

**In the  
Supreme Court of Ohio**

ALLISON HARRIS,	:	Case No. 2022-0784
	:	
Plaintiff – Appellant,	:	On Appeal from the Court of Appeals
	:	Seventh Appellate District
v.	:	Jefferson County
	:	
DUSTIN HILDERBRAND,	:	Court of Appeals Case #21 JE 0013
	:	
Defendant – Appellee.	:	

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**Brief of Amici Curiae Fraternal Order of Police of Ohio, Inc.,  
Buckeye State Sheriff’s Association, Inc. and  
Ohio Association of Chiefs of Police, Inc.  
Urging affirmance in support of Appellee Dustin Hilderbrand**

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Gwen E. Callender (0055237)  
FRATERNAL ORDER OF POLICE OF OHIO, INC.  
222 East Town Street  
Columbus, Ohio 43215  
(614) 224-5700 Phone  
(614) 224-5775 Fax  
[gcallender@fopohio.org](mailto:gcallender@fopohio.org)  
*Counsel for Amici Curiae  
Fraternal Order of Police of Ohio, Inc.  
Buckeye State Sheriff’s Association  
Ohio Association of Chief of Police, Inc.*

Matthew P. Mullen (0063317)  
John P. Maxwell (0064270)  
KRUGLIAK, WILKINS, GRIFFITHS &  
DOUGHERTY CO., L.P.A.  
405 Chauncey Ave. NW  
New Philadelphia, OH 44663  
(330) 364-3472 Phone  
(330) 602-3187 Fax  
[mmullen@kwgd.com](mailto:mmullen@kwgd.com)  
[jmaxwell@kwgd.com](mailto:jmaxwell@kwgd.com)  
*Counsel for Appellee Dustin Hilderbrand*

James G. Bordas III (0074071)  
BORDAS & BORDAS, PLLC  
1358 National Road  
Wheeling, WV 26003  
(304) 242-8410 Phone  
(304) 242-3936 Fax  
[jbordasiii@bordaslaw.com](mailto:jbordasiii@bordaslaw.com)  
*Counsel for Appellant Allison Harris*

Alphonse A. Gerhardstein (0032053)  
M. Caroline Hyatt (0093323)  
FRIEDMAN GILBERT & Gerhardstein  
37 East 7<sup>th</sup> Street, Suite 201  
Cincinnati, OH 45202  
(513) 572-4200 Phone  
(513) 621-0427 Fax  
[al@FGGfirm.com](mailto:al@FGGfirm.com)  
[caroline@FGGfirm.com](mailto:caroline@FGGfirm.com)  
*Counsel for Amicus Curiae,  
The Ohio Association for Justice*

Aaron M. Glasgow (0075466)  
ISAAC, WILES, BURKHOLDER &  
TEETOR, LLC  
2 Miranova Place, 7<sup>th</sup> Floor  
Columbus, OH 43215  
(614) 221-2121  
[aglasgow@isaacwiles.com](mailto:aglasgow@isaacwiles.com)  
*Co-Counsel for Appellee Dustin Hilderbrand*

Hollie F. Reedy (0065845)  
ENNIS BRITTON CO., L.P.A.  
300 Marconi Blvd., Suite 308  
Columbus, OH 43215  
(614) 705-1332 Phone  
(614) 423-2971  
[hreedy@ennisbritton.com](mailto:hreedy@ennisbritton.com)  
*Counsel for Amicus Curiae  
Ohio School Boards Association*

Pamela Leist (0082091)  
ENNIS BRITTON CO., L.P.A.  
1714 West Galbraith Rd.  
Cincinnati, OH 45239  
T: (513) 421-2540  
[pleist@ennisbritton.com](mailto:pleist@ennisbritton.com)  
*Counsel for Amici Curiae  
Ohio School Boards Association*

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## **STATEMENT OF INTEREST OF AMICI CURIAE**

Amici curiae submitting this brief are Ohio based organizations of sworn law enforcement officers. Amici curiae and its membership have extensive experience with constitutional rights and qualified immunity and submit this brief to add additional context and practical perspectives to this case from the view of law enforcement personnel who dedicate their lives to protecting and serving our communities.

