In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case Nos. 2024-0522
	:	
Appellant,	:	On Appeal from the
	:	Fairfield County
v.	:	Court of Appeals,
	:	Fifth Appellate District
JEREMY REED,	:	
	:	Court of Appeals
Appellee.	:	Case No. 2023 CA 00012

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INTRODUCTION

This appeal raises two unrelated questions: (1) may a defendant, after pleading no-contest, ordinarily challenge his conviction on the ground that the hypothetical trial would have prejudiced him by joining charges; (2) may a court of appeals deny an en-banc petition by a vote of only three judges? The answers are no, and no.

Evaluating prejudice from joined charges usually requires a trial. It is not a question that can be resolved in the abstract. This Court has consistently held that a defendant suffers no prejudice from joined charges if the evidence from any charge would be admissible under Evidence Rule 404 (regarding other-acts evidence) in separate trials of the other charges. *See, e.g.*, *State v. Knuff*, 2024-Ohio-902, ¶46. And deciding whether evidence is admissible under Rule 404 is usually only possible in light of the other evidence at trial and the defendant's trial strategy. *See, e.g.*, *State v. Smith*, 2020-Ohio-4441, ¶44. It follows that once a defendant pleads no-contest, the argument that a hypothetical trial joining several charges would prejudice him is usually off the table. The typical analysis here resembles the Court's consistent holdings that a defendant may not appeal a motion-in-limine ruling after pleading no contest. In both contexts, an appeal asks too many hypothetical, unanswerable questions. In both cases, then, no appeal should be allowed.

The other question is whether a District Court of Appeals may dispose of an en-banc petition as a panel of three instead of as a full court. Appellate Rule 26(A)(2)(a) seems to

answer that the vote must be of the full court. That Rule reads, "Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc." The Rule defines the "en banc court" as "all fulltime judges." *Id.* Despite this language, the Court held in 2013 that a panel of three judges could dispose of the petition. *State v. Forrest*, 2013-Ohio-2409, ¶1. The Court should overrule that decision because it is incompatible with Appellate Rule 26's language.

A final question is how these independent questions fit together. The answer is that they do not. But ruling on both questions as independent grounds for the judgment would serve the interests of judicial efficiency. The judgment below should be reversed both because it erred in holding Reed suffered prejudicial joinder and in holding that three judges could insulate that ruling from a vote of the full court. Ruling on both grounds would involve alternate holdings that are "independent and equally sufficient" to reverse the judgment below. *See, e.g.*, *Wright v. Spaulding*, 939 F.3d 695, 701 (6th Cir. 2019) (emphasis deleted). Addressing both questions, that is, would not risk making one ground advisory or unnecessary to the outcome.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law officer and "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. The Attorney General also often serves

as a special prosecutor in criminal cases. For both reasons, the Attorney General is interested in the rules that govern criminal cases in state court, including the rules that govern review of a motion to sever after a no-contest plea.

STATEMENT

A grand jury indicted Jeremy Reed for, among other counts, several first-degree felonies—7 rape counts and 4 kidnapping counts. *State v. Reed*, 2024-Ohio-43, ¶2 (5th Dist.) ("App. Op."). The kidnapping counts each included a sexual-motivation and sexually violent predator specification. *Id.* The kidnapping allegations included instances when Reed took a 9-year-old girl hunting in the woods so that he could sexually abuse her. R.124, Am. Bill of Particulars, at 2 (Jan. 31, 2023). All the charges involved crimes against girls. *See* App. Op. ¶2. The charged spanned across 15 years. *Id*.

