

**IN THE SUPREME COURT OF OHIO**

**David Ayers,**

**Plaintiff-Appellant,**

**v.**

**The City of Cleveland, Joseph Scott and  
David M. Leneghan,**

**Defendants-Appellees.**

Case No. 2018-0852

ON APPEAL from the Court of Appeals for  
the Eighth Appellate District of Ohio

Court of Appeals Case No. 16 CA 105074

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**BRIEF OF OHIO LAW PROFESSORS**

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## **STATEMENT OF INTEREST**

Amici Curiae are professors of law at Ohio law schools. They teach, publish books and articles, and lecture on topics concerning legal ethics. Their expertise can aid the Court in the resolution of this case. Their employment and titles are listed for identification purposes only.

- **Avidan Y. Cover** is a Professor of Law at Case Western Reserve University School of Law, where he teaches in the Civil Rights and Human Rights Clinic, directs the School of Law's Institute for Global Security Law and Policy, and has taught courses in legal professional responsibility and constitutional law. His scholarship, which addresses legal ethics and government misconduct, appears in prominent publications such as the Georgetown Journal of legal Ethics.
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- **Rachel J. Smith** is a Professor of Practice at the University of Cincinnati College of Law. She teaches professional responsibility, legal writing, and advocacy. Professor Smith has an undergraduate degree in geology from Barnard College, and, simultaneously, a master's degree in environmental science and a J.D. from Indiana University. She clerked for the Honorable Wade Brorby, U.S. Court of Appeals for the Tenth Circuit. Before joining the College of Law, Professor Smith practiced at Dinsmore & Shohl where she focused on environmental law

and pharmaceutical products liability. She had previously served as a Senior Assistant Attorney General in the office of the Wyoming Attorney General

Each of the amicus curiae identified above are acting in their individual capacities and not at the direction or on behalf of the universities and law schools with which they are affiliated.

Neither Amici Curiae nor their counsel of record have any financial interest in this matter. Counsel of record for Amici Curiae are providing their services *pro bono*.



## **INTRODUCTION**

The record in this case amply demonstrates that the interests of Detective Denise Kovach (“Kovach”) and the City of Cleveland (“Cleveland”) diverged no later than entry of the \$13 million judgment against Kovach in favor of Appellant David Ayers (“Ayers”). Upon entry of the judgment, Kovach could have pursued indemnification from Cleveland. Instead, a Cleveland in-house attorney, Joseph Scott (“Scott”), and a bankruptcy attorney hired by Cleveland, David Leneghan (“Leneghan”), advised Kovach to file for bankruptcy protection in order to extinguish her liability for the Ayers judgment, and with it, Cleveland would argue below, its own liability as indemnitor under R.C. 2744.07(A)(2).

Cleveland’s bankruptcy scheme violated the Ohio Rules of Professional Conduct. Scott and Leneghan failed to disclose to Kovach that they had conflicts of interest arising from the Ayers judgment and her rights of indemnification against Cleveland. Properly advised by independent counsel, Cleveland could not have manipulated Kovach into an unnecessary bankruptcy filing. Rather, independent counsel would have demanded and obtained indemnification from Cleveland to satisfy the judgment and protect Kovach’s financial well-being. In the process, Ayers would have obtained justice for a wrongful conviction and for the 11-year deprivation of his liberty. Amici respectfully submit that Cleveland should not be permitted to evade justice through the unethical conduct of its lawyers.

## **STATEMENT OF THE CASE AND FACTS**

Amici Curiae adopt the Statement of the Case and Facts found in the brief on the merits filed by Plaintiff-Appellant.

