IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. CITIZENS NOT POLITICIANS, ET AL.,	:	**Case No. 2024-1200**
Relators,	:	
v.	:	**Original Action in Mandamus**
OHIO BALLOT BOARD, ET AL.,	:	**Expedited Elections Case**
Respondents.	:	

BRIEF OF AMICI CURIAE LEADERS OF THE OHIO HOUSE MINORITY CAUCUS AND THE OHIO SENATE MINORITY CAUCUS IN SUPPORT OF RELATORS

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INTRODUCTION

The message sent by the Secretary of State and the Republican members of our State Ballot Board ("Board") to the millions of Ohio voters who will decide whether they want a citizen-led redistricting commission this fall is this:

If we can't win fairly, we cheat. If our messaging isn't enough to win, we lie.

These politicians have rigged the system to put forward a misleading and dishonest ballot summary of the Citizens Not Politicians ("CNP") proposed constitutional amendment. Ironically, it was a desire to put an end to that type of self-serving behavior that led hundreds of thousands of Ohioans to work tirelessly to get an independent redistricting proposal on the ballot. We, the amici, refuse to stand idly by and watch the Republican members of the Board make a mockery of Ohio's citizen-led ballot initiative process.

Before this Court is a clear choice: recognize the distortion and deception and remedy the misleading ballot language so that it accurately reflects the language of the ballot initiative, or rubber stamp a perverse and corrupt political hit job from a body that is supposed to act with integrity to uphold our laws, defend our Constitution, and ensure that Ohioans have a fair opportunity to make their voice heard at the ballot box. The path to arriving at this particular ballot language has been fraught with backroom meetings, political agendas, and a stunning lack of transparency. Ohioans deserve more from their elected officials. This Court has an opportunity to protect the integrity of this election and to ensure that voters are not misled before casting their vote on a proposed constitutional amendment that would end gerrymandering in Ohio.

STATEMENT OF INTEREST OF AMICI CURIAE

The proposed amici, Leaders of the Ohio Senate Minority Caucus and the Ohio House Minority Caucus,[1] file this brief of amici curiae in opposition to the Respondent Board's merit brief. Amici are elected leaders of political caucuses that represent millions of Ohioans living within seven of Ohio's thirty-three Senate districts and thirty-two of Ohio's ninety-nine House districts. The Ohio Senate Minority Caucus and the Ohio House Minority Caucus have two members who sit on the Board and witnessed the actions taken by the Board majority. Amici and their constituents are residents and voters of Ohio and therefore have a substantial interest in the proper oversight of the Board's presentation of statewide ballot initiatives that may potentially change the Constitution of the State of Ohio. Amici file this brief to present an alternative view from that of the Board's majority members.

Amici support the Relators' argument that the actions of the Board are unlawful and represent a marked divergence from its bipartisan and ministerial role. Indeed, after the Board's similar failure to follow the law in the lead up to last year's elections,[2] amici are particularly interested in deterring a continuing pattern of such misconduct, which can only be done by this honorable Court. It is through filing this brief that amici offer the Court a view of the dishonest and disingenuous Ballot Board process.

STATEMENT OF FACTS

On August 2nd, the Ohio Secretary of State announced a meeting of the Ohio Ballot Board to "prescribe and certify ballot language" for the 'Citizens Not Politicians' proposed constitutional amendment. Caucus counsel for board member Senator Hicks-Hudson immediately requested that the Secretary of State's office submit language when it was drafted.

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[1] State Representative Beryl Piccolantonio has been designated lead Pro Se representative.
[2] *State ex rel. Ohioans United for Reproductive Rights v. Ohio Ballot Bd.*, 2023-Ohio-3325.

The following week, on August 7th, having received no draft language, Senator Hicks-Hudson's office spoke on the phone with the Secretary of State's Director of Legislative Affairs. During this call, the Senator's office expressed the need to review ballot language as far in advance as possible prior to the meeting. The Director said that the Secretary of the Ballot Board was working on a draft. Shortly after the call, Senator Hicks-Hudson's office followed up with the Secretary of State by email, reiterating the Senator's request for the disclosure of draft ballot language. Within the hour, the Director replied that there was no proposed language to share, seemingly contradicting the information he provided in the earlier phone call.

