In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2023-0294
	:	
Appellant,	:	On Appeal from the
	:	Hamilton County
v.	:	Court of Appeals,
	:	First Appellate District
SONTEZ SHECKLES,	:	
	:	Court of Appeals
Appellee.	:	Case Nos. C-220255, C-220256

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLANT STATE OF OHIO

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INTRODUCTION

As this Court has long recognized, criminal trials should be about the strength of the State's evidence, not about "senseless technicalities." *Long v. State*, 109 Ohio St. 77, 93 (1923); *see also Hess v. State*, 5 Ohio 5, 13–14 (1831). Ohio's modern Rules of Evidence embrace this notion. Relevant evidence is presumed admissible. Evid.R. 402. Witnesses are presumed competent to testify to matters within their personal knowledge. Evid.R. 601–02. And the rules for authenticating other types of evidence are flexible. *See* Evid.R. 901. By favoring admission over exclusion, Ohio's evidentiary rules ensure "that the truth may be ascertained" and "justly determined." Evid.R. 102. The lower courts lost sight of all this: with no proper legal basis, they prevented the State from admitting compelling evidence of a serious crime.

This matter arises from a shooting at a Cincinnati bar. Shortly after the shooting, the State charged Sontez Sheckles with attempted murder and other crimes. Two pieces of evidence laid the foundation for the State's anticipated case. *First*, the State intended to introduce admissions that Sheckles made during related federal proceedings. To recount those admissions, the State would call the federal prosecutor who was personally involved in those proceedings. *Second*, the State planned to submit video-surveillance footage of the crime. But the State's plans were for naught. Before trial, the trial court excluded both pieces of evidence. On appeal, the First District affirmed these evidentiary rulings over a vigorous dissent. Both lower courts erred.

Begin with the admissibility of the federal prosecutor's testimony. A federal regulation requires that Department of Justice employees obtain the Department's approval before testifying about certain matters. 28 C.F.R. §16.22(a). Here, the federal prosecutor the State intended to call appeared willing to testify, but the parties disputed whether (and to what extent) he had authorization from the Department. The lower courts relied on the federal regulation to justify wholly excluding the federal prosecutor's testimony. They erred. The regulation serves "only to provide guidance for the *internal operations* of the Department of Justice." 28 C.F.R. §16.21(d) (emphasis added). It does not create a rule of evidence—let alone a rule of evidence applicable in state courts—or confer a private right. Thus, private parties cannot invoke such regulations as a way to exclude evidence. *See United States ex rel. Treat Bros. Co.*, 986 F.2d 1110, 1118–19 (7th Cir. 1993).

The State's video evidence was admissible, too. The State had assembled a video of the crime—compiled with raw footage taken from security cameras located at the bar where the crime occurred. The lower courts concluded that the State failed to authenticate the video. That conclusion also lacks support. In proceedings below, the State elicited testimony about the video from the bar's owner. She confirmed that (1) the police had obtained the raw footage of the bar's security cameras and (2) the police's video compilation accurately depicted what her bar looked like on the night in question. Under this Court's precedent, that testimony was enough to authenticate the video; the State did not need to offer technical evidence regarding how the police compiled the video. *See*

Midland Steel Prods. Co. v. Int'l Union, United Auto., Aero. & Agric. Implement Workers, Local 486, 61 Ohio St. 3d 121, 129–30 (1991); *State v. Pickens*, 141 Ohio St. 3d 462, 201-Ohio-5445 ¶¶144, 150–51 *overruled in part on other grounds*, *State v. Bates*, 159 Ohio St.3d 156, 2020-Ohio-634 ¶35.

At bottom, the lower courts' mistaken evidentiary rulings defeated the State's case before it ever began. This Court should reverse.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law officer and often serves as special prosecutor in criminal cases. He "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. This case concerns the steps Ohio prosecutors must take to ensure that certain evidence—testimony from federal officers and video evidence—is admissible in state criminal cases. For obvious reasons, Ohio has a strong interest in the rules that govern admission of such evidence.

The first two propositions in this case also present important questions of federalism. Generally, the federal government "has no power to regulate" the "procedures that state courts use at criminal trials." *Collins v. Virginia*, 138 S. Ct. 1663, 1680 (2018) (Thomas, J., concurring). Here, the First District broke from that general understanding—it held that a federal regulation displaces Ohio's Rules of Evidence and requires the exclusion of undeniably relevant evidence.

STATEMENT OF THE CASE AND FACTS

1. The U.S. Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), provides background critical to this case. *Touhy* involved a state prisoner who sought habeas relief in federal court. *Id.* at 463. As part of habeas proceedings, the prisoner subpoenaed records from a federal agent. *Id.* at 464. But the agent refused to produce the records, citing a federal regulation that barred Department of Justice employees from producing subpoenaed documents without the Department's authorization. *Id.* at 463 n.1 & 465. In the trial court's view, that regulation did not justify the agent's refusal, so it held the agent in contempt. *Id.* at 465.

The Supreme Court saw things differently. It deemed the federal regulation a valid exercise of executive power. *Id.* at 468. And it held that a federal agent—as a subordinate of the federal government—may properly refuse to produce documents without authorization from the agent's superiors. *Id.* at 468. The Supreme Court's analysis stopped there. *See id.* at 467–68. The Court did not reach the question of whether the federal government may wholly "refuse to produce government papers under [its] charge." *Id.* at 469. Nor did the Court speak to the admissibility of evidence obtained in violation of federal regulations.

