In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2024-0669
	:	
Appellee,	:	On Appeal from the
	:	Lorain County
v.	:	Court of Appeals,
	:	Ninth Appellate District
EDWARD BALMERT,	:	
	:	Court of Appeals
Appellant.	:	Case No. 20CR103223

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

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INTRODUCTION

This case is about proximate causation when a driver, driving with marijuana levels above the legal limit in his system, causes a collision. Appellant Edward Balmert drove a car with a statutorily prohibited level of marijuana metabolite in his system, *see* R.C. 4511.19(A)(1)(j)(viii)(II), but he argues the State failed to show that his decision proximately caused the serious injuries he inflicted with his vehicle. The facts are simple: while taking a left turn, Balmert collided with a State Trooper who was directing traffic, injuring the Trooper so severely that her career as a police officer ended. He was convicted on impairment *per se*; that is, lab results proffered at trial proved that he drove a car with above-lawful levels of a prohibited substance in his system. *Id.* And because he crashed into the Trooper, causing her serious physical harm, the trial court also convicted him on aggravated vehicular assault, concluding that the harm of serious physical injury was "cause[d]" when Balmert violated R.C. 4511.19 by driving with an unlawful amount of marijuana metabolites in his system. Tr. 312. Last, the court *acquitted* Balmert of being actually impaired under R.C. 4511.19(A)(1)(a), noting that there was reasonable doubt as to whether the marijuana metabolite or his underlying disease caused the noticeable tremors, lack of balance, and other indicia of drug abuse. The single question here is whether the State established at trial that Balmert's violation of the *per se* impaired-driving statute proximately caused his colliding with, and seriously injuring, the Trooper.

The State established that in spades. To establish proximate cause in the criminal context, the State must show that the result was a foreseeable consequence of the unlawful conduct. *State v. Crawford*, 2022-Ohio-1509, ¶16. Here, the State proffered expert evidence that marijuana use at statutorily prohibited levels slows any driver's reflexes so much that an impaired driver will have trouble braking, swerving, and otherwise avoiding collisions in that state. Tr. 95–96. And the State proffered evidence that the intersection in which the accident happened was one such situation in which a driver's attentiveness and reflexes had to function normally to safely navigate it without an accident. The trial court credited all that, pointing out that Balmert's depressed reflexes made it much more foreseeable that a collision would occur in a "dangerous situation" with "a lot of directions." Tr. 313. That left little doubt that the collision was a foreseeable result of driving while impaired by drug use.

Just as important is what this case *is not* about. Balmert argues against adopting a substantial-factor test, one that asks whether the defendant's conduct was a substantial factor in bringing about the result when there are multiple contributing causes. That test, however, is a question of *actual* causation, which asks whether "the former event caused the latter," and not *proximate* causation, which asks whether the harm has "a sufficient connection" to cause. *Paroline v. United States*, 572 U.S. 434, 444 (2014). Indeed, this case is not about actual causation at all because everyone agrees that the accident would not have happened but for Balmert's conduct. And Balmert's argument is doubly inapposite

because this case does not concern multiple contributing causes. As Balmert concedes, he alone brought about the result. *Accord* Balmert Br.19.

Nor is proximate cause in this case about whether marijuana metabolites cause impairment as a scientific matter. Impairment is not in question when it is established by legislative determination that driving with marijuana metabolites above specified levels is *per se* driving while impaired. Once impairment is established *per se*, the question that remains is whether "the harm alleged" has "a sufficiently close connection" to driving while impaired. *Crawford*, 2022-Ohio-1509 at ¶16 (quotations omitted). Relitigating impairment is off the table.

Finally, this case *is not* about whether the trial court improperly used acquittal evidence supporting actual impairment to convict Balmert on the compound offense of aggravated vehicular assault; Balmert's contrary claim in his second proposition of law is mistaken. Nor is it about whether doing so would violate the double-jeopardy provisions of the Ohio and federal constitutions, as his third proposition of law posits. The trial court simply did not use evidence of actual impairment to reach its conviction on the aggravated vehicular assault, a point even Balmert accepts. Because these questions are not raised here, and especially because the third question raises constitutional issues that are neither presented nor fully ventilated, the Court should dismiss both the second and third propositions of law as improvidently allowed. To the extent the Ninth District may have introduced such an error in affirming a valid

conviction, that is no barrier to this Court's affirming the judgment. This Court does not "reverse a correct judgment," even if it is "supported by flawed reasoning." *State ex rel. Duncan v. Am. Transmission Sys., Inc.*, 2022-Ohio-323, ¶14.