Reed pleaded not guilty to all charges. *Id.* at ¶3. Reed then moved to sever the counts into four separate cases, one for each victim. *Id*. The common-pleas court denied the motion, reasoning that the evidence as to each victim would be "simple and direct" and that the judge would instruct the jury that evidence related to one victim "must not influence the other counts." R.51, Trial Op. (no pagination) (May 2, 2022). The common pleas court also noted that "many of the same witnesses" would testify as to each victim. *Id.*

After the denial, Reed changed his plea to no-contest on 2 counts of rape and 2 counts of gross sexual imposition (third-degree felonies). App. Op. ¶5. The court judged Reed

guilty and sentenced him to a prison term of 28–33 years. *Id.* The court also classified Reed as a Tier III sex offender. *Id.*

Reed appealed, and the Fifth District reversed over Judge Delaney's dissent. The Fifth District recognized that Reed had the burden to bring forth information for the trial judge to evaluate the merits of his severance motion. *Id.* at ¶15. The appeals court then rejected both grounds that exhibit lack of prejudice from joinder. First, the Fifth District held that, because Reed denied the acts altogether, he would not defend the case by claiming mistaken identity, mistake, or accident. App. Op. ¶22. Without those possible defenses, the court reasoned, evidence about other acts would need to be excluded under Evidence Rule 404 and Rule 403. *Id.* at ¶¶19–23. Second, the Fifth District held that the jury would "have had a difficult time looking at the evidence … as simple and distinct." *Id.* at ¶26.

Judge Delaney dissented. She opined that the "limited record" meant that Reed could not show prejudice from the trial court's order denying severance. *Id.* at ¶31 (Delaney, J., dissenting).

The State sought en-banc review. Only the original three-judge panel voted on that request. Those three judges alone—not the full six judges that make up the Fifth District—voted to deny the petition without dissent. Or. Denying En Banc Review (Feb. 28, 2024).

The State appealed and this Court agreed to review questions regarding joinder and en-banc voting.. *07/24/2024 Case Announcements*, 20204-Ohio-2781.

ARGUMENT

This case presents two distinct sets of questions—one about joinder under the criminal rules and one about the mechanics of en-banc voting. The brief takes those distinct topics in turn.

***Amicus Curiae* Ohio Attorney General's Proposition of Law No 1:**

> *A defendant convicted after pleading no-contest may not ordinarily appeal an order rejecting a pretrial motion to sever joined charges.*

A defendant bears the burden to show prejudice from joined charges. Proving prejudice after a no-contest plea is impossible because prejudice turns on facts from a trial that will never happen. Reed cannot show prejudice here.

I. Proving prejudicial joinder is a heavy lift.

The Ohio Rules of Criminal Procedure authorize a single indictment to charge "[t]wo or more offenses" that are "of the same or similar character." Crim.R. 8(A). That rule expresses a policy that "favors joining multiple offenses in a single trial." *Knuff*, 2024-Ohio-902 at ¶46 (quotations omitted); *State v. Lott*, 51 Ohio St. 3d 160, 163 (1990); *cf. Ashe v. Swenson*, 397 U.S. 436, 454–55 (1970) (Brennan, J., concurring); *Pointer v. United States*, 151 U.S. 396, 401–03 (1894). The policy favoring joinder, the Court has noted, "conserves judicial and prosecutorial time, lessens the not inconsiderable expenses of multiple trials, diminishes inconvenience to witnesses, and minimizes the possibility of incongruous results in successive trials before different juries." *State v. Thomas*, 61 Ohio St. 2d 223, 225

(1980); *see State v. Clinton*, 2017-Ohio-9423, ¶43. *State v. Hamblin*, 37 Ohio St. 3d 153, 157–58 (1988).

The Rules also authorize courts to sever joined charges. Crim.R. 14. Under these Rule 14 motions, the defendant shoulders the "burden to demonstrate that joinder is prejudicial." *State v. Gordon*, 2018-Ohio-259, ¶21; *accord State v. Dean*, 2015-Ohio-4347, ¶60; *State v. Torres*, 66 Ohio St. 2d 340, 343 & syl. ¶1 (1981). Part of the burden the defendant shoulders is pointing the trial court to "sufficient information so that it [can] weigh the considerations favoring joinder against the defendant's right to a fair trial." *Clinton*, 2017-Ohio-9423 at ¶46 (quotation omitted); *State v. Spaulding*, 2016-Ohio-8126, ¶63; *Torres*, 66 Ohio St. 2d at 343 & syl. ¶1; *cf. Opper v. United States*, 348 U.S. 84, 95 (1954); *Villalobos v. State*, No. 04-01-00479-CR, 2002 WL 2008090, at *2 (Tex. App. Sept. 4, 2002).