## ARGUMENT

### **Proposition of Law: Municipalities May Not Suborn Unethical Conduct in Order to Evade Their Mandatory Indemnity Obligations Under R.C. 2744.07(A)(2)**

#### **I. Loyalty and Independent Judgment Lie at the Heart of the Legal Profession**

“The principles of loyalty and independent judgment are fundamental to the attorney-client relationship.” Prof.Cond.R. 1.7, Comment 1; *see also Columbus Bar Assn. v. Ross*, 107 Ohio St.3d 354, 2006-Ohio-5, 839 N.E.2d 918, ¶ 29 (“[A] lawyer's duty to provide undivided loyalty to a client is paramount \* \* \* .”); *Disciplinary Counsel v. Jacobs*, 109 Ohio St.3d 252, 2005-Ohio-2395, 846 N.E.2d 1260, ¶ 8 (“Lawyers must avoid all actual and potential conflicts of interest so as not to dilute their independent loyalty to each client.”). There is perhaps no greater obligation on a practicing attorney than to maintain independence, avoid conflicting interests, and advocate faithfully on behalf of her client.

Failure by members of the legal profession to maintain independent judgment erodes public trust in the judicial process and threatens the legitimacy of the legal system as a whole. Trust is an indispensable element of legal practice: “[a] client must have the utmost confidence in his or her attorney if the client is to feel free to divulge all matters related to the case to his or her attorney.” *Kala v. Alum. Smelting & Ref. Co.*, 81 Ohio St.3d 1, 4, 688 N.E.2d 258 (1998). Conflicts of interest that undermine trust in turn undermine faith in the entire judicial system. The consequences are severe. *See United States Courts, Code of Conduct for United States Judges*, Canon 1 (Mar. 20, 2014) (“An independent and honorable judiciary is indispensable to justice in our society.”).

In addition to public-policy considerations, strong moral principles justify the fiduciary duty of loyalty: “it is not only legally but also morally right that a lawyer adopt as his dominant purpose the furthering of his client's interest.” Charles Fried, *The Lawyer as Friend: The Moral*

*Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060, 1066 (1976). Our nation is founded on the moral bedrock of equal opportunity. Every individual has a right to loyal counsel, and it is the legal profession's mandate to provide it.

Compliance with the duty of loyalty is an essential element of a well-functioning judiciary. Attorneys are morally and legally obligated to observe it. Courts should be wary of statutory interpretations that incentivize violations of a lawyer's "paramount" duty. *See Columbus Bar Assn. v. Ross*, 107 Ohio St.3d 354, 2005-Ohio-0750, 839 N.E.2d 918, ¶ 29. The General Assembly, after all, expressly cautions against unjust or unreasonable interpretations of its laws. *See* R.C. 1.47(C) ("In enacting a statute, it is presumed that \* \* \* [a] just and reasonable result is intended.").

## **II. Conflict-of-Interest Rules Prohibit Lawyers from Benefitting One Client at Another Client's Expense**

Ohio Rule 1.7 provides, in its entirety, as follows:

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

- (1) the representation of that client will be directly adverse to another current client;
- (2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

(b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:

- (1) the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) each affected client gives *informed consent, confirmed in writing*;
- (3) the representation is not precluded by division (c) of this rule.

(c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:

(1) the representation is prohibited by law;

(2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

(Emphasis sic.) Prof.Cond.R. 1.7.

In March 2012, Cleveland appointed in-house attorney, Joseph Scott, to represent Kovach and her co-defendant, Cleveland, as defendants in the lawsuit filed by Ayers. Following the Ayers judgment, Scott continued to represent Kovach, despite the fact that her interests were directly at odds with those of his other client, Cleveland. Exh. G to Plaintiff's Mtn. to Compel, Docket in *Ayers v. City of Cleveland*, No. CV-15-846683 (C.P.), at p. 13-14, Nos. 2. Under Rule 1.7(b), Scott was required to disclose his potential conflict to Kovach and obtain her informed written consent before he could represent her in connection with Leneghan's employment as bankruptcy counsel. Specifically, Scott was required to disclose to Kovach that he was Cleveland's Chief Assistant Director of Law for General Litigation, Exh. G, at p. 13, No. 13; that in such capacity, he was responsible for approving and rejecting claims for indemnification, *id.*; that her interest in seeking indemnification and Cleveland's interest in opposing indemnification created a conflict of interest for him as counsel to both parties, *see* Prof.Cond.R. 1.7(b)(2); and that in light of her potential claim against Cleveland arising from the Ayers judgment, he could not represent her in evaluating bankruptcy strategies or hiring bankruptcy counsel without her informed written consent. The record, however, contains no evidence that such disclosures were ever made to Kovach, let alone that she consented in writing to Scott's conflicted representation relative to Leneghan's employment and the bankruptcy plan. *See* Trial Docket 66, at 12 ("Defendants do not have any \* \* \* conflict of interest waivers.").