On August 9th, with a week to go before the Ballot Board meeting, Senator Hicks-Hudson sent a letter to Secretary LaRose, urging him to distribute any proposed ballot language or "in the absence of submitted language, any preliminary drafts that [the Secretary of State's] staff have created or received." No reply was ever received.

On behalf of board member Representative Upchurch, the House Minority Chief of Staff also requested language from the Secretary of State on August 9th. Four days later, on August 13th, a representative from the Secretary of State's office replied that "[the Secretary of State] has not circulated draft language yet but will do so prior to the meeting." There was no offer to discuss the matter with Representative Upchurch and no specific time indicating when he would receive the language.

On Wednesday, August 14th, at 1:25 PM, counsel for the Citizens Not Politicians ballot committee distributed its summary language proposal to the Ballot Board members. The Secretary of State waited to distribute his drafted language until 11:01 AM on Thursday, August 15th, just under 24 hours before the Ballot Board was scheduled to meet. Neither Senator Hicks-Hudson nor Representative Upchurch were afforded an opportunity to meet with the Secretary of

State's office to review or discuss the language. No input from Senator Hicks-Hudson or Representative Upchurch was sought or accepted. Both members were stunned by the partisan and deceitful language proposed.

The next day, Friday, August 16th, at 11:00 AM, the Ballot Board met to discuss ballot language for the Citizens Not Politicians ballot initiative. With respect to the details of the Board's proceedings, amici adopt by reference Section 3 of the Relators' Statement of Facts, Relators' Br. at 9–13, as well as the Board's transcript. Relators' Complaint, Exhibit L.

After the completion of the Ballot Board meeting, but on the same day as the meeting, Senator Hicks-Hudson and Representative Upchurch sent a public records request to the Secretary of State asking for records that would show how the language was developed, who was involved in its crafting, and what arguments of the Relators' were considered (and how) during the process. The records request also asked for information regarding the Secretary of State's involvement and knowledge of "Ohio Works," an organization the Secretary of State recommended during the Ballot Board meeting to draft an argument against the ballot amendment. Ohio Works has filed an amicus brief in this case. To date, none of this information has been provided to either of the members or their respective caucuses.

Upon learning of the filing of the Complaint in this matter, Senator Hicks-Hudson and Representative Upchurch made a request to the Ohio Attorney General for the appointment of outside counsel to represent them in this matter, stating that they believed their interests are substantially different from those of the Ohio Secretary of State and the Ballot Board members representing the Majority caucuses. This request was denied. In addition, an Answer has been filed by the Ohio Attorney General for the Ballot Board members, including named parties Senator Hicks-Hudson and Representative Upchurch. Neither Senator Hicks-Hudson nor

Representative Upchurch were consulted or afforded an opportunity to provide input into that response.

ARGUMENT

I. Accurate ballot language is critical to ensure that state election results reflect the will of the People.

Citizen-initiated constitutional amendments have been an important and critical element of a state's democratic government to provide the people with the direct power to effectuate change even—perhaps especially—when their elected representatives refuse to. Misleading ballot language prevents the public from understanding the consequences of their vote and inhibits their ability to vote in accordance with their preferences.[3] This in turn leads to election results that are not "a true reflection of the electorate's desires."[4] According to The National Conference of State Legislatures, "[t]he ballot title and summary are arguably the most important part of an initiative in terms of voter education. Most voters never read more than the title and summary of the text of initiative proposals. Therefore, it is of critical importance that titles and summaries be concise, accurate and impartial."[5]

In an online experiment published in the Social Science Quarterly in 2021, 502 adults eligible to vote in the U.S. read hypothetical ballot measures and then indicated whether they would support them.[6] The study found that people were almost twice as likely to back a hypothetical tax increase to fund education when it was described as an additional "one cent per