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. He is interested in the proper application of Ohio's aggravated-vehicular-assault statute, R.C. 2903.08, and the correct interpretation of the right against Double Jeopardy under the United States and Ohio Constitutions. The Attorney General also sometimes serves as special counsel in cases of significant importance involving these legal issues.

STATEMENT OF THE CASE AND FACTS

I. Ohio law protects Ohio roadways from dangerous drivers who drive while under the influence of drugs and alcohol and cause serious injury or death to others.

To reduce the number of dangerous drivers that cause serious injury and death on Ohio's roads, Ohio law criminalizes "operat[ing] any vehicle" while under the influence of drugs and alcohol. R.C. 4511.19; *see State v. Tanner*, 15 Ohio St. 3d 1, 6 (1984). The relevant statute that governs driving while impaired by drug or alcohol use, R.C. 4511.19, measures unlawful impairment in one of two ways—by an "actual" or by a "technical" showing of impairment. The actual-impairment provision prohibits operating a vehicle

"under the influence of alcohol, a drug of abuse, or a combination of them." R.C. 4511.19(A)(1)(a). Convictions under this provision for "actual impairment" (as this brief will call them) hinge "primar[ily]" on the driver's "*behavior*." *State v. Naylor*, 2024-Ohio-1648, ¶45 (11th Dist.) (emphasis in original) (citing *State v. North*, 2020-Ohio-6846, ¶27 (7th Dist.)). Other provisions, the technical-impairment provisions, make it a *per se* offense to operate a vehicle with a prohibited level of a specified substance—including alcohol, marijuana metabolites, amphetamines, and cocaine—in the urine or blood, or some combination thereof. R.C. 4511.19(A)(1)(b)–(j). A conviction under one of these provisions for "technical impairment" (as this brief will call it) is largely based on a scientific determination, usually through lab testing, that the driver's urine or blood contains a particular level of a prohibited substance. Relevant to this case, the General Assembly has determined that driving with a urine concentration of "at least thirty-five nanograms of marihuana metabolite per milliliter" constitutes *per se* driving while impaired. R.C. 4511.19(A)(1)(j)(viii)(II).

Ohio law also punishes drivers who injure others while driving under the influence of drugs, alcohol, or both. R.C. 2903.08. Specifically, it is a felony to "cause serious physical harm to another person or another's unborn" "while operating or participating in the operation of a motor vehicle, motorcycle, utility vehicle, mini-truck, snowmobile, locomotive, watercraft, or aircraft"—in one of three ways. R.C. 2903.08(A), (B). One way, relevant here, is to cause such harm while operating a motor vehicle "[a]s the proximate

result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance." R.C. 2903.08(A)(1)(a). Thus, under this provision, aggravated vehicular assault is a compound offense predicated on an underlying offense of actual or technical impairment.

II. Edward Balmert struck a state trooper and seriously injured her, ending her career as a police officer, and he was convicted of aggravated vehicular assault and driving while *per se* impaired.

A. Appellant Edward Balmert was driving his car during the daytime when he exited a highway ramp into an intersection, which included on- and off-ramps to the highway, in Lorain County. Tr. 127. Three State troopers standing in the middle of the intersection, including Trooper Cynthia Gehlmann, were directing stopped traffic through the intersection. Tr. 43–48. After Trooper Gehlmann instructed Balmert to go through the intersection, he tried to turn left. Tr. 69. He then collided with the Trooper, causing her "life altering injuries" and ending her career as a police officer. *State v. Balmert*, 2024-Ohio-1207, ¶2 (9th Dist.) ("App.Op.").