To the contrary, without disclosing his conflicts of interest to Kovach and obtaining her informed consent in writing, Scott engaged Leneghan on behalf of Kovach for the limited purpose of seeking bankruptcy protection. Exh. C, pp. 28-29, Nos. 12-18. In fact, Scott was the only person to discuss the engagement letter with Leneghan. *Id.* Under these circumstances, Scott’s representation of Kovach in connection with the Leneghan engagement violated Ohio Rule 1.7(b) because she did not consent to it, in writing, upon full disclosure of his conflicts of interest. *See* Trial Docket 66, at 12 (“Defendants do not have any \* \* \* conflict of interest waivers.”).

Leneghan’s representation of Kovach in connection with her bankruptcy proceedings was equally flawed. Cleveland’s engagement letter with Leneghan provided for the joint representation of both the City and Kovach in connection with personal, individual bankruptcy proceedings. Exh. U, at p. 2, Article I.A (“The City engages [Leneghan] \* \* \* and [Leneghan] agrees to render and perform legal services *for the City* by way of representation of [Kovach] \* \* \* in preparation, trial, and any appeal(s) of personal, individual bankruptcy proceedings.”) (emphasis added). But Leneghan’s representation was beset by conflicts of interest under Rule 1.7(a)(2) because the joint representation created a “substantial risk” that his ability to “consider, recommend, or carry out an appropriate course of action” for Kovach would be “materially limited by [his] responsibilities” to Cleveland. *See* Prof.Cond.R. 1.7(a)(2). On the one hand, Leneghan, as Kovach’s bankruptcy counsel, was duty-bound to consider the pros and cons of a bankruptcy filing and to advise Kovach accordingly. That advice should have included independent analysis of Kovach’s indemnity rights and whether it militated in favor of or against any bankruptcy filing. Cleveland, however, prohibited Leneghan from performing any analysis whatsoever. *See*, Exh. U, at p. 2 (“Associated Counsel shall not begin research on any

legal issue having to do with municipal law without prior authorization from the Director.”). On the other hand, Leneghan, as Cleveland’s counsel, was duty-bound to attempt to protect Cleveland from liability as Kovach’s indemnitor. Filing a bankruptcy petition for Kovach would serve Cleveland's interests, but the Rules of Professional Conduct do not allow an attorney to serve one client's interests at the expense of another client. Such clear conflict put Leneghan on the horns of a dilemma that he could resolve only by rejecting the proposed engagement.

Instead, Leneghan accepted it. *See* Exh. U. He did so even though the engagement letter made clear that he was not being retained to evaluate all available legal strategies for avoiding Kovach’s personal bankruptcy. Instead, he was being hired only *to file* personal, individual bankruptcy proceedings. *Id.* at p. 2, Article I.A. Under the contract, Leneghan was required to render all “services necessary and appropriate to individual bankruptcy proceedings for Detective Denise Kovach \* \* \*.” *Id.* Furthermore, Leneghan’s contract expressly prohibited him from beginning research on any legal issue having to do with municipal law without prior authorization from Cleveland’s Director of Law. *Id.*

Flouting the Rules of Professional Conduct, Cleveland and Scott made it impossible for Leneghan to “consider, recommend, or carry out an appropriate course of action,” and Leneghan violated those rules by accepting the engagement under those circumstances. *See* Prof.Cond.R. 1.7(a)(2). One course of action was a bankruptcy proceeding. The other course of action was exhausting all rights of indemnification. No competent lawyer could make recommendations about whether to pursue one course of action, i.e., a bankruptcy filing, without considering and making recommendations about the alternative, i.e., claiming indemnification. Unfortunately, limited by his contractual obligations to Cleveland, and without any ability to

consider Kovach's indemnity rights, Leneghan was unable to consider or recommend an "appropriate course of action" for her. *See* Exh. U, at p. 2, Article I.A.