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[3] Binder, Mike, *Getting it Right or Playing it Safe? Correct Voting, Confusion and the Status Quo Bias in Direct Democracy* (September 1, 2009) available at https://ssrn.com/abstract=1465780; Reilly, Shauna & Richey, Sean, *Ballot Question Readability and Roll-Off: The Impact of Language Complexity*, POL. RSCH. Q. 62 (2009).
[4] *Binder*, supra note 3 at 23.
[5] https://ballotpedia.org/Ballot_title (last visited Sept. 5, 2024).
[6] Ordway, Denise-Marie, *Ballot measures: Research on how ballot format, wording and news coverage affect voters* (Sept. 22, 2023), The Journalist's Resource https://journalistsresource.org/politics-and-government/ballot-measures-election-research/ (last visited Sept. 5, 2024).

dollar," compared to when it was described as "a 22 percent increase." *Id.* The results demonstrate that the way ballot measures are worded and framed can affect how voters respond to them. As such, it is of the utmost importance that "[...] state institutions that are responsible for writing ballot questions, as well as the courts that hear challenges thereto, must remain mindful of the potential for nefarious manipulation of the process." *Id.*

Ohio is not alone in reviewing proposed amendment language for impartiality before the measure is presented to voters. While other states have varying processes, each state reinforces the importance of impartiality in the language that will appear on the ballot. States have different procedures to prepare title and summary for citizen initiated constitutional amendments and statutes. In some states like Ohio, a government entity determines the ballot language. In other states, the ballot title is determined by the sponsors of the measure.[7] For example, in Alaska, a ballot title and summary is drafted by the lieutenant governor and attorney general. *Id.* In the state of Florida, a ballot title is first drafted by the initiative sponsors before it must then be approved by the secretary of state and the state supreme court. *Id.* Despite the differences in how ballot titles and summaries are drafted, "deceptive ballot language" is an emerging issue that has recently been litigated in state courts throughout the country.[8] Courts around the country have found that the importance of impartiality cannot be overstated, as it goes to the heart of a representative government and encourages trust in governmental institutions. The majority's actions are contrary to this well-established practice. The majority of state courts apply sound logic and reasoning to address misleading and deceptive ballot language. Ohio should join them.

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[7] Ballotpedia, *Ballot Title*, https://ballotpedia.org/Ballot_title (last visited Sept. 5, 2024).
[8] Roth, Zachary, *Not just Ohio: Biased Language is the hot new tactic to thwart ballot measures*, Colorado Newsline (Aug. 31, 2024), https://coloradonewsline.com/2023/08/31/biased-language-ballot-measures/ (last visited Sept. 5, 2024).

The Florida Supreme Court has held that the basic purpose of its ballot drafting provision, Section 101.161(1), Florida Statutes (2007), is "to provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Advisory Op. to Att'y Gen. re Fee on Everglades Sugar Prod.*, 681 So.2d 1124, 1127 (Fla. 1996). While a ballot title and summary does not need to explain every detail or ramification of a proposed amendment, it must state in clear and unambiguous language the chief purpose of the measure. *See Carroll v. Firestone*, 497 So.2d 1204, 1206 (Fla. 1986). Furthermore, the purpose of section 101.161 is to ensure that voters are advised of the amendment's true meaning. The Florida Supreme Court evaluates a ballot title and summary, by deciding two questions, "[f]irst . . . whether the 'ballot title and summary . . . fairly inform the voter of the chief purpose of the amendment[,] [and] [s]econd . . . 'whether the language of the title and summary, as written, misleads the public.'" *Advisory Op. to Att'y Gen. re Additional Homestead Tax Exemption*, 880 So.2d 646, 651-52 (Fla. 2004) (quoting *Right to Treatment & Rehab.*, 818 So.2d 491, 497 (Fla. 2002); *Advisory Op. to Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So.2d 563, 566 (Fla. 1998)). In applying this logic, the Court found that a 2007 ballot summary of a proposed amendment to Florida's Constitution to establish a 1.35 percent property tax cap was misleading and did not comply with § 101.161(1). *Advisory Opinion to the AG re: 1.35% Property Cap*, 2 So.3d 968 (Fla. 2009).