The Department of Justice's "*Touhy* regulations," which are now located at 28 C.F.R. §§16.21–29, continue to govern the conduct of Department employees. Among

other topics, the regulations address the disclosure of information in cases where the United States is not a party. The regulation most relevant here says this:

> In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

28 C.F.R. §16.22(a). In fewer words, this regulation bars Department employees (including federal prosecutors) from disclosing certain information in any "state case" where the United States is not a party *unless* the Department has given "prior approval" for the disclosure. *Id.*

The Department's *Touhy* regulations also lay out the "procedures" employees must follow before disclosing information that the regulations cover. 28 C.F.R. §16.21(a). For example, the regulations outline (1) the steps that Department employees must take upon receiving demands for information, 28 C.F.R. §16.24; (2) the information the Department needs about the requested disclosure, 28 C.F.R. §16.22(c)–(d); and (3) who must "make the final decision and give notice" of the Department's position, 28 C.F.R. §16.25(c). A separate regulation lists factors the Department considers in deciding whether to voluntarily disclose information. 28 C.F.R. §16.26. Those factors include whether the "disclosure is appropriate under the rules of procedure governing the case"

and whether any privilege applies. *Id.* Another regulation covers how Department employees are to respond if a court compels an unauthorized disclosure. 28 C.F.R. §16.28.

As proves critical later on, the Department's *Touhy* regulations do not purport to establish evidentiary rules that bind courts. Indeed, the regulations do not expressly address what happens if a Department employee discloses information without authorization. *See* 28 C.F.R. §§16.21–29. The regulations do make clear, however, that they are *not* "intended to impede the appropriate disclosure … by Department law enforcement agencies to federal, state, local and foreign law enforcement, prosecutive, or regulatory agencies." 28 C.F.R. §16.21(c). And, most importantly for this case, the regulations expressly state that they are "intended only to provide guidance for the internal operations of the Department of Justice." 28 C.F.R. §16.21(d). The regulations, in other words, do not create any right or benefit for private parties to rely upon. *Id.*

2. Against this federal backdrop, turn to the facts of this case. In late 2019, a shooting at a downtown Cincinnati bar left one person dead and another injured. *One dead, one injured in shooting at Downtown bar*, WCPO Cincinnati (Nov. 29, 2019), https://perma.cc/AGD2-Y98L. The bar's security cameras recorded much of the crime. *See* Hearing Tr. 25, 29–30 (May 25, 2022) ("Tr."); *State v. Sheckles*, 2023-Ohio-133 ¶2 (1st Dist.) ("App. Op."). Armed with that video evidence, the State soon charged Sontez Sheckles with attempted murder, felonious assault, and having a weapon while under a disability. App. Op. ¶2.

But Sheckles' case stalled for over two years. The delay stemmed mostly from factors outside of the State's control. *See* App. Op. ¶¶46–49 (Myers, J., dissenting). Sheckles asked for, and received, multiple continuances of his trial. *See id.* Further complicating matters, Sheckles faced an independent federal prosecution relating to the shooting. App. Op. ¶3 (majority op.). Sheckles ultimately pleaded guilty in the federal case to unlawful possession of ammunition. *Id.* The State submits that, during the federal-plea process, Sheckles "admitted to everything that" the State had charged him with in the state case. Tr. 5. The State thus notified Sheckles in April 2022 that it might call Zachary Kessler—a former federal prosecutor, who was involved in Sheckles' federal proceedings—as a witness in the state case. App. Op. ¶3. The State later sent Sheckles a certified copy of his federal plea agreement, which the State intended to introduce at trial. *Id.*

This case was initially scheduled for a bench trial on May 12, 2022. *See* App. Op. ¶2. At that point, the State asked for its first continuance. The State wanted to secure a witness—a representative of the bar where the shooting took place—to make sure that it could authenticate the video evidence of the crime. App. Op. ¶50 (Myers, J., dissenting). The trial court granted the continuance over Sheckles' objection. But it warned the State that there would be no further continuances on this basis. App Op. ¶2 (majority op.).

3. The case returned to court for trial on May 25, 2022. But the case never made it to trial. Instead, during pretrial proceedings, the trial court excluded two pieces of

evidence critical to the State's case: (1) Kessler's testimony and (2) video-surveillance footage of the crime.

From the outset of that day's proceedings, the parties disputed whether Kessler could properly testify at trial. Earlier that morning, Sheckles had filed a motion to quash a subpoena directed at Kessler. Tr. 2. Sheckles argued that Kessler's testimony would be in "direct violation" of the Department of Justice's *Touhy* regulations. Tr. 3. Kessler, the argument went, might "be subject to sanctions" from the Department if he took the stand and testified without the Department's authorization. Tr. 4.

The State responded that Kessler was present and able to testify. *Id.* It further stressed the value of Kessler's testimony: according to the State, the federal proceedings—including a statement of facts Sheckles signed as part of his plea deal—resulted in "a full admission to all the elements of the State's case." Tr. 5. The State additionally noted that at least some of Kessler's testimony did not even require authorization under the Department's *Touhy* regulations. Tr. 8. Kessler also spoke for himself during the proceedings. He had discussed the matter with the U.S. Attorney's office that morning. Tr. 4–5, 7. It was Kessler's understanding that, at some point that day, the Department of Justice would be sending a letter confirming that he had authorization to testify. *Id.*

The trial court did not think it could proceed with Kessler's testimony without the letter, so it paused proceedings. Tr. 7, 9. But before taking a recess, the court informed Sheckles that he did not have standing to move to quash a subpoena directed at Kessler.