In addition to conflicts of interest between Kovach and Cleveland, Leneghan's financial self-interest created a personal conflict of interest and jeopardized his independent judgment when recommending an appropriate course of action. *See* Prof.Cond.R. 1.7(b)(2) (conflicts of interests may be created from "the lawyer's own personal self-interests"). Pursuant to the terms of the engagement letter, Leneghan's compensation was dependent upon his filing a bankruptcy petition for Kovach. Exh. U, p. 4, Article IV.A. ("As compensation for Associate Counsel's services, [Cleveland] shall pay [Leneghan] a fee determined at the rate of One Thousand Dollars (\$1,000) for [Kovach's] individual bankruptcy filing. [Leneghan] shall further be compensated at a rate of Two Hundred Fifty Dollars (\$250.00) per hour for any adversarial proceeding."). Thus, Cleveland's compensation scheme incentivized Leneghan to file a bankruptcy petition rather than demanding and, if necessary, litigating indemnity rights *for free*.

Critically, based on these conflicts of interest, Cleveland never should have proposed, and Leneghan was not permitted to accept, the engagement. To the contrary, Rule 1.7 makes crystal clear that a lawyer may only accept a joint representation of two clients in conflict if he is able to provide "competent and diligent representation to each affected client," Prof.Cond.R. 1.7(b)(1); "each affected client gives *informed consent, confirmed in writing*," (emphasis sic.) Prof.Cond.R. 1.7(b)(2); and the representation would not involve "the assertion of a claim by one client against another client represented by the lawyer in the same proceeding." Prof.Cond.R. 1.7(b)(3); 1.7(c)(2). Leneghan's representation failed on each and every score. First, Leneghan could not competently consider and recommend a bankruptcy strategy without considering Kovach's indemnification rights against Cleveland. As debtor's counsel, Leneghan certified to

the bankruptcy court that he “agreed to render legal service for all aspects of the bankruptcy case, including: [a]nalysis of the debtor(s) financial situation, and rendering advice to the debtor(s) in determining whether to file a petition in bankruptcy under title 11 of the United States Code.” Chapter 7 Voluntary Petition, *In re Denise Kovach*, N.D.Ohio Bankr. No. 13-15340-aih, at \*3 (July 29, 2013). Kovach’s indemnity rights were no less significant to her financial condition than the Ayers judgment itself. Insofar as Kovach’s financial condition was dependent upon indemnification, and she and Cleveland had opposing interests with respect to indemnification, Leneghan could not advise both parties in connection with Kovach’s bankruptcy filing. Second, Cleveland and Leneghan failed to disclose these conflicts of interest to Kovach and obtain her informed, written consent. *See* Trial Docket 66, at 12 (“Defendants do not have any \* \* \* conflict of interest waivers.”). Finally, Leneghan was required to reject the joint representation involving Kovach’s bankruptcy proceedings to the extent that it should have involved a claim for indemnity by Kovach against Cleveland. Prof.Cond.R. 1.7(b)(3), 1.7(c).

In *Office of Disciplinary Counsel v. Mazer*, 86 Ohio St.3d 185, 712 N.E.2d 1246 (1999), the Court found that an attorney had violated DR 5-105(B) [replaced by Ohio Rule 1.7(a)-(b)] when he represented two shareholders in a dispute with the buyer of their privately-held corporation. Following the sale of the business, the two shareholders sued the buyer for payment of the purchase price or, alternatively, to recover control of the company. Although their interests were substantially aligned, the trial court recognized the potential of “a falling out between [the two shareholders] as to how the money is to be divided” in the case of a settlement agreement. *Mazer* at 187. The case ultimately settled, a falling out over the division and timing of the settlement payment occurred between the two clients, and one of the attorney’s two clients discharged him. *Id.* at 186. In a disciplinary proceeding against the attorney, this Court found



that “it was ‘likely’ that respondent’s continued representation of both [clients] in the state court litigation would [have] adversely affect[ed] his clients and it was far from ‘obvious’ that he could adequately represent both [of the client’s] interests.” *Id.* at 188. Due to the potential conflict alone, the Ohio Supreme Court ordered a six-month suspension from the practice of law. *Id.* (“Regardless of whether respondent’s conduct created an actual conflict of interest, it created a *potential* conflict of interest, which is sufficient to violate DR 5-105(B) [now Ohio Rule 1.7(a)-(b)].” (Emphasis sic.)).