In Arkansas, the Supreme Court has established that a ballot title must be an impartial summary of the proposed amendment, and it must give voters a fair understanding of the issues presented and the scope and significance of the proposed changes in the law. *Cox v. Daniels*, 288 S.W.3d 591 (Ark. 2008) (citing *May v. Daniels*, 194 S.W.3d 771 (Ark. 2004)). Furthermore, the ballot title must be free from misleading tendencies that, whether by amplification, omission, or

fallacy, thwart a fair understanding of the issue presented. *Id.* It cannot omit material information that would give the voters serious ground for reflection. *Id.* It is required that the title be complete enough to convey an intelligible idea of the scope and import of the proposed law. *Id.* Thus, it must be intelligible, honest, and impartial so that it informs the voters with such clarity that they can cast their ballots with a fair understanding of the issues presented. *Id.* The ultimate issue is whether the voter, while inside the voting booth, is able to reach an intelligent and informed decision for or against the proposal and understands the consequences of his or her vote based on the ballot title. *Id.* In *Wilson v. Martin*, the Court struck down a ballot title of a proposed constitutional amendment purporting to limit fees and damages in medical lawsuits because it failed to define the term "non-economic damages," which the Court determined was a technical term that was not readily understood by voters. *Wilson v. Martin*, 500 S.W.3d 160 (Ark. 2016).

Pursuant to Colorado Revised Statutes § 1-40-106, the title board shall consider the public confusion that might be caused by misleading ballot titles. This statutory section further provides that the ballot titles "shall correctly and fairly express the true intent and meaning" of the initiative, and "shall unambiguously state the principle of the provision sought to be added, amended or repealed." § 1-40-106(3)(b); *see also In re Proposed Initiative for 1999-2000 # 29*, 972 P.2d 257, at 266 (Colo. 1999). The Supreme Court of Colorado has held that "Perfection is not the goal" of the Title Board's title-setting efforts. *Id.* However, the Title Board's chosen language must not mislead voters. *Id.* In *Blake v. King*, the Colorado Supreme Court assessed a proposed ballot initiative to amend the Colorado Constitution to establish standards and procedures to discharge or suspend employees. *Blake v. King* (*In re Title, Ballot Title, & Submission Clause* 2007-2008 # 62), 184 P.3d 52 (Colo. 2008). The Petitioner, a registered

elector, argued that the ballot title was misleading because it failed to express the purpose of the initiative to repeal the employment at-will doctrine; failed to express that the initiative eliminated the civil service system; failed to express that the measure eliminated the constitutional right to contract; failed to clearly express that the measure created a new just cause standard governing the suspension and discharge of all employees in Colorado; and failed to express that the measure eliminated the fundamental right of access to the courts and due process rights to challenge a mediator's final decision. *Id.* at *5. The Court rejected the Petitioner's arguments in finding that the title adequately tracked the initiative as it informed the voters that discharge or suspension was now prohibited without the establishment of just cause; it explained that an employer must provide written documentation of the basis for discharge; and it explained the process for mediation and reinstatement. The Court further held that the Title Board is not required to explain the interplay between new and existing law.

The Utah Supreme Court is required by law to presume that a ballot title prepared by legislative staff is an impartial summary. Utah Code Ann. § 20A-7-308(4)(b)(i). The Supreme Court is not permitted to change the wording of a ballot title unless it is clearly convinced by the sponsors that the ballot title is either patently false or biased, Utah Code Ann. § 20A-7-308(4)(b)(ii). It is not within the Supreme Court's statutory grant of authority to modify the ballot title simply because there may be a better or more clearly stated way of putting it. To modify the language, the Supreme Court must find that the proposed title is clearly false or clearly biased. *Snow v. Office of Legislative Research*, 167 P.3d 1051 (Utah 2007).

The above cases demonstrate a general consensus throughout the United States that the majority of voters, when called upon to vote for or against a proposed measure, will derive their information about its contents from an inspection of the ballot title and summary. *Wilson v.*

Martin, 500 S.W.3d at *7 (citing *Christian Civic Action Comm. v. McCuen*, 884 S.W.2d 605 (Ark. 1994)). Because of this, the majority of states tend to agree on two key requirements of a ballot title and summary: 1) a ballot summary must reflect the true intentions of the proposed initiative; and 2) a ballot summary must be impartial.