Tr. 8–9. The court suggested that Sheckles instead raise his arguments through a motion in limine. *Id.* Sheckles filed such a motion. Tr. 9. He again argued that Kessler's testimony would violate the Department's *Touhy* regulation. *See* Tr. 18–19. The State agreed to respond orally to Sheckles' motion. Tr. 10. But, before the State could present its legal arguments, the Court turned to other issues. *Id.*

Eventually, after expressing its irritation with how the day's proceedings were going, the trial court returned its attention to Kessler. Tr. 18. By that point, Kessler had a letter from the Department authorizing his testimony, which the Department had emailed to Kessler's phone. Tr. 19. To prove as much, the State offered to show the court the phone. Tr. 20, 37. The State also reiterated that there were some aspects of Kessler's testimony that did not require the Department's authorization. Tr. 20. But instead of soliciting further arguments or information from the State, the trial court granted Sheckles' motion to exclude Kessler's testimony. Tr. 22. The court also excluded Sheckles' federal plea agreement. *Id.* To explain these actions, the court said that because the Department's letter "was not on [its] desk," the court "did not see it." Tr. 37.

During the same May 25 proceedings, the trial court also addressed the admissibility of the State's video evidence. By way of background, the State had compiled a video summary, consisting of clips from the raw footage taken by security cameras at the bar where the crime took place. Tr. 25, 29–30; *see also* Evid.R. 1006 (allowing for

"summary" presentation of "voluminous" recordings). That morning, Sheckles orally moved to exclude the State's video, noting authenticity concerns. *See* Tr. 11, 22–24.

The State called the bar's owner, Victoria Evans, to authenticate the video. Evans testified that her bar has multiple security cameras, which capture various angles of the establishment. Tr. 29. She said that, after the crime, the police took the hard drive with the bar's security footage. Tr. 30. Evans further testified that she watched the State's entire video compilation on her phone before taking the stand. Tr. 31. The video, Evans confirmed, showed the inside and outside of her bar on the night in question. Tr. 31–32.

The trial court was dissatisfied with Evans' testimony. According to the court, to authenticate the video the State needed testimony from the person who compiled the video summary. Tr. 33. Though the State disagreed with that assessment, it offered to present the person "who actually made the compilation video." *Id.* And the State soon informed the court that this person was "on her way." *Id.* (The State also reminded the court that it was scrambling to respond to arguments first raised that day. Tr.34.) But the trial court, without waiting for another witness, ruled that the "video will be excluded" during trial. Tr. 36.

At the close of the May 25 proceedings, the State informed the trial court that it would appeal the court's evidentiary rulings rather than risk a trial without the excluded evidence. Tr. 37–39. A few days later, the court memorialized its evidentiary rulings. It excluded Kessler's testimony because Kessler failed to produce a letter confirming his

authorization to testify. Entry (May 31, 2022). And it excluded the State's video evidence because, in its view, the State had failed to authenticate the evidence. Entry (June 1, 2022).

4. The State appealed, and a divided panel of the First District affirmed. The panel started with the exclusion of Kessler's testimony. On appeal, the State argued that the Department's *Touhy* regulations did not serve as a proper basis for excluding the testimony. App. Op. ¶¶23, 26. The panel initially suggested that it need not reach the argument. It said that the State had forfeited the argument during proceedings below. App. Op. ¶29. The panel further questioned whether Kessler gave any "indication that he would testify without the protection of the letter." App. Op. ¶32.

The panel, however, proceeded to the merits. The Department's *Touhy* regulations, the panel explained, "prohibited" Kessler's testimony "absent prior approval" from the Department. App. Op. ¶31 (citing 28 C.F.R. §16.22). And those federal regulations had the force of federal law. App. Op. ¶32. It followed, the panel reasoned, that a "state court cannot allow a federal official to testify absent compliance with the regulations requiring agency approval." *Id.*

The panel also affirmed the trial court's exclusion of the video evidence. It acknowledged, based on Evans's testimony, that the police took "the hard drive containing all of the [bar's] recorded video." App. Op. ¶35. And Evans confirmed in her testimony that "the video depicted her bar and was from her recording system." *Id.* Even so, the panel held that the State did not authenticate the video. It reasoned that Evans

provided too little detail about "the operation or reliability of the [bar's] recording system." App. Op. ¶37. Additionally, the panel faulted the State for not proffering the video for purposes of the appellate record. App. Op. ¶40.

Judge Myers dissented as to both of the trial court's evidentiary rulings. With respect to Kessler's testimony, Judge Myers found no authority for the notion that federal *Touhy* regulations mandate the exclusion of testimony absent an approval letter. App. Op. ¶74. Indeed, Judge Myers explained, those "regulations *say nothing* about the admissibility at trial of … testimony or materials without prior authorization." App. Op. ¶76 (emphasis added). With respect to the video evidence, Judge Myers stressed that authentication "is a very low threshold." App. Op. ¶80 (quotation marks omitted). In her view, Evans's testimony "easily crossed" that threshold under this Court's precedent. App. Op. ¶89 (citing *Pickens*, 141 Ohio St. 3d 462).