The Fraternal Order of Police of Ohio (hereinafter “FOP”) is Ohio’s largest organization of sworn law enforcement officers, with more than 22,000 members and close to 200 local lodges. The FOP, through many of its local lodges, represents officers at the local, county and state level in all aspects of collective bargaining in addition to being a fraternal organization.

The Buckeye State Sheriffs’ Association (hereinafter “BSSA”) is an organization made up of eighty-eight sheriffs of Ohio, plus sheriff’s office employees and private citizens. The BSSA serves the citizens of Ohio by supporting the needs of Ohio’s law enforcement community by advocating for positive changes in the criminal justice system and providing training programs.

The Ohio Association of Chiefs of Police (hereinafter “OACP”) is an organization that is dedicated to cultivating professionalism and innovation among police executives to assure the continued success of the law enforcement community. The OACP offers a broad range of professional, educational and informational services to increase the public’s understanding of the role police play in maintaining our quality of community life. The OACP membership consists of active and retired Chiefs, Sheriffs and Law Enforcement Administrators.

The FOP, BSSA and OACP, and their members have an interest in the outcome of this case. The well-settled question of public employee immunity under R.C. §2744.03(A)(6) and the

future of K9 programs statewide is at stake in this case. These statewide organizations have members whose officers are assigned as K9 handlers and who harbor their canines in their private homes. If this Court were to reverse the Court of Appeals the future of K9 programs on a statewide basis would be severely undermined. Most, if not all, law enforcement agencies in Ohio require their K9 handlers to harbor the dogs in the officers' private homes. If this Court finds no qualified immunity for Deputy Hildebrand the ripple effect will be far reaching. Agencies who have invested considerable time and expense to purchase police dogs will be forced to reassess their programs. The harboring of the police dogs in the homes of the officers to whom they are partnered will no longer be a viable arrangement. Police dogs are working animals, but they are still animals. They require free space, exercise and human interaction. It would be unrealistic to imagine a scenario where a K9 handler could have a life outside of work and keep a police dog at their residence. The dogs simply cannot be kept always locked up in a crate outside of shift work. That is neither realistic, practical or humane.

The future of K9 programs in Ohio is on trial in this case. The sacrifice and commitment that K9 handlers make when they are selected to partner with a dog is significant. If Deputy Hilderbrand, or any K9 officer, believed that they could be held financially liable for their assigned police dog's action, in the absence of any malicious, bad faith or reckless or wanton behavior, there will be no officer willing to put their name in the hat to become a K9 handler. The immunity statute was designed specifically so public employees and officials would not have to put their own financial well-being at risk while serving their communities. A ruling upholding the Court of Appeals reaffirms that purpose and ensures the future of K9 programs in Ohio.

## STATEMENT OF FACTS

The Brief of Appellant and the 7<sup>th</sup> District Court of Appeals Opinion sets forth in detail the relevant facts in this case. For purposes of this Amici Curiae brief, those facts can be summarized as follows. Deputy Hilderbrand is a deputy with the Belmont County Sheriff's Office. (Hereinafter "BCSO"). In 2018 the BCSO acquired a new police dog named Xyrem. Xyrem was assigned to Deputy Hilderbrand to perform the primary duties of the detection and seizure of narcotics. *Brief of Appellant to the Court of Appeals*, page 2. As a K9 handler, Deputy Hilderbrand was required by the BCSO to keep the dog assigned to him at his home. *Court of Appeals Opinion*, page 2. The BCSO required its K9 handlers to keep their dogs at home to enhance the bond between the deputy and the dog. Deputy Hilderbrand's compliance with keeping Xyrem at his home was a condition of being a K9 handler for the BCSO. If Deputy Hilderbrand refused to keep Xyrem at his home he could not continue to work in his position as a K9 handler for the BCSO. *Brief of Appellant to the Court of Appeals*, page 2.

On August 10, 2019 Deputy Hilderbrand hosted a cookout at his residence with a small group of friends. The cookout started around 4:00 p.m. *Id*, page 3. Prior to dinner Deputy Hilderbrand demonstrated Xyrem's skills in alerting to contraband. *Court of Appeals Opinion*, page 3. Prior to dinner being served Deputy Hilderbrand put Xyrem and his other three (3) dogs in the house. At around 5:30 p.m. the guests ate dinner. The dogs remained in his home for approximately 45 minutes. *Id*, page 3.