When a defendant appeals an unsuccessful motion to sever, he must show that the common pleas court abused its discretion. *See, e.g.*, *State v. Brinkley*, 2005-Ohio-1507, ¶29; *State v. Hand*, 2006-Ohio-18, ¶166; *cf. Zafiro v. United States*, 506 U.S. 534, 541 (1993); *United States v. Lane*, 474 U.S. 438, 449 n.12 (1986). The trial court's discretion, coupled with the defendant's burden of proof, means that securing reversal of a denied motion to sever is a "heavy" lift. *State v. Ford*, 2019-Ohio-4539, ¶106; *Spaulding*, 2016-Ohio-8126 at ¶63; *accord State v. Sapp*, 2004-Ohio-7008, ¶69.

The heavy lift faces a near-immovable object in two common scenarios that arise when charges are joined for trial.

First, a defendant suffers no prejudice if the prosecutor "could introduce evidence of the joined offenses as 'other acts' under Evid.R. 404(B)." *Knuff*, 2024-Ohio-902 at ¶46; *Dean*, 2015-Ohio-4347 at ¶61. Federal courts follow the same rule. *See, e.g.*, *Lane,* 474 U.S. at 450; *United States v. McLaurin*, 764 F.3d 372, 386 (4th Cir. 2014); *United States v. Erickson*, 610 F.3d 1049, 1055 (8th Cir. 2010); *United States v. Pindell*, 336 F.3d 1049, 1058 (D.C. Cir. 2003). Other state supreme courts also follow this rule. *See, e.g.*, *State v. Loeschke*, 2022 S.D. 56, ¶27; *Whaley v. Commonwealth*, 567 S.W.3d 576, 584 (Ky. 2019); *State v. Brown*, 1998 ME 129, ¶9.

Second, a defendant suffers no prejudice if the "evidence of each crime joined at trial is simple and direct." *Knuff*, 2024-Ohio-902 at ¶46 (quoting *State v. Diar*, 2008-Ohio-6266, ¶96); *accord State v. Roberts*, 62 Ohio St. 2d 170, 175 (1980). This simple-and-direct test examines whether the evidence presented would leave the jury unable to tell what evidence "applied" to what crime. *Knuff*, 20204-Ohio-902, at ¶47; *see Diar*, 2008-Ohio-6266 at ¶98. This method of showing no prejudice operates independently of the Rule 404 method. A motion to sever will fail on this basis "regardless of the nonadmissibility of evidence of these crimes … under" Rule 404. *Lott*, 51 Ohio St. 3d at 163. The simple-and-direct rule traces back to the "common-law," which permitted "separate crimes [to] be joined in the court's discretion." *United States v. Lotsch*, 102 F.2d 35, 36 (2d Cir. 1939) (L. Hand, J.). The rule's common-law roots led federal courts to adopt it. *See, e.g.*, *United States v. Gooch*, 665 F.3d 1318, 1337 (D.C. Cir. 2012); *Bean v. Calderon*, 163 F.3d 1073, 1085

(9th Cir. 1998); *Drew v. United States*, 331 F.2d 85, 91 (D.C. Cir. 1964); *see also United States v. Bowers*, 811 F.3d 412, 422–24 (11th Cir. 2016);. The rule's deep roots also resulted in it springing up in the law of many other States. *See, e.g.*, *State v. Garcia*, 315 Neb. 74, 122 (2023); *State v. Rivera*, 175 N.H. 496, 502 (2022); *cf. Earley v. State*, 2011 WY 164, ¶¶8–9 (co-defendants).