5. The State timely appealed, and the Court accepted this case for review.

ARGUMENT

The State presents three propositions of law in this appeal. The Attorney General covers the same ground in two steps. His first proposition concerns the exclusion of Kessler's testimony. His second proposition then addresses the authenticity of the State's video evidence. The lower courts erred in both regards.

But before diving into the merits, a few words on jurisdiction. Normally, a pretrial ruling on a motion in limine—being "tentative and precautionary in nature"—does not

amount to a final, appealable order. *State v. Edwards*, 107 Ohio St. 3d 169, 2005-Ohio-6180 ¶17. The State, however, may immediately appeal a decision granting a motion to suppress evidence. R.C. 2945.67(A); Crim.R. 12(K). It follows that the distinction between motions in limine and motions to suppress affects when the State may appeal. The distinction "does not depend on" how motions are "labeled." *State v. Davidson*, 17 Ohio St. 3d 132, 135 (1985). Rather, if a court issues an "evidentiary ruling" suppressing evidence, and thereby renders the State unable to prosecute its case, the ruling is "a final order from which the state may appeal." *State v. Bassham*, 94 Ohio St. 3d 269, 271 (2002); *see also State v. Thyot*, 2018-Ohio-644 ¶¶12–13 (1st Dist.). That makes sense: if the rules were otherwise, the State would have "no meaningful recourse" to challenge "an adverse evidentiary ruling resulting in an acquittal," since the Double Jeopardy Clause would bar retrial after the acquittal. *State v. Malinovsky*, 60 Ohio St. 3d 20, 23 (1991).

In this case, the trial court's evidentiary rulings were "the functional equivalent of the granting of a motion to suppress." App. Op. ¶45 (Myers, J., dissenting). Those rulings were definitive, not tentative. *See, e.g.*, Tr. 8, 22, 36–37. And the rulings suppressed evidence—a confession and video evidence of the crime—critical to the State's case. The State was thus "left in a position" were it could "not proceed without that evidence." Tr. 39. The State, as a result, could immediately proceed with its appeal.

***Amicus* Attorney General's First Proposition of Law:**

> *The Department of Justice's* Touhy *regulations do not require, or even contemplate, the exclusion of evidence as a remedy for potential violations—the regulations thus provide no basis for excluding a witness's voluntary testimony in a state criminal case.*

On the merits, the first question presented concerns the trial court's exclusion of Kessler's testimony. Remember that Kessler was the federal prosecutor who secured Sheckles' guilty plea in a related federal case. Tr. 5. The State intended to call Kessler—and introduce evidence through him—about admissions Sheckles made during federal proceedings. *Id.* Kessler was present at the May 25 proceedings and, by all appearances, willing to testify at Sheckles' trial. *See* Tr. 4–5, 7, 19–20. At the very least, Kessler never refused to testify. Nor did he assert any privilege against testifying. Consequently, this case asks whether the Department of Justice's *Touhy* regulations allow for the exclusion of testimony at *a criminal defendant's* request. The answer is "no, they do not."

I. Neither state nor federal law justified the exclusion of Kessler's testimony.

A. Usually, the federal government does not regulate "the procedures that state courts use at criminal trials." *Collins*, 138 S. Ct. at 1680 (Thomas, J., concurring). And federal actors must speak with "unmistakably clear" language if they intend to "upset the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quotation marks omitted); *see also Sackett v. EPA*, 143 S. Ct. 1322, 1341 (2023); *Bond v. United States*, 572 U.S. 844, 858 (2014). It thus helps, before turning to federal law, to review the state law that presumptively governs this state case.

The goal of Ohio's Rules of Evidence is "that the truth may be ascertained" and "justly determined." Evid.R. 102. This goal is normally met when cases are decided based on the strength of the parties' evidence. Ohio's evidentiary rules therefore "favor inclusion of relevant evidence at trial, limiting its admissibility only in specific circumstances." *Davis v. Immediate Medical Servs.*, 80 Ohio St. 3d 10, 16 (1997) (citing Evid.R. 402). Stated in reverse, courts should be wary of attempts to "keep[] hidden" from factfinders "relevant information that could assist them in making their determinations." *Ede v. Atrium S. Ob-Gyn*, 71 Ohio St. 3d 124, 127 (1994). And relevancy is a low bar. Evidence is "relevant" if it has "any tendency to make" a fact "more probable or less probable than it would be without the evidence." Evid.R. 401. Parties seeking to exclude relevant evidence have the burden to demonstrate, or at least identify, a valid basis for excluding the evidence. *See, e.g.*, *State v. Tibbetts*, 92 Ohio St. 3d 146, 160 (2001); *State v. Roe*, 41 Ohio St. 3d 18, 23 (1989) (*per curiam*).

Ohio law also favors the inclusion of witness testimony. Witnesses are typically presumed competent to testify as to matters within their personal knowledge. *See* Evid.R. 601–02; R.C. 2317.01. A party who seeks to exclude a witness's testimony based on a privilege must establish that the privilege applies. *See State v. Brunson*, __ Ohio St. 3d __, 2022-Ohio-4299 ¶49; *State v. Tench*, 156 Ohio St. 3d 85, 2018-Ohio-5205 ¶234. Further, because privileges can be waived, a party claiming that a privilege blocks relevant testimony must have standing to raise the privilege. *See, e.g.*, *State v. Arnold*, 147 Ohio St. 3d

138, 146 (2016); *Diehl v. Wilmot Castle Co.*, 26 Ohio St. 2d 249, 253 (1971); *Brunson*, 2022-Ohio-4299 ¶48; *cf. also State ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, 2006-Ohio-3677 ¶31.

