviation where the existing deviation was based on the "legitimate objective" of "maintaining the integrity of various political subdivisions." Brown, 462 U.S. at 842. Second, under Section 7(C), a political subdivision may be divided only

"[w]here the requirements of section 3 of this Article cannot feasibly be attained by combining" whole governmental units, Art. XI, § 7(C) and here it was plainly feasible to comply with Section 3 without splitting Mentor, as Professor McDonald's alternative maps show. And third, even if Respondents' justification for splitting Mentor were not so legally flawed, it also makes no sense as a factual matter, for they could have created districts of even more equal population without splitting any political subdivisions.

More generally, even if the state or federal Constitution required mathematical equality for state legislative districts, the map adopted by Respondents still could not be upheld. Both McDonald plans have lower levels of average population deviation (2.85% and 2.90%) than the adopted plan (3.05%), while dividing far fewer governmental units (99 and 95 vs. 256).

Ultimately, nothing in federal law required or justified Respondents' violations of Article XI, and Respondents cannot use nonexistent federal rules to disregard our Constitution.

3. Respondents Propose a Radical New Approach to Article XI

Respondents quote extensively from *Voinovich*, Resp. Supp. Br. 33-34, but they never even pretend to apply its actual test to the districts Relators challenge, as they know their plan cannot survive under the *Voinovich* standard. Indeed, Respondents never recognize that unlike in *Voinovich*, the provisions of Article XI at issue in this case—Section 3, 7, and 10—are not irreconcilable and in fact are reconciled by their own terms.

Instead of applying or even acknowledging existing law, Respondents propose a new and deeply troubling standard, arguing that this Court must uphold any "departure from the provisions of Article XI" supported by any "rational basis," even if the departure is from explicit constitutional text that even *Respondents* admit is "mandatory." *Id.* at 34. Such a rule would render Article XI little more than empty words on a page. Such a reading of our state Constitution should be firmly rejected: "to interpret this constitutional provision as to subjugate it or any of its component constitutional requirements to lesser principles and non-constitutional considerations or factors would be to amend the constitution without the involvement of the most

critical players: the State's citizens. This we cannot, and are not willing, to do." *In re Legislative Districting of State*, 370 Md. at 373.

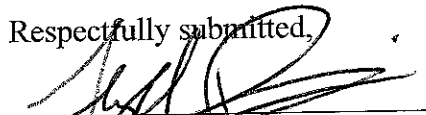
Respondents also propose a radical view of the Court's role, one that renders the Court impotent. Respondents claim that when it comes to Article XI, it is they, not this Court, who have the power to "interpret its terms." Resp. Supp. Br. 35. Not only is that view contrary to Article XI, Section 13, but "as is universally recognized, it is the exclusive province of the judiciary to interpret terms in a constitution and to define those terms." *In re: Senate Joint Resolution of Apportionment 1176*, No. SC12-1, slip op. at *76 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("[I]t is emphatically the province and duty of the judicial department to say what the law is.")). As courts across the country recognize, if courts do not enforce constitutional provisions aimed at ensuring fair apportionment, the people's right to vote in constitutional districts will be denied, and that is an unacceptable result. *See, e.g.*, *id.* at *22 ("It is this Court's duty . . . to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards constitutionally invalid."); *Twin Falls County*, 2012 WL 130416, at *5 ("[T]his Court must observe its imperative duty fearlessly to interpret the law as made, and never permit, if it be in our power to prevent, any infraction of the Constitution which we are sworn to uphold, support and maintain.").

III. CONCLUSION

Respondents conclude by arguing that "Relators' subjective view that the McDonald plans are superior to the one adopted by the Apportionment Board is not relevant." Resp. Supp. Br. 44. Relators could not agree more. What matters here is not anyone's subjective views, but rather whether the apportionment plan adopted by Respondents complies with Article XI. Unfortunately, in adopting that plan, Respondents decided that their own subjective views—pursuing the "rational" goals of partisan interests and incumbent protection—could override Article XI's explicit, objective, and mandatory terms. That is not how a Constitution works. Neither Relators nor Respondents get to choose a plan just because they like it better. The

Constitution dictates whether a plan is valid, and that determination is up to this Court. The constitutional rights of every Ohioan hang in the balance.

Respectfully submitted,



Lloyd Pierre-Louis (Bar # 0068086)
Wesp, Barwell & Pierre-Louis, LLC
6400 Riverside Drive, Suite D
Dublin, OH 43017
Phone: (614) 341-7576 ext. 4
Fax: (614) 388-5693
lpl@wesplaw.com

and

Dennis E. Murray, Jr. (Bar # 0038509)
Murray & Murray Co., L.P.A.
111 East Shoreline Drive
Sandusky, OH 44870-2517
Phone: (419) 624-3000
Fax: (419) 624-0707
DMJ@murrayandmurray.com

Counsel for Relators

CERTIFICATE OF SERVICE

A copy of the foregoing reply brief was served via e-mail this 30th day of March, 2012 upon the following:

Richard N. Coglianese
Michael J. Schuler
Erin Butcher Lyden
Assistant Attorneys General
Constitutional Offices
30 East Broad Street, 16th floor
Columbus, Ohio 43215
614-466-2872
Richard.coglianese@ohioattorneygeneral.gov
Michael.schuler@ohioattorneygeneral.gov
Erin.butcher@ohioattorneygeneral.gov

Counsel for Respondent Husted

John H. Burtch
E. Mark Braden
Robert J. Tucker
Baker & Hostetler, LLC
65 E. State Street, Suite 2100
Columbus, Ohio 43215
614-228-1541
jburtch@bakerlaw.com
ebraden@bakerlaw.com
rtucker@bakerlaw.com

Special Counsel for Respondents Kasich, Niehaus and Yost, and for Raymond DiRossi and Heather Mann

Jeannine R. Lesperance (0085765)
Renata Staff (0086922)
Assistant Attorneys Generals
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
(614) 466-2872
(614) 728-7592 (fax)
jeannine.lesperance@ohioattorneygeneral.gov
renata.staff@ohioattorneygeneral.gov

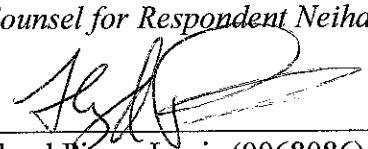
Counsel for Respondent Yost

Pearl M. Chin
Assistant Attorneys General
Constitutional Offices
30 East Broad Street, 16th floor
Columbus, Ohio 43215
614-466-2872
Aaron.epstein@ohioattorneygeneral.gov
Pearl.chin@ohioattorneygeneral.gov

Counsel for Respondent Kasich

Jeannine R. Lesperance (0085765)
Renata Staff (0086922)
Assistant Attorneys Generals
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
(614) 466-2872
(614) 728-7592 (fax)
jeannine.lesperance@ohioattorneygeneral.gov
renata.staff@ohioattorneygeneral.gov

Counsel for Respondent Neihaus



Lloyd Pierre-Louis (0068086)
Counsel for Relators