Applying these tests, the Court has rejected claims of prejudice when a trial joined two murders, a trial that involved two rapes, a trial for a murder and an assault, and a trial of two distinct armed robberies. *See respectively State v. LaMar*, 2002-Ohio-2128, ¶52; *Clinton*, 2017-Ohio-9423 at ¶¶45–49; *Ford*, 2019-Ohio-4539 at ¶¶40, 102– 10; *State v. Mills*, 62 Ohio St. 3d 357, 361–62 (1992); *see also, e.g., United States v. Goodhouse*, 81 F.4th 786, 791 (8th Cir. 2023) (aggravated sexual assault of two girls); *United States v. Rivera*, 546 F.3d 245, 253 (2d Cir. 2008) (sexual exploitation of 4 children); *Cobb v. Commonwealth*, No. 2002-SC-0052-MR, 2003 WL 21990530, at *2 (Ky. S. Ct. Aug. 21, 2003) (ten robberies in three weeks); *State v. Deruise*, 802 So. 2d 1224, 1231–33 (La. 2001) (twin murders, one a child). Joinder of charges is common both in Ohio and elsewhere.

II. No-contest pleas render some pretrial rulings unappealable.

Now consider how the rules for reviewing severance motions intersect with a conviction after a no-contest plea. Generally, pleas in criminal cases waive most issues for appeal. *See, e.g.*, *State v. Beasley*, 2018-Ohio-16, ¶15; *cf. Ross v. Common Pleas Ct. of Auglaize Cnty.*, 30 Ohio St. 2d 323, 323–24 (1972) (per curiam) (habeas relief); *United States*

v. Broce, 488 U.S. 563, 569 (1989) (collateral attack); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (same). And in many states, a no-contest plea waives all non-jurisdictional appellate arguments. *See, e.g.*, *State v. Vigil*, No. S-1-SC-37763, 2021 WL 424006, at *2 (N.M. Feb. 8, 2021); *In re Gay*, 2019 VT 67, ¶12; *Popkin v. State*, 2018 WY 121, ¶12; *State v. Bettie*, 2014 MT 18N, ¶8. In Ohio, however, a no-contest plea is a partial exception to the general waiver principle. Criminal Rule 12(I) instructs that no-contest pleas do not waive arguments that a trial court "prejudicially erred in ruling on a pretrial motion." Crim.R. 12(I); *see Beasley*, 2018-Ohio-16 at ¶15; *State v. LaRosa*, 2021-Ohio-4060, ¶41; *see also State v. Luna*, 2 Ohio St. 3d 57, 58 (1982) (speedy-trial objection preserved).

While Ohio's Criminal Rule 12(I) prevents across-the-board waiver, it does not preserve *every* pretrial ruling, regardless of other pretrial or trial proceedings. For example, "Ohio law is clear … that a ruling on a motion in limine may not be appealed and that objections to the introduction of testimony or statements of counsel must be made during the trial to preserve evidentiary rulings for appellate review." *Gable v. Gates Mills*, 2004–Ohio–5719, ¶34; *accord State v. Brown*, 38 Ohio St.3d 305, syl. ¶3 (1988). Similarly, if the defendant pretermits trial by pleading no-contest, he likewise waives the "right to appeal" pretrial rulings about admitting evidence. *State v. Engle*, 74 Ohio St. 3d 525, 529 (1996) (Resnick, J., concurring; joined by Moyer, C.J., and Douglas and Cook, JJ.); *see State v. Oshodin*, 2004-Ohio-1186, ¶5 (6th Dist.) (Lanzinger, J.); *State v. Humphries*, 2019-Ohio-2878, ¶6 (5th Dist.) (collecting cases).