All told, Ohio's evidentiary rules yield a strong presumption against excluding relevant evidence. And that remains true even when evidence in question is the product of a legal violation. Ohio law does not recognize a generalized "exclusionary rule" that requires the suppression of evidence to remedy legal violations. *State v. Campbell*, __ Ohio St. 3d __, 2022-Ohio-3626 ¶22. Instead, the exclusionary rule applies "to violations of a constitutional nature only." *Kettering v. Hollen*, 64 Ohio St. 2d 232, 234 (1980). A party seeking to exclude evidence based on other types of legal violations—such as statutory violations—must identify some independent legal "mandate" that requires the exclusion of evidence. *Campbell*, 2022-Ohio-3626 ¶22. This rule makes sense, as Ohio's lawmakers are more than capable of deciding for themselves when an "exclusionary remedy" is necessary to ensure compliance with Ohio law. *See id.*

B. Move, then, to federal law. Under the Supremacy Clause, the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties … shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. This language supplies "a rule of priority," under which federal law prevails when federal law and state law conflict. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (Gorsuch, J., op.). As a result, the federal government can, when acting properly within its enumerated

powers, require state courts to apply and enforce federal law. *See, e.g.*, *Haaland v. Brackeen*, 143 S.Ct. 1609, 1635 (2023); *Montgomery v. Louisiana*, 577 U.S. 190, 204–05 (2016).

For the Supremacy Clause to apply, a federal law must derive from the Constitution itself, be part of a treaty, or be "made in Pursuance" of the Constitution. U.S. Const. art. VI, cl. 2. The final category is the one potentially applicable here. Which laws are "made in Pursuance" of the Constitution? As a matter of first principles, the phrase is best read—in light of constitutional text, history, and structure—to capture federal *statutes* and nothing else. David. S. Rubenstein, *The Paradox of Administrative Preemption*, 38 Harv. J.L. & Pub. Pol'y 267, 286–91 (2015). Under that reading, federal regulations are not laws "made in Pursuance" of the Constitution and are thus "beyond the Supremacy Clause's purview." *Id.* at 283.

Admittedly, however, that is not the present state of the law. The U.S. Supreme Court has held that federal regulations have preemptive force. *See, e.g.*, *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). It is thus conceivable that a federal agency might attempt—through regulation—to set evidentiary rules for state-court proceedings. That would be an ambitious attempt: even accepting the preemptive force of federal regulations, it is debatable whether the federal government has the power to prescribe "admissibility rules to be used in state court for a state cause of action." *Pierce County v. Guillen*, 537 U.S. 129, 148 n.10 (2003); *see also Jinks v. Richland County*, 538 U.S. 456, 464–65 (2003); *Brown v. Gerdes*, 321 U.S. 178, 193 (1944) (Frankfurter, J., concurring).

Regardless, given the normal balance of federal and state authority, courts should not lightly assume that a federal agency is attempting to dictate evidentiary rules for state-court litigation. *See Gregory*, 501 U.S. at 460. Rather, as mentioned already, an agency must offer a clear statement if it intends such a radical step. *Id.*; *above* 14.

A clear statement would be especially critical when it comes to the question whether federal law imposes an exclusionary rule on state courts. That is because, much like Ohio law, federal law does not embrace a "generally applicable" exclusionary rule that attaches to all legal violations. *United States v. Abdi*, 463 F.3d 547, 556 (6th Cir. 2006); *see also Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348 (2006). "Historically, if evidence was relevant and reliable, its admissibility did not depend upon the lawfulness or unlawfulness of the mode, by which it was obtained." *Collins*, 138 S. Ct. at 1676 (Thomas, J., concurring) (alterations accepted, quotation marks omitted). True, the Supreme Court eventually crafted an exclusionary rule as a means of enforcing certain constitutional protections. *See* Akhil Reed Amar, *What Belongs in a Criminal Trial: The Role of Exclusionary Rules: Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 Harv. J.L. & Pub. Pol'y 457, 459–61 (1997); Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 43–62 (2018). But the federal exclusionary rule does not, in the ordinary course, attach to violations of federal statutes or regulations. *See, e.g.*, *United States v. Caceres*, 440 U.S. 741, 755–56 (1979); *United States v. Santos-Portillo*, 997 F.3d 159, 165 (4th Cir. 2021); *United States v. De La Cruz*, 835 F.3d 1, 6 (1st Cir. 2016); *Downs v. Holder*,

758 F.3d 994, 998 (8th Cir. 2014); *United States v. Rutherford*, 555 F.3d 190, 197 (6th Cir. 2009); *United States v. Kontny*, 238 F.3d 815, 818 (7th Cir. 2001); *Nowicki v. Comm'r*, 262 F.3d 1162, 1163–64 (11th Cir. 2001); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 886 (9th Cir. 2000) (*en banc*); *United States v. Kington*, 801 F.2d 733, 737 (5th Cir. 1986); *cf. also Sanchez-Llamas*, 548 U.S. at 348. For statutory violations, exclusion of evidence is appropriate "only where the statute specifically provides for suppression as a remedy or the statutory violation implicates underlying constitutional rights." *Abdi*, 463 F.3d at 556. For regulatory violations, it is the role of the executive branch to "fashion[] the appropriate remedy for the violation of its regulations." *Caceres*, 440 U.S. at 756. If the executive decides to rely upon "internal sanctions" to enforce federal regulations, courts should not "require exclusion" as well. *Id.*

C. The above principles—and particularly, the lack of any generally applicable exclusionary rule under state or federal law—make for a quick analysis in this case. Because neither state nor federal law supplied a legal basis for excluding Kessler's testimony, the trial court erred as a matter of law when it excluded the testimony.