It was plainly in Kovach’s best interest to pursue indemnity from Cleveland to the maximum extent possible before considering let alone filing for personal bankruptcy. Conversely, it was in Cleveland’s interest to eliminate all possibility that Kovach would make an indemnity claim and to direct her to seek a discharge of indebtedness under the bankruptcy laws. From the moment Kovach’s indemnity claim ripened as a result of the Ayers judgment, the interests of Kovach and Cleveland were completely at odds. No lawyer could exercise independent judgment on behalf of Kovach while also representing Cleveland in matters relating to satisfaction of the Ayers judgment.

### **III. A Lawyer May Not Accept Compensation from a Third Party Where Doing So Would Interfere with Professional Judgment or Unreasonably Limit the Scope of the Lawyer’s Representation**

#### **A. A Restrictive Payment Arrangement Between a Third Party and a Lawyer Violates a Lawyer’s Ethical Duties to the Client Where It Interferes with the Lawyer’s Independent Professional Judgment**

Ohio Rule 1.8(f) provides, in relevant part, as follows:

(f) A lawyer shall not accept compensation for representing a client from someone other than the client unless divisions (f)(1) to (3) \* \* \* apply:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; [and]

(3) information relating to representation of a client is protected as required by Rule 1.6;

Here, Kovach gave her informed consent for Cleveland to pay for Leneghan's representation. Exh. U. But the consent was insufficient because Cleveland failed to disclose that the arrangement would compromise Leneghan's independence of professional judgment and interfere with the Kovach-Leneghan attorney-client relationship. *See supra* p. 6; *see also Ayers v. Cleveland*, 2017-Ohio-8571, 99 N.E.3d 1269, ¶ 93 (8th Dist.) (Kilbane, J., dissenting); Exh. U. Under the guise of its statutory duty to defend under R.C. 2744.07(A)(1) ("a political subdivision shall provide for the defense of an employee"), Cleveland essentially tied Leneghan's hands, ensuring that he would not advise Kovach about her rights of indemnification without Cleveland's consent. Leneghan's acceptance of such an engagement violated Rule 1.8(f). *See, e.g., Prof.Cond.R. 1.8, Comment 12A* ("Insurance defense counsel may not permit an insurer's right to control the defense to compromise the lawyer's independent judgment, for example, regarding the legal research or factual investigation necessary to support the defense."). In analogous circumstances, the Board of Commissioners on Grievances and Discipline has held that insurers may not impose "[g]uidelines [on defense counsel for their insureds] that restrict or require prior approval before performing computerized or other legal research" because such restrictions interfere with the professional judgment of an attorney. Bd.Commr.Griev.Disp.Adv.Op. 2009-6, 2009 WL 2581719, at \*1 (Aug. 14, 2009).

In *In re Miller*, 312 B.R. 626 (Bankr.S.D.Ohio 2004), the bankruptcy court, applying former DR 5-107(B) (replaced by Rule 1.8), held that "[g]enerally, a debtor's attorney should not receive fees from a third party, especially when the third party \* \* \* is also receiving a benefit

from the transaction.” *Id.* at 628-629. DR 5-107(B) provided that “[a] lawyer shall not permit a person who \* \* \* pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.” The *Miller* court expressed heightened concern in circumstances where the fee paid to a debtor’s attorney is contingent on the outcome, rather than the work done relative to obtaining that outcome. *Miller* at 629. That is precisely what happened here. Cleveland’s contract with Leneghan provided for the payment of “One Thousand Dollars (\$1,000.00) for each individual bankruptcy filing” and “Two Hundred Fifty Dollars (\$250.00) per hour for any adversarial proceeding,” Exh. U, at p. 1, so that Leneghan would receive *no* payment for Kovach’s representation unless she filed for bankruptcy protection. Rather than rejecting a fundamentally flawed engagement, Leneghan acceded to Cleveland’s dictates and, in the process, disregarded Kovach’s paramount interest to obtain full indemnification from Cleveland.