The rationale of these Ohio cases about in-limine motions follows federal-court practice. A U.S. Supreme Court case illustrates. That case involved Federal Rule of Evidence 609, which governs the use of prior convictions to impeach a witness. The rule generally permits use of prior convictions to impeach if the defendant is testifying. *See* Fed.R.Evid. 609(a)(1)(B). Citing Rule 609, a defendant moved to exclude his prior conviction and the trial court overruled the motion. *Luce v. United States*, 469 U.S. 38, 39–40 (1984). At trial, however, the defendant did not testify. *Id.* at 39–40. The Supreme Court held that it could not review the decision rejecting the motion in limine because that review required knowing "the precise nature of the defendant's testimony, which [was] unknowable" without the defendant taking the stand. *Id.* at 41. Any possible harm to the defendant, the Court reasoned, would be "wholly speculative." *Id.*

Many courts apply *Luce* to Rule 404 questions, as the logic under that rule is the same. *See, e.g.*, *United States v. Prigge*, 830 F.3d 1094, 1097 (9th Cir. 2016) (collecting cases). A pretrial ruling about whether evidence should be admitted can only be evaluated in the context of all the evidence brought forth at trial. To preserve an argument about Rule 404, these cases hold, the underlying evidence "must be presented at trial." *Id.*

III. No-contest pleas presumptively foreclose appeals of orders denying a motion to sever joined charges.

For motions to sever, criminal Rule 12(I) leaves the door ajar in theory, but it almost always closes the door in fact. Evaluating prejudicial joinder means evaluating how a jury viewed the evidence. *See, e.g.*, *Knuff*, 2024-Ohio-902 at ¶47; *Diar*, 2008-Ohio-6266 at

¶96; *LaMar*, 2002-Ohio-2128 at ¶52. And to evaluate how a jury viewed the evidence, a jury had to hear evidence.

To see more specifically why prejudice is next-to-impossible absent a jury trial, recall the two ways this Court has held that a prosecutor can defeat a defendant's claim of prejudicial joinder. One, a defendant suffers no prejudice if the evidence from the hypothetical separate trials would have been admissible in each separate trial. *See, e.g.*, *Knuff*, 2024-Ohio-902 at ¶46. Two, a defendant suffers no prejudice if "evidence of each crime joined at trial is simple and direct." *Id.* (quotation omitted). Each of those bases almost always forecloses an argument for prejudicial joinder when the defendant pleads no contest. Evaluating either the Rule 404 or the simple-and-direct counter to a claim of prejudicial joinder is almost always impossible without a trial. Take each basis in turn.

A. A no-contest plea prevents a reviewing court from considering claimed prejudice in light of Rule 404.

Evaluating Rule 404 admissibility requires knowing what theories were raised at trial. *See Smith*, 2020-Ohio-4441 at ¶44. In sex-abuse trials, for example, mistake, intent, pattern or practice, and accident are often disputed. Those questions, of course, are grounds that render other-acts evidence admissible. *See, e.g.*, *State v. Williams*, 2012-Ohio-5695, ¶¶22–25; *Smith*, 2020-Ohio-4441 at ¶49; *Clinton*, 2017-Ohio-9423 at ¶49. Again, Ohio law is no outlier on this front. Both federal courts and other state supreme courts admit evidence of other sex crimes in trials about sex crimes. *See, e.g.*, *United States v. Gonyer*, 761 F.3d 157, 163 (1st Cir. 2014); *United States v. Breitweiser*, 357 F.3d 1249, 1254 (11th Cir. 2004);

United States v. Yellow, 18 F.3d 1438, 1440–41 (8th Cir. 1994); *State v. Mark Lynn J.*, No. 12-0272, 2013 WL 3185087, at *2 (W. Va. June 24, 2013); *State v. Armstrong*, 2010 S.D. 94, ¶¶14, 18; *Harp v. Commonwealth*, 266 S.W.3d 813, 822 (Ky. 2008); *State v. Noyes*, 157 Vt. 114, 117 (1991); *State v. Bergmann*, 135 N.H. 97, 102–03 (1991); *State v. Spaugh*, 321 N.C. 550, 556 (1988). Until trial, and the many ways it may play out, most Rule 404 objection simply cannot be evaluated. *See Prigge*, 830 F.3d at 1097.