The State of Ohio, on paper anyway, seemingly agrees, "[ballot language] shall properly identify the substance of the proposal to be voted upon," ... "[b]allot language shall not be held invalid unless it is such as to mislead, deceive, or defraud the voters." Ohio Constitution, Article XVI, Section 1. And yet, the Ohio Ballot Board's proposed ballot language for Issue 1 is plainly crafted to twist what the Amendment proposes in a way designed to mislead voters and persuade them to vote against the Amendment.

II. The Ballot Board language, as approved, does not comply with the law.

The dictionary definition of gerrymandering is plain to all. Gerrymandering is the process of dividing voters "so as to give one political party a majority in as many districts as possible . . .." Webster's New World Dictionary, 3rd College Ed. 1988, Victoria Neufeldt EIC, p. 567. The term has been in use since the early 19th century, deriving its name from a Founding Father, former Governor of Massachusetts, and Vice President, now deceased for over 200 years.[9] The pernicious and unscrupulous concept, definition, and popular understanding of gerrymandering is nearly as old as the Republic itself.

Unfortunately, the language adopted by the Ballot Board majority seeks to turn this well-established definition of gerrymandering upon its head. The Ballot Board's inversion of the definition of gerrymandering, and by implication who is gerrymandered, runs afoul of the Ohio Constitution's requirement that the adopted ballot language not "deceive, mislead, or defraud the

[9] Britannica, *Elbridge Gerry*, The Editors of Encyclopedia. https://www.britannica.com/biography/Elbridge-Gerry (last visited Sept. 5, 2024).

voters." Ohio Constitution, Article XVI, Section 1. The majority of the Ballot Board has chosen to craft a new definition of gerrymandering positing that a citizens' redistricting commission—specifically and clearly charged with ending partisan gerrymandering and producing fair district maps that are reflective of voters' real preferences—is the gerrymander. The adopted ballot language states implausibly that the proposed amendment seeks to

> "[e]stablish a new taxpayer-funded commission of appointees required to gerrymander the boundaries of state legislative and congressional districts to favor either of the two largest political parties in the state of Ohio." Adopted Ballot Language, at ¶ 2.

The actual language of the proposed amendment clearly states that the proposed amendment to the Constitution accomplishes the literal opposite of the Ballot Board's assertion by explicitly banning

> "partisan gerrymandering and prohibit[ing] the use of redistricting plans that favor one political party and disfavor others." Proposed Amendment, Sec. 6(B).

Today, the Ohio Constitution rejects partisan gerrymandering and demands the creation of fair maps that are reflective of the state's voters and not drawn to unduly favor one party over another. Ohio Constitution, Article XI, Section 6(B); Ohio Constitution, Article XIX, Section 1. However, the Constitution left the district design choices in the hands of various politicians. Article XI, Section 1. Those politicians have chosen to bend the Constitution's anti-gerrymandering requirements beyond the breaking point, leaving voters with no choice but to seek a new direction through a citizens' redistricting commission specifically empowered to end gerrymandering and produce fair district maps. However, the Ballot Board majority approved language that misleadingly asserts the ballot initiative removes anti-gerrymandering protections altogether rather than what it actually does: establish a new system designed to take politicians out of the process and eliminate partisan gerrymanders. Adopted Ballot Language, at ¶ 1.

However, the Ballot Board majority's deliberate attempt to use the ballot language to deceive, mislead, and defraud the voters of Ohio and audaciously misconstrue the very notion of gerrymandering should not be allowed to stand. The Ballot Board chose to substitute the only acceptable definition of gerrymandering with a radical rewrite that suits the Ballot Board majority's political purpose of defeating Issue 1. The Court should reject the Board's attempt to re-define a concept as clear, concise, and commonly understood as partisan gerrymandering.

III. The Secretary of State has not been transparent in how or why this language was crafted, which undermines the integrity of the Ballot Board's language.

The Secretary of State has stonewalled the Minority members of the Ballot Board, and the public, from obtaining information about who was involved in the drafting of the language and the basis for the language. Shortly after the Ballot Board meeting, on August 16th, the Senate and House Minority Caucuses requested information from the Ballot Board and Secretary of State. These legislators did this because they had questions around how this language became so egregiously misleading and who was working with the Secretary of State to compose it. To date, nearly three weeks later, the requests remain unanswered.