The dogs were let back out of the house after dinner. For approximately one hour the dogs, including Xyrem, ran around and played in the yard. At some point Plaintiff/Appellant Harris began to set up a frisbee game in the yard. As she was setting up the game with the frisbee Xyrem jumped up and bit her left breast. Deputy Hilderbrand did not give Xyrem any command and

Xyrem did not appear to be aggressive toward Plaintiff/Appellant Harris or any other guest while they were playing in the yard. *Court of Appeals Opinion*, page 3.

Deputy Hilderbrand transported Plaintiff/Appellee Harris to the hospital for treatment for the dog bite. *Brief of Appellant to the Court of Appeals*, page 4. After receiving treatment Plaintiff/Appellee Harris returned to Deputy Hilderbrand's house. The guests continued to socialize and hang out in the kitchen before leaving for the evening. *Id.*, pages 4-5.

## **ARGUMENT**

Amici Curiae's Argument Against Appellee's Proposition of Law:

**I. Deputy Hilderbrand is immune from liability with respect to the injuries caused by police dog Xyrem because the injury occurred within the confines of his employment and official responsibilities with the Belmont County Sheriff's office.**

R.C. §2744.02 provides immunity to political subdivisions and employees of political subdivisions for acts or omissions in connection with a governmental or proprietary function. R.C. §2744.03(A)(6) provides that employees of political subdivisions are immune from liability unless one of three exceptions applies. In this case the Plaintiff/Appellee Harris is arguing the first of those three exceptions, that Deputy Hilderbrand's actions or omissions were "manifestly outside the scope of the employee's employment or official responsibilities..." R.C. §2744.03(A)(6)(a). *Merit Brief of Appellant Harris*, pages 21- 24. Appellant sets forth the cases in Ohio that provide guidance on what constitutes conduct that is "manifestly outside the scope of the employee's employment or official responsibilities." In its brief the Appellant relied on the same cases relied upon by the Court of Appeals to define conduct that would be inside the scope of employment. Conduct is deemed to be within the scope of the employee's employment if "it is initiated, in part, to further or promote the master's business" and "For an act to fall within the scope of employment,



it must be calculated to facilitate or promote the business for which the [employee or agent] was employed.” *Merit Brief of Appellant*, page 23 and *Court of Appeals Opinion*, page 9 citing, *Coterel v. Reed*, 2016-Ohio-7411, 72 N.E.3d 1159, ¶ 17 (2d Dist.), *Curry v Blanchester*, 12<sup>th</sup> Dist. Clinton Nos. CA2009-08-010, CA2009-08-012, 2010-Ohio-3368, ¶30 and *Jackson v. McDonald*, 144 Ohio App.3d 301, 307, 760 N.E. 2d 24 (5<sup>th</sup> Dist. 2001). The Appellant relies on the same test as the Court of Appeals for determining whether the incident which occurred on August 10<sup>th</sup>, 2019 at Deputy Hilderbrand’s home with Xyrem constituted conduct which was manifestly outside the scope of his employment. Plaintiff/Appellant’s error is in how she applies all of the surrounding immaterial facts to that standard instead of examining the purpose underlying why Xyrem was at the Hilderbrand home on August 10, 2019.

**A. Deputy Hilderbrand’s housing of Xyrem at his home promoted the business for which he was employed as a K9 officer for the Belmont County Sheriff’s Office.**

The Appellant, in applying the aforementioned test to this case, focuses on several factors, none of which recognize the most important factor underlying the entire analysis. The Appellant urges this Court to find that Deputy Hilderbrand was acting outside the scope of his employment by arguing that he was off duty at his personal residence all day on August 10<sup>th</sup>, 2019, he was hosting a cookout for friends, he was cooking and eating food, he was drinking alcohol, playing games and playing with his other three (3) dogs along with Xyrem. In addition, the Plaintiff/Appellant points out that Deputy Hilderbrand was not on call that day, he was not training Xyrem nor was he on duty as a K9 officer that day. *Appellant’s Merit Brief*, pages 21-22. The Appellant goes further and reiterates the Trial Court’s finding that Deputy Hilderbrand was not furthering or promoting the business of the Belmont County Sheriff’s Department on the day of the dog bite. The Appellant writes, “It is difficult to imagine that reasonable minds would find

that hosting a party, drinking alcohol, and engaging an unrestrained police dog in commands to entertain guests at a private residence could possibly further the business of the Sheriff's Department or fall within a police officer's job duties or description." *Merit Brief of Appellant*, page 24.