A Sixth Circuit case offers a good illustration. That court affirmed a trial judge's ruling to admit other-acts evidence in a sexual-assault trial even though the defendant "ultimately did not assert a defense based on mistake." *United States v. LaVictor*, 848 F.3d 428, 446 (6th Cir. 2017). Admitting the evidence was no error, the Sixth Circuit held, because "it was certainly conceivable at the time that the government sought to introduce the evidence that [the defendant] would make an argument, however tenuous or unconvincing, that the assault was accidental or caused by a mistaken understanding." *Id.* Before the trial ended, no judge could say one way or the other that admitting the other-acts evidence was right or wrong.

It is no answer for a defendant to claim when moving to sever that he will structure his defense in a way to tee up a Rule 404 question. Such arguments are "risk free" because they are unenforceable. *Luce*, 469 U.S. at 42. No court could block a defendant from raising a defense he previously indicated he would not raise. Plus, allowing these kinds of arguments would only encourage defendants to "'plant' reversible error" in the record

to guard against possible conviction. *Id*. If a defendant could claim a Rule 404 error for a denied motion to sever after disclaiming defenses, but a plea relieved the defendant of fulfilling that disclaimer, the defendant would gain a windfall reversal. Indeed, it is precisely *because* a reviewing court would be hard pressed to call the error harmless that these pretrial rulings ought to be generally unreviewable. *See id.*

B. A no-contest plea blocks a reviewing court from evaluating claimed prejudice when the evidence is clear and distinct.

The same pre-trial, post-trial dynamic effects the simple-and-direct-evidence test. What happens at trial matters. For one thing, deciding whether the evidence was "simple and direct," *Knuff*, 2024-Ohio-902 at ¶46 (quotation omitted), is only possible after the evidence is aired in court. It is also impossible to conclude without a trial that the evidence was "amply sufficient to sustain each verdict, whether or not the indictments were tried together." *Torres,* 66 Ohio St.2d at 344; *Sapp*, 2004-Ohio-7008 at ¶73. The mechanics of the trial matter, too. Many courts have suggested that an instruction to the jury to "consider each count separately" goes a long way toward eliminating prejudice from joinder. *State v. Johnson*, 2016-Ohio-4934, ¶27 (1st Dist.) (DeWine, J.); *see also, e.g.*, *State v. Jackson*, 2024-Ohio-958, ¶60 (8th Dist.); *State v. Morris*, 2018-Ohio-5252, ¶40 (10th Dist.); *State v. Wilson*, 2017-Ohio-5724, ¶53 (5th Dist.); *State v. Conway*, 2008-Ohio-3001, ¶22 (2d Dist.). Ohio is no outlier in recognizing that a jury instruction may eliminate any prejudice from joinder. *See, e.g.*, *United States v. Kirkpatrick*,1998 WL 869978, at *6 (6th Cir. Dec. 1, 1998); *United States v. Caldwell*, 97 F.3d 1063, 1068 (8th Cir. 1996)*; cf. Closs v. Leapley*,

18 F.3d 574, 578 (8th Cir. 1994) (habeas-corpus review); *Commonwealth v. Peterson*, 453 Pa. 187, 200–01 (1973). As with the Rule 404 route to showing no prejudice, the simple-and-direct-evidence route is a near-certain dead end when a defendant's no-contest plea avoids trial.

* * *

Evaluating prejudice from joinder is much like evaluating prejudice from other rulings that determine what the jury will hear. After all, the danger from joined charges arises from "the distraction of the attention of the jury," *McElroy v. United States*, 164 U.S. 76, 80 (1896), or the jury forming an "unfavorable impression" about the accused, *State v. Minneker*, 27 Ohio St. 2d 155, 157–58 (1971). Evaluating on appeal whether joinder results in actual prejudice is almost always impossible if no factfinder ever evaluated the evidence. For that reason, the Attorney Geneal urges the Court adopt a presumptive rule that a defendant may not appeal a trial court's decision rejecting a motion to sever after pleading no contest.