Balmert was arrested at the scene. He voluntarily submitted to field sobriety tests, underwent two drug evaluations, and provided a urine sample. *Id.* at ¶2. In the evaluations, he was evaluated by two different drug-recognition experts, including an independent third-party expert, both of whom concluded that Balmert was under the influence of marijuana. *Id.* at ¶¶11–14. And lab tests conducted on his urine sample

showed that he had been driving with a statutorily prohibited level of marijuana metabolite in his system, 316 nanograms per milliliter. *Id.* at ¶15

B. The State indicted Balmert on four charges: aggravated vehicular assault, R.C. 2903.08(A)(1)(a); recklessly causing vehicular assault under R.C. 2903.08(A)(2)(b); operating a vehicle "under the influence" of a "drug of abuse" under R.C. 4511.19(A)(1)(a); and operating a vehicle with a prohibited concentration of marijuana metabolite in the urine R.C. 4511.19(A)(1)(j)(viii)(II). He waived his right to a jury trial and was tried before a judge. App.Op. ¶4.

At trial, the arresting police officer, Sergeant Francway, testified as to the primary and secondary field sobriety tests that he administered at the scene of the accident. *Id.* at ¶11. He testified that Balmert's eyes did not converge, that he was unable to keep his balance, that his whole body was quivering, and that his mouth was "very dry," with a "pasty film" on the tongue and "raised taste buds." *Id.* Sergeant Francway also testified that Balmert admitted to having been "using hemp." *Id.* Based on the lack of eye convergence, tremors, and the dryness of the mouth, filmy tongue, and raised taste buds displayed by Balmert, he concluded that Balmert had been using marijuana. *Id*.

Sergeant Francway, who is a certified Drug Recognition Expert, also testified to the effects of marijuana use on a person's ability to operate a motor vehicle. *Id.* at ¶12; Tr. 94. He explained that drivers must have normally functioning reflexes—that is, normal reaction times—to operate a motor vehicle safely. Tr. 95. He also explained that

marijuana use slows down the body's natural reaction times so much that it would impede a driver's ability to brake, swerve, or otherwise "take evasive actions" in time to avoid collisions. Tr. 95–96. In short, he concluded that marijuana use dangerously "slows the reactions" while driving. Tr. 96.

After examining Balmert himself, Sergeant Francway also asked another drug-recognition expert to conduct an independent evaluation on Balmert. App.Op. ¶12. The second expert, Lieutenant Scott Schmoll, also testified at trial. *Id.* at ¶13. He testified that Balmert had admitted to "smoking hemp every day" and "using marijuana a week prior to the accident." *Id.* He observed that Balmert had displayed signs of drug influence during the examination, such as being unable to look straight ahead. *Id.* Lieutenant Schmoll also observed eyelid tremors and swaying while Balmert walked. *Id.* He explained that Balmert could not touch his finger to the tip of his nose when prompted and appeared surprised by his inability to do so. *Id.* Like Sergeant Francway, Lieutenant Schmoll also concluded that Balmert "was under the influence of [c]annabis and unable to operate a vehicle safely." *Id.*

Finally, a crime-lab specialist testified about the tests conducted on Balmert's urine sample taken on the scene. *Id.* at ¶15. The test revealed a prohibited level of marijuana metabolite of 316 nanograms per milliliter, which is nine times over the statutorily prohibited amount of 35 nanograms per milliliter. *Id.* She also testified that the metabolite could only have come from Tetrahydrocannabinol ("THC"), the psychoactive

ingredient in cannabis, and not from a cannabidiol product that does not contain THC. *Id.*

C. After receiving this evidence, the trial judge issued his verdict. He started with the charges for technical impairment under R.C. 4511.19 and aggravated vehicular assault premised on that predicate offense. He found "no reason to dispute the lab result" on the urine test and found that result reflected a marijuana-metabolite level "many times over the legal limit." Tr. 311. Based on that lab result, the Court found Balmert *per se* guilty of driving while impaired under 4511.19(A)(1)(j)(viii)(II). App.Op.¶4; Tr. 311–12. And, finding that Balmert "cause[d] serious physical harm while operating a vehicle while having" a prohibited "level of a metabolite" in his urine, the court also convicted Balmert of aggravated vehicular assault under R.C. 2903.08(A)(1)(a). App.Op.¶4; Tr. 312. The court later noted that Balmert did not have his "full faculties around him" in a situation with "a lot of distractions" that required him to be "extra attentive" and that his "reflexes weren't going to be as good as someone else's" due to his marijuana use. Tr. 313.