Ballot Board members from the Minority caucuses have also been denied information during the course of this specific litigation, despite the fact that these Democratic members sit on the Ballot Board and are *named Respondents* in this case. Both Senator Hicks-Hudson and Representative Upchurch requested an outside counsel assignment from the Attorney General because they believed that their interests would not be adequately represented by the Attorney General who would also be representing the Secretary of State and the Ballot Board members that represent the Majority caucuses of the House and Senate. That request was denied by the Attorney General's office who told the two named parties in this litigation that they would be

represented by the Attorney General. Yet the Attorney General, without their input, consultation, and even their knowledge, filed an Answer, purportedly on their behalf as named Respondents. This prompted the Senate and House Minority Caucuses to write the Attorney General and reiterate their request for outside counsel. If the Attorney General plans to represent them in Court, all members of the Ballot Board should at least be provided information and included in conversations about the content, strategy, and filings in the matter. To date, no such information or involvement has been provided by the Attorney General to the Minority caucus members of the Ballot Board.

The undersigned are unclear who has been assisting the Secretary of State in the crafting of this egregious language. We believe that transparency is key to any democracy, and that the intentional actions to deny information to sitting members of the Ohio Ballot Board and their caucuses is detrimental to public trust in the Ballot Board's approved ballot language. A writ of mandamus that supports a recrafting of the existing, flawed language and ballot title, with guidance from the Court regarding the necessary corrections, would provide the Secretary of State a necessary second chance to ensure transparency and restore public trust in the Ballot Board's process and the language it produces.

IV. A writ of mandamus, directing the Secretary of State to reconvene the Ballot Board and issue lawful ballot language, is necessary to preserve Ohio's citizen-led ballot issue process.

A writ of mandamus is appropriately issued when the relators establish 1) a clear legal right to the requested relief, 2) a clear legal duty on the part of the respondent official or governmental unit to provide it, and 3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Manley v. Walsh*, 2014-Ohio-4563 at ¶ 18. In this case, the Secretary of

State and the majority members of the Ballot Board have willfully and intentionally disregarded clear instruction from the Ohio Constitution and Ohio Revised Code regarding their obligations as Ballot Board members. They have failed to issue legally sound ballot language and have refused all attempts by the Minority Caucus members on the Ballot Board and the ballot committee itself to bring the language into compliance.

The problematic conduct, however, is symptomatic of a larger, more pronounced issue: the audacity of the Secretary of State and supporting statewide elected officeholders and legislative appointees to the Ballot Board to turn what should be a fair, honest, ministerial process into a blatant political power play. It is clear from the language that the intent of Ohio Const. Article XVI, Section 1 was to create a non-partisan, non-political, honest, and transparent process for the adoption of ballot language. To allow the Ballot Board's language to stand, as is, would irreparably harm ballot initiatives moving forward and would undermine the constitutional provisions that clearly set forth the process and guardrails for the development of ballot language.

The cloak of darkness that has surrounded this ballot language, including how it came to be and how and why it is being defended, merits this Court's concern and action. Without this Court's intervention, 1) Relators are left with no remedy, 2) the voice of two members of the State's Ballot Board–elected representatives–will have been improperly blocked from meaningful participation and consideration, and 3) the State will have undercut hundreds of thousands of Ohioans who collected signatures on a fully and accurately described ballot proposal in order to deceitfully putting forward language that can influence the millions of Ohioans who will be considering and voting this November.

CONCLUSION

Amici curiae respectfully ask this Court to find in favor of Relators, following precedent set regarding similar provisions in other state constitutions and statutes, and require the Ballot Board to produce language that is both accurate and honest. To accomplish this, the Court should issue a peremptory writ of mandamus directing the Secretary of State to reconvene the Ballot Board and adopt language that complies with the requirement that ballot language not "mislead, deceive, or defraud the voters." *State ex rel. Voters First v. Ohio Ballot Bd.*, 2012-Ohio-4149 at ¶ 26 (quoting Ohio Const., art. XVI, Section 1). It also means adopting language as Relators have proposed to the Ballot Board, or at the very minimum, incorporating the suggestions made through Relators' filings in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2024, the foregoing was filed electronically using the Court's electronic filing system. I further certify that the foregoing was served by electronic mail on the following:

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