**B. A Lawyer May Not Unreasonably Limit the Scope of His Representation**

Ohio Rule 1.2(c) provides: “A lawyer may limit the scope of a new or existing representation if the limitation is *reasonable* under the circumstances and communicated to the client, preferably in *writing*.” (Emphasis sic.). But the Ohio Rules make clear that even if a lawyer limits his representation, he is not “exempt \* \* \* from the duty to provide competent representation.” Prof.Cond.R 1.2, Comment 7; *see also* Bd.Commr.Griev.Disp. 2000-3 (June 1, 2000), at \*2 (“‘Reasonable’ or ‘reasonably’ when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.”).

Here, the limitations on the scope of Leneghan’s representation were plainly unreasonable. As debtor’s counsel, Leneghan certified to the bankruptcy court that he “agreed to render legal service for all aspects of the bankruptcy case, including: [a]nalysis of the debtor(s)

[sic] financial situation, and rendering advice to the debtor(s) in determining whether to file a petition in bankruptcy under title 11 of the United States Code.” *In re Kovach*, N.D. Ohio Bankr. No. 13-15340-aih, at \*3 (July 29, 2013). Because Kovach’s financial condition could not be understood without fully analyzing her indemnity rights under municipal law, Leneghan could not limit the scope of his engagement to exclude such matters.

Finally, Leneghan failed to advise Kovach that her indemnification rights were outside the scope of his representation. *See* Exh. U. Thus, even if such a limitation were reasonable--and it was not under the circumstances—Leneghan violated Rule 1.2 by failing to disclose the limitation to Kovach.<sup>1</sup>

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<sup>1</sup> The majority opinion of the Court of Appeals below expressed “disfavor” with the City’s conduct and concluded that “the dissent’s concerns with the City’s conduct are justified.” *Ayers v. Cleveland*, 2017-Ohio-8571, 99 N.E.3d 1269, ¶ 33, 48 (8th Dist.). Nevertheless, the majority disregarded these concerns in its standing analysis. *Id.* at ¶ 33 (“Regardless of the court’s disfavor with the City’s conduct, Ayers lacked legal standing...”). The dissent, on the other hand, concluded that the City’s conduct bears directly on Ayers’ standing. *Id.* at ¶ 78 (Kilbane, J. dissenting). Respectfully, Amici submit this Court should adopt the dissent’s reasoning. The General Assembly did not intend to provide political subdivisions with an exception to indemnification based on employee-bankruptcy filings made by conflicted counsel in violation of the Rules of Professional Conduct. Nor, it is respectfully submitted, are concepts of standing so narrow and rigid to require this Court to perpetuate Ayers’ injury-in-fact, caused by violations of the Code of Professional Conduct.

## **CONCLUSION**

By controlling Kovach's defense through conflicted counsel in violation of the Rules of Professional Conduct, Cleveland (through Scott and Leneghan) steered Kovach unnecessarily into bankruptcy court without ever considering, let alone recommending to her, that she pursue indemnification from Cleveland with no impairment to her credit or financial well-being. *Ayers v. Cleveland*, 2017-Ohio-8571, 99 N.E.3d 1269, ¶ 96 (8th Dist.) (Kilbane, J., dissenting). In this manner, Cleveland hoped to avoid monetary repercussions for Ayers' wrongful conviction and eleven-and-a half year incarceration. Respectfully, this Court should countenance no application of R.C. 2744.07 that indulges or promotes violations of the Rules of Professional Conduct, let alone violations that cause a miscarriage of justice.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I, Kathleen M. Brinkman, certify that a copy of the foregoing Amicus Brief of Ohio Law Professors was served via U.S. mail this 19th day of November 2018, upon the following counsel and David M. Leneghan:

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