Last, the court turned to the charges for actual impairment under R.C. 4511.19(A)(1)(a) and recklessly causing physical harm with a vehicle under R.C. 2903.08(A)(2)(b). He acquitted Balmert on both. The judge noted that he had "reasonable doubt" as to whether Balmert was actually impaired given Balmert's conflating medical conditions. Tr. 314. But the trial judge also acknowledged that a conviction for actual impairment was "a

moot point" because he had convicted Balmert on technical impairment anyway. *Id.* And because Balmert had "caused physical harm" in that state, that *per se* offense provided the predicate for the aggravated-vehicular-assault conviction. *Id.* Turning to recklessness, trial court acknowledged that Balmert may not have appreciated the level at which he was impaired. Tr. 313. The court thus held that Balmert's behavior did not rise to the level of "perverse" to be reckless because there was no evidence that Balmert knew he was impaired enough to cause such serious harm. Tr. 313.

Balmert was sentenced to two years of mandatory imprisonment for aggravated vehicular assault and three days at the Lorain County Correctional Facility for driving while technically impaired. *Id.* The trial court also sentenced Balmert to mandatory post-release control. *Id.*

D. Balmert appealed to the Ninth District. First, he argued that there was insufficient evidence to conclude that his impaired driving was the proximate cause of the collision with the trooper. App.Op. ¶¶5–6, 17–18. He also argued that aggravated vehicular assault is not a crime of violence so the lower court erred by sentencing Balmert to mandatory post-release control. App.Op. ¶¶26–30.

The Ninth District affirmed Balmert's convictions in full. First, the lower court held that there was extensive evidence—including testimony from the experts who examined Balmert and concluded that he was under the influence of marijuana—showing that Balmert was driving while under the influence of marijuana at the time of the crash. *Id.*

at ¶¶6–25. Thus, the court below held that there was sufficient evidence to show that the impairment proximately caused the crash. App.Op. ¶16. But the court agreed with Balmert that the trial court erred in imposing mandatory post-release control because aggravated vehicular assault is not an offense of violence. *Id.* at ¶¶26–30. His sentence was reversed on the post-release portion and remanded to the trial court.

E. Balmert appealed to this Court, raising three propositions of law. First, he argues that aggravated vehicular assault requires proof that driving while impaired was the proximate cause of the collision. Jur. Mem. 9 (May 13, 2024). His second and third propositions of law are related. Balmert argues that the court cannot use evidence of actual impairment to satisfy the proximate-cause element both because his conviction for aggravated vehicular assault is predicated on a technical-impairment offense and because he was acquitted of actual impairment. Jur. Mem. 12–16. This Court accepted all propositions of law for review. *See* 07/23/2024 *Case Announcements*, 2024-Ohio-2718.

ARGUMENT

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

> *Aggravated vehicular assault under R.C. 2903.08(A)(1) requires proof that the driver's actual or technical impairment was the proximate cause of serious physical harm to another person, which requires proof that the result was a foreseeable consequence of the driver's conduct.*

I. This Court should affirm Balmert's conviction for aggravated vehicular assault because his impaired driving was the proximate cause of the collision with the trooper.

A. R.C. 2903.08 is satisfied when the serious physical harm caused by the driver is a foreseeable consequence of driving while impaired and would not have happened but for the driver's conduct.

1. A conviction for aggravated vehicular assault requires proof that the driver's actual or technical impairment was the proximate cause of the injury to another person. To see why, recall the aggravated-vehicular-assault statute. R.C. 2903.08 prohibits any "person, while operating or participating in the operation of a motor vehicle" to "*cause* serious physical harm" "[a]s the *proximate result* of committing a violation of division (A) of section 4511.19 of the Revised Code[.]" R.C. 2903.08(A)(1)(a) (emphases added). "Cause," taken together with "proximate result," means proximate cause. *State v. Crawford*, 2022-Ohio-1509, ¶¶14–15. Indeed, in *Crawford*, this Court interpreted the similarly worded involuntary-manslaughter statute that provides that "[n]o person shall cause the death of another … as a proximate result of the offender's committing or attempting to commit a felony." *Id.* (quoting R.C. 2903.04(A)). There, the Court explained that the words "cause" and "proximate result" together point to a proximate-

cause element. *Id.* at ¶¶14–15. So too here. "In referencing the 'proximate result'" of the injury "cause[d]" by the defendant's impaired driving, the aggravated-vehicular-assault statute "is simply talking about 'proximate cause.'" *Id.* at ¶15 (quotation and citation omitted).