The Appellant's analysis ignores the most significant fact underlying the unfortunate bite incident. Noticeably absent from the Appellant's statement of facts in its Brief to this Court is the undisputed fact that Deputy Hilderbrand, as a condition of his employment as the K9 officer, is required by the Sheriff's Department to house and take care of Xyrem *at his home*. Deputy Hilderbrand did not voluntarily keep Xyrem at his home or in his yard, he was mandated to do so by his Employer, the Belmont County Sheriff. *Court of Appeals Opinion*, page 2. The Appellant does not dispute this fact, she simply overlooks it to focus on what Deputy Hilderbrand chose to do on his day off work on August 10<sup>th</sup>.

What makes this case unique is the nature of the claim underlying this litigation. This is not a case where the definition of whether Deputy Hilderbrand was acting manifestly outside the scope of his employment can be answered by looking at whether he was on duty, or by looking at whether he was performing an "act" or "duty" to promote the business of the Sheriff's office. The BCSO schedules Deputy Hilderbrand to work a certain number of days and hours on the road performing work for the Sheriff's Office, and days off where he is not required to be on the road working for the Sheriff's Department. The immunity claim in this case cannot be looked at in terms of Deputy Hilderbrand being on duty or off duty because his obligation to harbor Xyrem at his home is a 24/7 obligation. Because Deputy Hilderbrand was required to harbor Xyrem at his residence, without any restrictions related to who Xyrem can interact with in his home, Deputy

Hilderbrand is at all times acting to further promote the business of the Belmont County Sheriff's Department.

By harboring Xyrem at his home on August 10<sup>th</sup>, while he was off duty, Deputy Hilderbrand was furthering and promoting the Belmont County Sheriff's business. A dog cannot take care of itself like a human can. Dogs must be provided shelter, fed, given water, taken to the veterinarian when they need medical attention; tasks that they cannot perform themselves. As a result, the BCSO must have any police dog that it owns be cared for 24/7 by someone. In this case that someone happened to be Deputy Hilderbrand because he is assigned as Xyrem's handler. It is irrelevant that Deputy Hilderbrand decided to host a cookout on August 10<sup>th</sup>, or that Deputy Hilderbrand was not on duty on August 10<sup>th</sup> or that Deputy Hilderbrand did a demonstration with Xyrem earlier in the evening. During the time that Xyrem is at Deputy Hilderbrand's home Deputy Hilderbrand is furthering the business of the Sheriff's Office, plain and simple. Otherwise, Deputy Hilderbrand would not be housing a government owned police dog at his home.

The Trial Court and the Appellant make much ado about the demonstration that Deputy Hilderbrand did with Xyrem shortly after his friends arrived for the cookout. The facts in this case are undisputed that the bite did not occur during that demonstration. In fact, the bite occurred at the very minimum ninety minutes after the demonstration, if not longer. *Merit Brief of Defendant/Appellant Dustin Hilderbrand to the Court of Appeals*, page 4 citing the deposition of Harris, pp 87-88. There is nothing in the record establishing that Deputy Hilderbrand was doing anything with Xyrem at the time of the dog bite. The fact that he did a demonstration 90 minutes earlier is irrelevant to the analysis of whether harboring Xyrem at his home promotes the business of the Sheriff's Department. Imagine a scenario where Deputy Hilderbrand was on duty August 10<sup>th</sup> and had utilized Xyrem to respond to commands for an actual deployment just prior to going

off duty and the same incident occurs at his home shortly after returning home. In that scenario the Plaintiff/Appellant would not be connecting the work Xyrem performed on duty as some sort of tether to an incident that occurred ninety minutes later off duty. Xyrem is a dog. He does not clock out of work and know that there is a difference between being on duty and off duty. The demonstration that Deputy Hilderbrand did 90 minutes before the bite occurred is of no consequence to the underlying definition of whether Xyrem's actions occurred within the scope of employment of Deputy Hilderbrand. In either fact pattern it is not germane to the underlying determination of whether he was furthering the business of the Sheriff's office.