Consider first how Ohio's evidentiary rules apply to this case. Kessler, as the federal prosecutor who handled a related federal case, had personal knowledge of Sheckles' guilty plea in that case. Tr. 5. Kessler was thus competent to testify as to the federal proceedings. *See* Evid.R. 601–02. And, while the parties dispute the precise implications of Sheckles' guilty plea, *see* Tr. 5–6, Sheckles' plea undoubtedly clears the low threshold

of relevancy, *see* Evid.R. 401. Consequently, to exclude Kessler's testimony under Ohio law, Sheckles needed to identify a basis for exclusion under Ohio's Rules of Evidence. *See Davis*, 80 Ohio St. 3d at 16. He never did.

Federal law does nothing to override Ohio law in this scenario. The Department of Justice's *Touhy* regulations require federal prosecutors to obtain authorization before disclosing certain information. 28 C.F.R. §16.22(a); *above* 5–6. Here, insofar as Kessler needed authorization, it appears he received it. *See* Tr. 19–20. But, in the end, neither the existence nor scope of authorization matters. Even assuming Kessler's testimony would have violated the Department's *Touhy* regulations, the trial court still erred in excluding the testimony. The reason is simple: the Department's *Touhy* regulations do not require the exclusion of evidence to remedy violations. Indeed, the regulations make clear that they are "intended only to provide guidance for the internal operations of the Department" and do not create any right or benefit for others to rely upon. 28 C.F.R. §16.21(d). Private parties, it follows, do not get to enforce these regulations themselves and seek exclusion of evidence. Rather, the remedy for a *Touhy* violation is for the Department to impose sanctions on a person who discloses covered information without authorization. Even Sheckles' counsel recognized as much below, telling the trial court: "Kessler is going to be subject to sanctions if he takes the stand and testifies." Tr. 4.

Caselaw reinforces this conclusion. Take, for example, the Seventh Circuit's decision in *United States ex rel. Treat Bros. Co.*, 986 F.2d 1110. There, a private company argued

that a district court should have excluded two witnesses because their testimony violated the Army's *Touhy* regulation. *Id.* at 1118. The Army, however, was "not attempting to enforce the regulation in order to prevent its personnel from testifying." *Id.* Faced with these circumstances, the Seventh Circuit held that *the Army's* procedures for disclosing information did not give "private litigants" a tool for excluding testimony. *Id.* at 1119. Other courts have similarly rejected attempts by private parties to invoke *Touhy* regulations as a means of excluding evidence. *See, e.g.*, *Christison v. Biogen Idec*, No. 2:11-cv-01140, 2015 U.S. Dist. LEXIS 42481 at *3 (D. Utah Mar. 30, 2015); *United States ex rel. Liotine v. CDW Gov't, Inc.*, No. 05-33, 2012 U.S. Dist. LEXIS 94837 at *18 (S.D. Ill. July 10, 2012); *CPC Reference Labs., Inc. v. Lab. Corp. of Am. Holdings*, No. 3:070-cv-65, 2009 U.S. Dist. LEXIS 138717 at *4 (N.D. Miss. July 24, 2009); *cf. also Moore v. Chertoff*, No. 00-953, 2006 U.S. Dist. LEXIS 55628 at *4 (D.D.C. Aug. 10, 2006).

II. The First District's contrary analysis is unpersuasive.

The State argued on appeal that the trial court erred by excluding Kessler's testimony based on the Department's *Touhy* regulations. App. Op. ¶¶23, 26. A panel of the First District rejected that argument for both procedural and substantive reasons. It erred on all fronts.

Begin with the procedural analysis. The panel reasoned that the State had forfeited the argument by not making it in the trial court. App. Op. ¶29. But courts should not enforce forfeiture principles unless the forfeiting party received a fair chance to make the

argument. *See State v. Roberts*, 32 Ohio St. 3d 225, 233 (1987); *Barger v. United Bhd. of Carpenters & Joiners of Am.*, 3 F.4th 254, 266 n.6 (6th Cir. 2021). Here, the State did not receive a fair chance to make its full argument. Recall that Sheckles did not move to exclude Kessler's testimony until the morning of his rescheduled trial. Tr. 10. To keep proceedings moving, the State said it would respond orally to the motion. *Id.* But the trial court, which was "irritated" with how proceedings were going, Tr. 18, ruled on the motion without ever allowing the State to develop its legal arguments, *see* Tr. 18–22. Anyway, the State certainly argued below that Kessler's testimony was admissible. There is nothing improper about the State refining its arguments on appeal, consistent with its previously advanced position. *See Phoenix Lighting Grp., L.L.C. v. Genlyte Thomas Grp., L.L.C.*, 160 Ohio St. 3d 32, 2020-Ohio-1056 ¶21.