Proximate cause, along with actual or but-for cause, together make up the causation requirement in criminal statutes. *State v. Evans*, 2023-Ohio-2688, ¶53 (8th Dist.); *Burrage v. United States*, 571 U.S. 204, 210 (2014); *Paroline*, 572 U.S. at 444; *see*, *e.g.*, *State v. Pitts*, 2022-Ohio-4172, ¶19 (1st Dist.); *State v. Lovelace*, 137 Ohio App. 3d 206, 216 (1st Dist. 1999) (citing Lafave & Scott, Criminal Law, Section 35, 246 (1st Ed.1972)); *State v. Carpenter*, 2019-Ohio-58, ¶51 (3d Dist.); *State v. Platt*, 2024-Ohio-1330, ¶38 (4th Dist.); *State v. Williams*, 2020-Ohio-4430, ¶¶24–26 (7th Dist.); *State v. Hall*, 2017-Ohio-879, ¶71 (12th Dist.). Together, actual and proximate cause "invoke[] traditional principles of causation," *State v. Yerkey*, 2022-Ohio-4298, ¶44 (DeWine, J., dissenting) (discussing causation in the civil context which is the same as causation in the criminal context), which frame "separate but related" questions related to causation, *Paroline*, 572 U.S. at 444. One coda before proceeding. As the just-cited cases indicate, courts are inconsistent on what they mean by "proximate cause." Some use the umbrella term "proximate cause" to refer to actual cause *and* legal cause together, *e.g.*, *Carpenter*, 2019-Ohio-58, ¶51, whereas others maintain analytic clarity by referring to legal cause only as "proximate cause" and distinct from actual cause, *e.g.*, *Pitts*, 2022-Ohio-4172, ¶19 and *Platt*, 2024-

Ohio-1330, ¶38. Analytically, all cases require both prongs—actual cause and legal cause—so this brief will take the latter approach and call legal cause "proximate cause" to avoid confusion and to promote clarity.

On the one hand, but-for causation asks whether the result would have happened but for the defendant's conduct. *Burrage*, 571 U.S. at 215–16; *Evans*, 2023-Ohio-2688, ¶54; *Williams*, 2020-Ohio-4430, ¶¶28–29; *Carpenter*, 2019-Ohio-58, ¶52; *Platt*, 2024-Ohio-1330, ¶39. It answers whether "the former event caused the latter." *Paroline*, 572 U.S. at 444; *accord Yerkey*, 2022-Ohio-4298, ¶44 (DeWine, J., dissenting).

On the other, proximate causation asks whether "the harm alleged" has "a sufficiently close connection to the conduct at issue[.]" *Crawford*, 2022-Ohio-1509, ¶16 (quotations omitted); *Paroline v. United States*, 572 U.S. 434, 444 (2014); *accord Yerkey*, 2022-Ohio-4298, ¶44 (DeWine, J., dissenting). A cause connects sufficiently to the result when it is "a direct, natural, reasonably foreseeable consequence, as opposed to an extraordinary or surprising consequence, when viewed in the light of ordinary experience." *Evans*, 2023-Ohio-2688, ¶55 (quotation omitted); *Williams*, 2020-Ohio-4430, ¶35; *Carpenter*, 2019-Ohio-58, ¶53; *Platt*, 2024-Ohio-1330, ¶44; *State v. Bacon*, 2016-Ohio-618, ¶83 (6th Dist.). A defendant is responsible for the "foreseeable consequences which are known to be, or should be known to be, within the scope of risk created by his conduct." *Carpenter*, 2019-Ohio-58, ¶53 (quotations omitted). Put another way, the proximate-cause requirement "preclude[s] liability in situations where the causal link between conduct and result is so

attenuated that the consequence is more aptly described as mere fortuity." *Paroline*, 572 U.S. at 445.

B. Colliding with Trooper Gehlmann, who was directing traffic at a chaotic intersection, was a foreseeable result of driving while impaired and would not have happened but for Balmert's conduct.

The State proffered sufficient evidence showing that the collision with the Trooper was a foreseeable result of Balmert's conduct, driving while impaired, thus satisfying the proximate-cause element of R.C. 2903.08(A)(1). *See* Tr. 312–13. This Court should affirm his conviction.