The Plaintiff/Appellant is hyper focused on facts that do not directly address her argument that an exception should apply to the immunity given to political subdivisions and its employees under R.C. Chapter 2744. To prove the exception the Plaintiff/Appellant must prove that Deputy Hilderbrand was not furthering the business of the Sheriff's Office. No matter how you slice it the answer is the same; if Xyrem is being housed at Deputy Hilderbrand's private residence he is engaging in the furthering of the Sheriff's business. The fact that Deputy Hilderbrand hosted a party or drank alcohol does not mean that Xyrem being at that house is not furthering the business of the BCSO. There is no evidence in the record that Deputy Hilderbrand was restricted in any manner from having a personal life while at the same time housing Xyrem for the BCSO. Deputy Hilderbrand was allowed to live his life off duty and have friends over, drink alcohol, do a demonstration with the police dog; there was no restriction placed on him that is in the record of this case. As long as he housed Xyrem while he was off duty, as he was required to do by the Sheriff's policy, he was furthering the business of the BCSO. As such, when Xyrem bit Ms. Harris amid being housed at Deputy Hilderbrand's home he did so while Deputy Hilderbrand was furthering the business of the Sheriff's Office.

Plaintiff/Appellant argues that it is difficult to imagine that hosting a party, drinking alcohol and “engaging an unrestrained police dog in commands to entertain guests at a private residence could possibly further the business of the Sheriff’s Department or fall within a police officer’s job duties or description.” *Merit Brief of Appellant*, page 24. Again, Plaintiff/Appellant misses the underlying query and instead focuses on the actions of Deputy Hilderbrand only. Deputy Hilderbrand did not bite Ms. Harris, the police dog who he is required to house and care for at his home engaged in the underlying conduct that caused the injury. There is nothing in the record indicating that Deputy Hilderbrand was in the proximity of Ms. Harris when the bite occurred. So, whatever he was or was not doing on that day does not answer the query posed by the exception to the immunity defense. The fact that he was housing Xyrem at his home for the purpose of furthering the business mission of the Sheriff’s Office is all that is needed to find that the immunity statute applies.

In a similar case a trial court in Clinton County granted summary judgment to a police officer whose police dog ran across the street and bit a pedestrian as he was walking. *Santel v Rector*, 2011-Ohio-1996, Case No. CA2010-10-018 (12<sup>th</sup> Dist, 2011). That case involved Hamilton Township Police Officer Timothy Rector. The Hamilton Township Police Department required the officer to keep the police dog, Pero, at the home he shared with his wife while he was not on duty. On the morning of the dog bite the Township officer returned home from duty with Pero. Shortly after returning home Officer Rector’s wife let Pero outside into their unfenced backyard to relieve itself. It was at that time that Pero crossed the street and bit a man walking on the other side of the street. The trial court granted summary judgment to Officer Rector officer finding that he was a government employee acting within the scope of his employment and that none of the three statutory exceptions to governmental employee immunity applied. *Id.*

The fact that Officer Rector did not have a fence which allowed Pero to run across the street was not relevant to the test of whether he was acting manifestly outside the scope of his employment. Nor was the fact that it was the officer's wife who let Pero out in the first place which then resulted in him running across the street relevant to the test of whether Officer Rector was acting manifestly outside the scope of his employment. Those facts are simply not material or relevant to answering the question of an Officer's liability when it comes to housing a police dog if that dog injures someone off duty. The fact that the dog is required to be housed at the officer's home anytime it is off duty is the only fact needed to determine whether the officer/handlers are immune from liability. In both the *Santel* case, and in this case, the "master" is the Employer, and it is the Employer's business purpose of having a K9 program and needing housing and care for that program that underlies the grant of immunity. If that were to be disturbed by this Court reversing the Court of Appeals the result will be devastating to the future of K9 programs in Ohio.