IV. Reed cannot show prejudice here.

Applying the above rule is straightforward. Because Reed's no-contest plea prevents any reviewing court from concluding that the other-acts evidence is admissible (or not), Reed cannot carry his "heavy" burden to show prejudice. *Ford*, 2019-Ohio-4539 at ¶106; *Spaulding*, 2016-Ohio-8126 at ¶63. Nor can he prove prejudice from the nature of the evidence, as no court will ever have a chance to instruct a jury about how to treat the

evidence of Reed's crimes as separate and distinct. *Johnson*, 2016-Ohio-4934 at ¶27 (1st Dist.); *Jackson*, 2024-Ohio-958 at ¶60 (8th Dist.). At the very least, Reed has not cleared the hurdle of offering the courts "sufficient information" to "weigh the considerations favoring joinder against the defendant's right to a fair trial." *Clinton*, 2017-Ohio-9423 at ¶46; *Torres*, 66 Ohio St. 2d at 343 & syl. ¶1. Reed's four-page motion to sever offered few details and "submit[ted] that none of [the] exceptions" for admitting Rule 404 evidence "appl[ied]" to his case. R.44, Mot. to Sever, at 4 (April 11, 2022). And even on that point, Reed incorrectly called Evidence Rule 404 a "general prohibition" against admitting evidence. That evidentiary Rule is widely regarded as a "rule of inclusion, not exclusion." *State v. Sawyer*, No. 79197, 2002 WL 407935, at *7 (8th Dist. Mar. 14, 2002); *see, e.g.*, *United States v. Goodman*, 88 F.4th 764, 768 (8th Cir. 2023); *United States v. Ciavarella*, 716 F.3d 705, 728 (3d Cir. 2013); *United States v. Crowder*, 141 F.3d 1202, 1206 (D.C. Cir. 1998) (en banc); *United States v. Blankenship*, 775 F.2d 735, 739 (6th Cir. 1985).

***Amicus Curiae* Ohio Attorney General's Proposition of Law No 2:**

> *All non-recused judges in an appellate district must vote on a petition for en-banc rehearing.*

Turning to the meaning of the Rule of Appellate Procedure regarding en-banc voting, the Attorney General offers three observations.

First, although the Court authors this and other rules, it has long used "general principles of statutory construction to interpret court rules." *In re T.A.*, 2022-Ohio-4173, ¶16; *State ex rel. Law Office of Montgomery Cnty. Pub. Defender v. Rosencrans*, 2006-Ohio-

5793, ¶23 (per curiam); *Thomas v. Freeman*, 79 Ohio St. 3d 221, 224 (1997). Therefore, if "a court rule is unambiguous," courts should "apply it as written." *Erwin v. Bryan*, 2010-Ohio-2202, ¶22; *accord State ex rel. Potts v. Comm. on Continuing Legal Edn.*, 93 Ohio St. 3d 452, 456 (2001).

Second, Appellate Rule 26(A)(2)(a)'s language about en-banc voting is unambiguous. That rule authorizes "a majority of the en banc court" to order full-court proceedings. App.R 26(A)(2)(a). In the very next sentence, the Rule explains that the "en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case." *Id*. That language tells the courts of appeals to make decisions about en-banc proceedings through a vote of all judges of that court who are eligible to participate in the case. So a vote to proceed, or not proceed, en-banc should be made by all such judges. Just as the Rule dictates that the full court cannot short-circuit a panel's role in resolving an appeal, *State v. Maldonado*, 2024-Ohio-2652, ¶12, a panel cannot block the full court's role by voting as a group of three alone.