The State established at trial through expert evidence that driving while under the influence of marijuana increases the risk of collision because marijuana use depresses the user's reflexes. Tr. 95–96. Sergeant Francway, a certified drug recognition expert, testified about the effects of marijuana use on drivers. He testified that marijuana use depresses the normal reaction time so substantially that a driver who had used marijuana would have trouble braking or swerving in time to avoid collisions. Tr. 95–96. Thus, Sergeant Francway's testimony established that the collisions are foreseeable, if not likely, when a driver's reaction time is slowed by marijuana use.

What is more, accidents while driving impaired are even more foreseeable in confusing intersections, which require heightened alertness to avoid crashes. The intersection in which this accident happened was one such confusing intersection with numerous on- and off-ramps to the highway and enough traffic that three troopers were

required to direct the stopped traffic through the intersection. It was foreseeable that Balmert's depressed reflexes made navigating that kind of intersection that much harder because he would have, and ultimately did have, trouble braking or swerving to avoid the sorts of unexpected traffic obstructions that happen in such circumstances. As the trial court itself noted, "it was a dangerous situation with a lot of things going on, a lot of distractions," in which drivers had to be "extra attentive" to safely navigate. Tr. 313. And, as the trial court noted, Balmert's "reflexes weren't going to be as good as someone else's" because he was driving impaired. Tr. 313. He just "didn't have his full faculties around him." Tr. 313.

Balmert, too, testified that he found the intersection confusing and had to check twice to make sure that he was being waved through by troopers. Tr. 275–76. And, after looking right to ensure no one else was moving into the intersection before turning left, Balmert did not look left again, as he acknowledged he should have, to make sure no one else had moved into his path. In a situation like that, Balmert's slowed reaction time to brake, change direction, or take other evasive action made it all the more foreseeable that he could collide with something or someone while taking that left turn.

Last, the General Assembly made a legislative determination that marijuana-metabolites above the specified level *per se* constitutes impairment, which is premised on the "ordinary" knowledge that marijuana use diminishes reflexes thus increasing the risk of dangerous collisions. The sponsoring senators for the *per se* marijuana-metabolite

provisions noted that they had worked closely with forensic toxicologists to establish precise levels at which driving becomes dangerous. *State v. Whalen*, 2013-Ohio-1861, ¶16 n.2 (1st Dist.) (citing 2005 OH Sub.S.B. 8, Third Consideration, available at http://www.ohiochannel.org, Ohio Senate Session (February 16, 2005) 14:15:57 (accessed May 1, 2013)). Forensic toxicologists involved in the legislative process unanimously agreed those levels strongly established a point beyond which any driver becomes dangerously impaired. *Id.* And the state levels are consistent with federal standards, thus reflecting the ordinary wisdom of not only Ohioans, but also Americans.

Put it this way: collisions while driving high are neither an "extraordinary" nor a "surprising consequence," especially at a stalled intersection, "when viewed in the light of ordinary experience." *Evans*, 2023-Ohio-2688, ¶55. No one who knows Balmert was driving with marijuana metabolite above prohibited levels in his system would likely characterize his collision with a trooper directing traffic through a chaotic intersection, while Balmert had slower-than-normal reflexes, as a "mere fortuity." *Paroline*, 572 U.S. at 445.

C. Balmert is correct that proximate cause is an element of aggravated vehicular assault, but he misunderstands the application of that standard to his case.

1. Balmert correctly identifies proximate cause as an element of the aggravated-vehicular-assault offense but confuses actual and proximate causation in arguing for the foreseeability test.

Balmert argues at length that the aggravated vehicular assault includes a proximate cause element and that the foreseeability test articulated in a civil case, *Strother v.*

Hutchinson, 67 Ohio St.2d 282, 287 (1981), satisfies that element. Balmert Br.9–19. Everyone agrees that the words "cause" and "proximate result" in the aggravated-vehicular-assault statute taken together point to a proximate-cause element in the statute. *See above* at 12–13. And this Court had already said in the criminal context that "foreseeable harm is what matters for proximate cause" in criminal statutes. *Crawford*, 2022-Ohio-1509, ¶16. The matter ends there.