**B. A reversal of the Court of Appeals will result in the eventual elimination of K9 programs as they currently exist in Ohio.**

Both Deputy Hilderbrand and Chief Deputy James Zusack submitted affidavits attached to the Defendant Deputy's Motion for Summary Judgment providing sworn statements that Deputy Hilderbrand was required to keep Xyrem at his home when he was not on duty. *Brief of Appellant Hildebrand to the Court of Appeals*, page 2. Chief Deputy Zusack submitted sworn testimony in his affidavit that Deputy Hildebrand could not continue to work in his position as a K9 officer if he refused to house Xyrem at his home. *Id.*, at 2. Having established that it was the "master" Employer whose business interest required Deputy Hildebrand as a condition of his employment to keep Xyrem at his home while he was off duty, it is important to understand why Belmont County and all other K9 programs require the same condition. Chief Deputy Zusack stated in his

affidavit that the reason for the arrangement of having the employee keep the police dog at his home was to “solidify the bond between the handler and the dog, making them both more effective.” *Id.*, at 2. For a K9 program to be effective, it is imperative that the officer and dog become a team. They must work with each other every day, not only at times when they are on duty. The handler must work on training with the dog often to ensure the dog is properly conditioned. This is only effective if the team is together every day, and not just at work. For K9 handlers to be successful as a handler this 24/7 relationship is a critical component. If the Court reverses the decision of the Court of Appeals, officers who previously believed they would be immune from liability for the actions of their department owned police dog, would no longer be able to comfortably rely on the immunity going forward. This will have the dual effect of making it impossible to recruit officers to be K9 handlers and make the housing of police dogs cost prohibitive for agencies in Ohio.

Law enforcement is an extremely dangerous occupation. Police dogs have evolved over the years as a valuable law enforcement tool not only to enhance law enforcement capabilities but also to protect the lives of both officers and the public. Canines provide incredible assistance in a variety of tasks ranging from criminal apprehension, evidence recovery, tracking of suspects, narcotics detection, explosives detection, tracking lost persons, officer protection, building searches and public relations. No officer would go through the application and training process of becoming a canine handler knowing that they may not be immune from personal liability if their police dog bit someone while they were off duty at their home. The irony in this case is all too obvious. The Employers who own the dogs requires its handlers house and care for the police dog 24/7, yet the Plaintiff/Appellant is arguing that its handler is only immune from liability if he/she is on shift engaged in actual police work. The Plaintiff/Appellant refuses to acknowledge that the

care and housing of the police dogs are part and parcel of the entire program. The care and training and personal attention that the handlers give to the dogs off duty is just as important, if not more important, than what occurs on duty. Most policies concerning canine units set forth a multitude of responsibilities that the handlers have off duty. The handlers must perform canine care daily from grooming, to examining the canine eyes, ears, mouth, nostrils, feet, to clipping toenails, feeding, bathing, dispensing medicines as needed, keeping the kennel and yard clean. The list is long. All those duties occur off duty, because the care and housing of a police dog is a 24/7 commitment. Again, all these tasks and responsibilities are in furtherance of the business interest of the Belmont County Sheriff's office, the owner of the police dog and the architect of the canine programs.

If this Court were to reverse the Court of Appeals it will alter the current practice of having the canine handlers house the police dogs at their homes. At the very least, it could force agencies to consider kenneling their dogs at a third-party vendor when the dog and handler are not on duty. This would deteriorate the effectiveness of the team. The team of the dog and its handler must be together as much as possible for the bond to form and be maintained. If agencies are forced to kennel the canines because officers cannot afford the liability risk, many canine programs would naturally be eliminated. Law enforcement agencies simply could not afford the added cost of kenneling and care when off duty. The expense will simply be too great and the negative effect on the "bond" between the handler and the dog will result in the elimination of these programs slowly but surely. If law enforcement agencies eliminate their K-9 programs the public will lose out on their many benefits. Some of those benefits are listed below:

- Ability to track suspects
- Ability to track lost or missing children



- Ability to locate illegal narcotics
- Ability to locate explosive devices
- Ability to provide comfort to victims of crime (therapy dogs)
- Ability to locate and confront suspects in dangerous situations (barricades)
- Ability to provide protection and support to their handlers and other officers.