To be sure, the Rule is cagey about the actor, as it reads, "[u]pon a determination that two or more" in-district decisions conflict, the full-court may order en-banc proceedings. App.R. 26(A)(2)(a). But the context of the sentence conveys that the Rule describes a "determination" by the en-banc court, not by some subset of it. Viewing the context, of course, is both how readers understand text and how this Court interprets it. A "fair

reading" requires looking to language "as a whole" and reading "words in their context." *Gerrity v. Chervenak*, 2020-Ohio-6705, ¶15; *see Com. & Indus. Ins. Co. v. City of Toledo,* 45 Ohio St. 3d 96, 102 (1989); *Pfeifer v. Graves*, 88 Ohio St. 473, 487 (1913). Here, the full sentence, and the full context means reading the "determination" to be an act of the "en banc court," which means the full court. The Rule may speak "in the passive voice," the rest of the Rule "leave[s] little doubt" that the full court is the relevant actor. *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 128 (1977).

Despite this plain meaning, this Court held in 2013 that that Appellate Rule 26(A)(2) "provides no guidance as to who must determine whether the decision in a case conflicts with another decision from the same district." *Forrest*, 2013-Ohio-2409 at ¶11. The majority there reasoned that the Rule "states only that 'a determination' must be made; it does not state who must make the determination." *Id.* Three Justices dissented from that reading. Justice O'Donnell opined that Rule's language permits "each member of a multijudge appellate court to decide whether an intradistrict conflict exists." *Id.* at ¶30 (O'Donnell, J., dissenting). Then-Justice Kennedy also dissented on this point, stressing that the Rule, "construed as a whole … indicat[es] that the en banc court makes the determination whether an intradistrict conflict exists." *Id.* at ¶22 (Kennedy, J, concurring in part and dissenting in part). Then-Chief Justice O'Connor agreed with both dissenting views. *Id.* at ¶¶28, 32.

The dissenting Justices had the better of the debate in *Forrest*. "A fair reading of a text *requires* evaluation of the context in which the words are written." *Giroux v. Comm. Representing the Petitioners*, 2023-Ohio-2786, ¶11 (emphasis added). The *Forrest* majority, though, "zeroe[d] in on the meaning" of the phrase *a determination* only "in isolation," which "disregard[ed] the importance of considering the text as a whole." *See Great Lakes Bar Control, Inc. v. Testa*, 2018-Ohio-5207, ¶11. That approach "falls flat because it overlooks" the full-context link between the determination and the "en banc court" a few words later in the sentence. *Id.*; App.R. 26(A)(2)(a).

Overruling *Forrest* is the right result on the text, and the usual test for overruling announced in *Westfield Insurance Company v. Galatis* is no obstacle to that result. *See* 2003-Ohio-5849, ¶48. *Galatis* holds no sway here. The Court has said that *Galatis* does not apply in cases about "procedural rules." *State v. Henderson*, 2020-Ohio-4784, ¶29; *see also State v. Silverman*, 2009-Ohio-1576, ¶33 (per O'Connor, J.). Whether *Forrest* stands or not is a question of the meaning of an appellate rule of procedure. Thus, *Galatis* does not enter the picture here.

Third, the full-participation rule may matter in this case. Although Judge Delaney dissented from the merits ruling, she agreed with two other judges that the case need not be reheard en-banc. Perhaps her vote reflected inevitability under the erroneous *Forrest* rule. Judge Delaney's vote is key to form a "majority of the en-banc court" because the Fifth District includes only six judges. App.R. 25(A)(2)(a); *see* Ohio Const. art. IV, §3(A)

(authorizing more than three judges per appellate district); R.C. 2505.011(A) (setting at six the number of judges in the Fifth District); *compare* Ohio Const. art. IV, §6 (version effective Nov. 3, 1959) (reflecting amendment that authorized General Assembly increase number of judges in appellate districts), *with* Ohio Const. art. IV, §6 (version effective January 1, 1945 until November 3, 1959) (lacking such authorization). With *Forrest* cleared out of the way, though, and all six judges available to vote, perhaps Judge Delaney would join three other judges to reverse the panel opinion. The only way to be sure the Fifth District—the whole Fifth District—would deny review is to reverse the judgment below.

CONCLUSION

For these reasons, the Court should reverse the Fifth District's judgment.

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 was served this 14th day of October, 2024, by e-mail on the following:

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