The panel's substantive analysis fares no better. The panel reasoned that the Department's *Touhy* regulations bar Department employees from disclosing certain information without authorization. App. Op. ¶31. And federal regulations have the force of federal law. App. Op. ¶32. It followed, in the panel's view, that "a state court cannot allow a federal official to testify absent compliance with" the Department's *Touhy* regulations. *Id.*

This chain of reasoning misses a key link. The panel never explained why the Department's *Touhy* regulations require a state court to exclude evidence to safeguard against potential regulatory violations. Again, there is no generally applicable

exclusionary rule under either state or federal law. *Above* 16, 18–19. And the Department's *Touhy* regulations do not contain an exclusionary rule or any other language suggesting that they intend to displace evidentiary standards in state criminal cases. *See* 28 C.F.R. §16.21(d).

One final point before moving on. In affirming the trial court's ruling, the panel hinted that Kessler might have actually been *un*willing to testify. *See* App. Op. ¶¶30, 32. The record does not support the suggestion. While Kessler might not have directly said "I will testify," he repeatedly signaled during the proceedings below that he was cooperating with the State and ready to testify. *See* Tr. 4–5, 7, 19–20. In any event, Kessler never affirmatively refused to testify. This case, therefore, is not about whether a state court may exclude the testimony of an unwilling federal witness. This case is instead about whether a state court can preemptively exclude a federal witness's testimony at a criminal defendant's request. The Department's *Touhy* regulations provide no basis for doing so.

***Amicus* Attorney General's Second Proposition of Law:**

> *Under the silent-witness theory, the State may authenticate a video of a crime by calling a witness familiar with the scene of the crime—the State need not also produce the person who actually compiled the video footage.*

The second question presented asks whether the State did enough to authenticate the video evidence it intended to introduce at trial. The answer is "yes, it did."

I. The State properly authenticated its video evidence.

A. Authentication is "a condition precedent to" the admissibility of evidence. Evid.R. 901(A). A party seeking to authenticate evidence must provide "evidence sufficient to support a finding that the matter in question is what" the party claims it to be. *Id.* As that standard implies, evidence can be authenticated in various ways. For example, the submitting party may rely on any combination of "distinctive characteristics" evidence might have, and those characteristics may be "taken in conjunction with" the surrounding "circumstances." Evid.R. 901(B)(4).

"The threshold for authentication is low." *Edwards v. Adrenalin Trampoline Park, LLC*, 2020-Ohio-280 ¶13 (10th Dist.) (Brunner, J.) (citations omitted). A party need not conclusively prove that evidence is authentic for evidence to be admitted. *Id.*; *see also, e.g.*, Evid.R. 901(B)(2) (allowing nonexperts to authenticate handwriting). "[T]he rule requires only a prima facie showing of genuineness and leaves it to the jury to decide the true authenticity and probative value of the evidence." *State v. Powell*, 2014-Ohio-2048 ¶33 (8th Dist.) (Stewart, J.). Put another way, as long as there is some reason to believe that evidence is what the submitting party says it is, questions surrounding the completeness or accuracy of the evidence will go to the ultimate weight the evidence receives rather than its initial admissibility. *See, e.g.*, *State v. Myers*, 154 Ohio St. 3d 405, 2018-Ohio-1903 ¶116; *State v. Gross*, 97 Ohio St. 3d 121, 2002-Ohio-5524 ¶57; *State v. Richey*, 64 Ohio St. 3d 353, 360 (1992).

This Court has approved two methods for admitting video evidence. *First*, a party may rely on the "pictorial testimony theory." *Midland Steel Prods. Co.*, 61 Ohio St. 3d at 129 (quotation marks omitted). Under this theory, a sponsoring witness testifies as to the video's accuracy based on that witness's own observations of the recorded events. *Id.* The theory rests on the premise that the admitted video is "merely illustrative" of the sponsoring witness's own eyewitness observations. *Id.* (quotation marks omitted). Thus, to authenticate video evidence under the pictorial-testimony theory, the party submitting evidence must have a sponsoring witness who actually saw the events in question.

Second, and more relevant here, video evidence may be "admissible under the silent witness theory." *Id.* at 130. Under this theory, video evidence "speaks for itself" and acts as "substantive evidence of what it portrays independent of a sponsoring witness." *Id.* (quotation marks omitted). Though video evidence speaks for itself under this theory, the submitting party must still authenticate the video. To do so, the party must make "a sufficient showing of the reliability of the process or system that produced the evidence." *Id.* That is less complicated than it may sound. The submitting party is *not* required to put on technical, "expert testimony regarding the reliability of [the] video surveillance system" that made the recording. *Id.* The party may instead show reliability through lay testimony. *Id.* Here is how that works. The party calls a witness with "personal knowledge about the layout of" the area recorded in the video. *Id.* That witness then testifies as to whether the video "accurately depict[s]" the "known features" of the area.

Id. If it does, that "impliedly authenticate[s] the accuracy of the surveillance system." *Id.* After all, if the video depicts the "known features" of the area accurately, then it is "likely that" the video "also depict[s]" the other recorded events accurately. *Id.*

This Court's decision in *Pickens*, 141 Ohio St. 3d 462, reinforces the low bar for authenticating video evidence under the silent-witness theory. The case involved murders committed in an apartment building. To support the State's case against the defendant, "the police spliced together multiple clips" of surveillance footage taken from security cameras near the crime scene. *Id.*, ¶144. To authenticate the spliced video, the police called the property manager of the apartment complex. *Id.*, ¶141. The property manager gave a general overview of the apartment complex's surveillance system—which consisted of over 140 security cameras—including how the security footage was recorded. *Id.*, ¶¶141, 151. He further testified to being familiar with the area of the crime, which was accurately reflected in the footage he turned over to police. *Id.*, ¶144. The Court held that the property manager's testimony was enough to authenticate the evidence—no testimony from an expert, or the police who spliced together the video footage, was necessary. *Id.*, ¶151.