In this case Xyrem's duties were primarily the detection and seizure of narcotics. *Brief of Appellant to the Court of Appeals*, page 2. Xyrem's job duties are to assist Deputy Hilderbrand as a drug interdiction officer. As the Court of Appeals appropriately stated, "The material facts are undisputed, and they do not demonstrate that Appellant was manifestly outside the scope of his official responsibilities at the time. Instead, the only evidence on this issue was the affidavit of his superior, which confirms that Appellant, as a K9 deputy, was *required* to "keep and care for" his dog at his home while off duty to "solidify the bond between the deputy and dog, so that they work well together on duty" and this arrangement allows them to be available when on call." *Court of Appeals Opinion*, page 11. The fact that the bite occurred during a social gathering does not negate the immunity provided under R.C. Chapter 2744 of the Ohio Revised Code. Because Deputy Hilderbrand was required to care and house the BCSO's police dog 24/7, he was not manifestly outside the scope of his official responsibilities at the time of the incident giving rise to this litigation.

## CONCLUSION

The Fraternal Order of Police of Ohio, Inc., the Ohio Association of Chiefs of Police and the Buckeye State Sheriff's Association urges this Court to affirm the Opinion and Judgment Entry of the 7<sup>th</sup> District Court of Appeals. Deputy Hilderbrand is entitled to immunity as a matter of law against both the negligence and strict liability dog bite claim. A decision affirming the Court of Appeals will ensure the continuing future and viability of K9 programs in Ohio.

Respectfully submitted,

/s/ *Gwen Callender*

Gwen Callender (0055237)

Chief Counsel

FRATERNAL ORDER OF POLICE OF OHIO, INC.

222 East Town Street

Columbus, OH 43215

[gcallender@fopohio.org](mailto:gcallender@fopohio.org)

(614) 224-5700 Phone

(614) 224-5775 Fax

Counsel for Amici Curiae

## CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Brief was served by electronic mail upon the following this 9<sup>TH</sup> day of January, 2022:

James G. Bordas III (0074071)  
BORDAS & BORDAS, PLLC  
1358 National Road  
Wheeling, WV 26003  
(304) 242-8410 Phone  
(304) 242-3936 Fax  
[jbordasiii@bordaslaw.com](mailto:jbordasiii@bordaslaw.com)  
*Counsel for Appellant Allison Harris*

Matthew P. Mullen (0063317)  
John P. Maxwell (0064270)  
KRUGLIAK, WILKINS, GRIFFITHS &  
DOUGHERTY Co., L.P.A.  
405 Chauncey Ave. NW  
New Philadelphia, OH 44663  
(330) 364-3472 Phone  
(330) 602-3187 Fax  
[mmullen@kwgd.com](mailto:mmullen@kwgd.com)  
[jmaxwell@kwgd.com](mailto:jmaxwell@kwgd.com)  
*Counsel for Appellee Dustin Hilderbrand*

Alphonse A. Gerhardstein (0032053)  
M. Caroline Hyatt (0093323)  
FRIEDMAN GILBERT & GERHARDSTEIN  
37 East 7<sup>th</sup> Street, Suite 201  
Cincinnati, OH 45202  
(513) 572-4200 Phone  
(513) 621-0427 Fax  
[al@FGGfirm.com](mailto:al@FGGfirm.com)  
[caroline@FGGfirm.com](mailto:caroline@FGGfirm.com)  
*Counsel for Amicus Curiae,  
The Ohio Association for Justice*

Hollie F. Reedy (0065845)  
ENNIS BRITTON CO., LPA  
300 Marconi Blvd, Suite 308  
Columbus, OH 43215  
(614) 705-1332 Phone  
(614) 423-2971 Fax  
[hreed@ennisbritton.com](mailto:hreed@ennisbritton.com)  
*Counsel for Amici Curiae*  
*Ohio School Boards Association*

Pamela Leist (0082091)  
ENNIS BRITTON CO., L.P.A.  
1714 West Galbraith Rd.  
Cincinnati, OH 45239  
(513) 421-2540  
[pleist@ennisbritton.com](mailto:pleist@ennisbritton.com)  
*Counsel for Amici Curiae*  
*Ohio School Boards Association*

*/s/ Gwen Callender*  
Gwen Callender (0055237)