Though not directly at issue in this case, a final wrinkle with respect to video evidence deserves quick mention. Ohio's Rules of Evidence recognize that sometimes recorded evidence will be too voluminous to allow for convenient presentation at trial. Evid.R. 1006. In these situations, a party is free to present the evidence "in the form of a

… summary." *Id.* The summarizing party simply needs to make the original recording available to the opposing party "at a reasonable time and place." *Id.* That way, the opposing party will be able to counter the content of the summary if it sees fit.

B. In this case, the State made a sufficient showing to authenticate the video evidence it intended to introduce at trial. Recall the basic facts. This case arises from a shooting that took place in a Cincinnati bar. The bar's security cameras recorded the crime. *See* App. Op. ¶2. To support the State's case against Sheckles, the police compiled a video from raw footage they obtained from the bar. *Id.* During pretrial proceedings, the State called the bar's owner, Victoria Evans, to authenticate the compilation video. Evans confirmed that her bar has security cameras that monitor various angles of the bar. Tr. 29. She further confirmed that the police had obtained the video footage from her bar for the night in question. Tr. 30. Finally, and most significantly here, Evans confirmed that she had watched the State's video compilation and that it accurately showed how the bar looked on that night. Tr. 31–32.

Applying this Court's precedent in this area, Evans's testimony properly authenticated the video evidence. Evans was familiar with "the layout of" her bar. *Midland Steel*, 61 Ohio St. 3d at 130. By testifying that the videos showed the inside and outside of her bar on the night in question, Tr. 31–32, Evans verified that the State's compilation video accurately depicted the "known features" of her bar, *Midland Steel*, 61 Ohio St. 3d at 130. It stands to reason that the compilation video "also depicted" the crime accurately.

Midland Steel, 61 Ohio St. 3d at 130. It follows that Evans's testimony was enough to "impliedly authenticate[] the accuracy of the surveillance system." *Id.* Any lingering concern about how the police went about compiling the video goes to weight, not admissibility. *Cf. Richey*, 64 Ohio St. 3d at 360 ("The possibility of contamination goes to the weight of the evidence, not its admissibility.")

II. The First District required the State to show too much.

The panel's contrary analysis sets too high a standard for the authentication of videos. The panel recognized that the police had obtained the video footage from the bar. App. Op. ¶35. And the panel recognized that Evans had "confirmed the video depicted the bar." *Id.* But the panel still concluded that this case was different from this Court's past cases like *Pickens*. App. Op. ¶39. Evans, the panel said, "did not testify about the operation or reliability of the recording system." App. Op. ¶37.

It appears from these statements that the panel misunderstood how videos are authenticated under the silent-witness theory. At the risk of undue repetition, a lay witness testifies to the reliability of a video by confirming that the video accurately depicts "known features" that are being recorded. *Midland Steel*, 61 Ohio St. 3d at 130. That testimony then justifies the inference that other aspects of the recording are also accurate. *Id.* So, by "confirm[ing] the video depicted" her bar on the night in question, App. Op. ¶35, Evans *did provide* testimony about the "reliability of the recording system," *contra* App. Op. ¶37. The panel seemingly wanted technical details about the surveillance

system's installation and operations. *See* App. Op. ¶¶37–40. But this Court's precedent does not demand such technical details for video authentication. *See Midland Steel*, 61 Ohio St. 3d at 130; *Pickens*, 141 Ohio St. 3d 462 ¶151.

The First District also suggested that Evans's testimony was problematic because the police—not Evans—compiled the video summary. App. Op. ¶38; *see also* Tr. 33 (trial court: "I need the person who actually made the compilation video to tell me how they made that video"). But imposing this type of compilation-witness requirement on the State contradicts this Court's precedent. Remember that, in *Pickens*, the State relied on a property manager to authenticate video evidence even though "the police spliced together" the video. 141 Ohio St. 3d 462 ¶144. The Court found no problem with this approach. *Id.*, ¶151. And that makes sense: authenticity does not require a conclusive showing, it requires only a showing "sufficient" for one to reasonably conclude that the evidence is what it purports to be. Evid.R. 901(A). Any further questions go to weight.

The panel's final basis for affirming also falls short. Specifically, the panel criticized the State for failing to proffer the compilation video to assist with its appeal. App. Op. ¶40. A proffer, though usually advisable, is not required to preserve evidentiary rulings for appeal. *State v. Gilmore*, 28 Ohio St. 3d 190, 191–92 (1986). An alleged erred is preserved so long as "the substance of the excluded evidence is apparent to the court from the context." *Id.* at 192; *accord* Evid.R. 103(A)(2). In this case, it is obvious from the record that the excluded evidence in question is a compilation of video footage taken

from security cameras at the crime scene. *See* Tr. 11–13, 23–25, 28–32. Because the First District had a sufficient record to decide whether the trial court properly excluded the video evidence, there is no serious preservation issue.

CONCLUSION

The Court should reverse the judgment of the First District.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellant State of Ohio was served this 14th day of July, 2023, by e-mail on the following:

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