From there, however, Balmert sets up and strikes down a strawman by arguing *against* a substantial-factor test to assess proximate causation. But the substantial-factor test—which asks whether the defendant's conduct is a substantial factor in bringing about the result when there are multiple contributing causes—is used to assess *actual* causation and not *proximate* causation. *Carpenter*, 2019-Ohio-58, ¶52; *Hall*, 2017-Ohio-879, ¶73; *Platt*, 2024-Ohio-1330, ¶40; *State v. Emerson*, 2016-Ohio-8509, ¶24 (2d Dist.); *State v. Filchock*, 2006-Ohio-2242, ¶77 (11th Dist.); *State v. Flanek*, No. 63308, 1993 Ohio App. LEXIS 4282, *19 (8th Dist. Sept. 2, 1993). Although Balmert misses the mark by focusing on this issue because but-for causation is not at issue in this case, his confusion is understandable. The cases he relies on—including *Filchock*, 2006-Ohio-2242, and *Flanek*, 1993 Ohio App. LEXIS 428—use "proximate cause" as an umbrella term to mean both actual *and* legal cause, thus perhaps creating the misimpression that other allegedly contributing causes can undercut "proximate cause." But those cases focus solely on whether the State established *actual* causation, that is, the first prong of causation. They do not support

consideration of other alleged causes under the second prong, whether that second prong is called "legal cause" or "proximate cause." Here, no one questions that Balmert's conduct was the only cause of the accident and resulting injuries to the trooper. And he concedes that he was the *sole* contributor to the accident, even accepting that no one else was culpable or contributed to the collision. Balmert Br.19. Thus, but-for causation has unquestionably been established and is not at issue in this case.

In arguing against a substantial-factor test, Balmert's discussion doubly misses the mark. The cases Balmert cites and distinguishes all analyze whether defendant's conduct should subject him to criminal liability when there are *multiple* contributing causes to the harm. For instance, Balmert first discusses at length an unpublished case from the Eighth District, *State v. Flanek*, 1993 Ohio App. LEXIS 428. Balmert Br.13–14. In *Flanek*, the defendant, a drunk driver, hit a victim with his car and did not stop until he heard her scream. *Flanek*, 1993 Ohio App. LEXIS 4282, *6–7. At trial, he sought to deflect blame by pointing at several other contributing causes for the accident, including that he thought someone had thrown something at the car, that the victim herself contributed to the accident by swerving into his path, and that there was nothing he could have done to avoid hitting her. *Id.* at *3–4. The Eighth District held that none of that precluded criminal liability because the defendant was a substantial cause for the accident. *Id.* at *6–7.

Likewise, Balmert's criticisms of a pair of Eleventh District decisions applying the substantial-factor test fail to advance his argument. Balmert Br.16. In *Filchock*, the

defendant, a drunk driver, hit and killed another driver on the road. 2006-Ohio-2242, ¶75. He too argued that there were other contributing factors, including that the victim contributed to the accident by driving too slowly and that another driver was attempting to outmaneuver the defendant off the highway. *Id.* at ¶76. The court rejected his arguments, holding that his contribution to the accident was a "substantial factor" in bringing about the harm even if other factors could have contributed to it. *Id.* at ¶¶76–77.

State v. Naylor, 2024-Ohio-1648 (11th Dist.), too, concerns actual causation in the context of multiple contributory causes. There, the defendant, this time a driver operating a vehicle while exceeding the permissible levels of marijuana metabolite, pointed to other contributing factors to the accident he caused involving several victims: the alleged malfunction of a victim's power steering pump, her driving without a valid driver's license, her swerving into the opposite lane instead of to the side of the road, and that the other victims were not wearing seat belts. *Id.* at ¶52. Again, the Eleventh District found that such contributions posed no bar to criminal liability when the driver's conduct was the substantial factor in bringing about the accident. *Id.* at ¶¶52–53.

At bottom, in advocating for *Strother*'s foreseeability test over a substantial-factor test, Balmert both misses the point and the case in which this Court already establishes the foreseeability test in the criminal context—namely, *Crawford*, 2022-Ohio-1509. The substantial-factor test, which applies on questions of actual causation when there are

multiple contributors to a result, simply does not apply here because Balmert's conduct is undisputedly the sole cause of the accident. And actual causation is not an issue in this case at all when but-for Balmert's conduct, the accident would not have happened.

2. Balmert misapplies the foreseeability test.

Balmert misapplies the foreseeability test in two ways. First, he asks this Court to second-guess the General Assembly's determination that driving with a statutorily prohibited amount of marijuana metabolite in one's system is *per se* driving impaired. Second, he tries to relitigate Balmert's impairment in the guise of arguing proximate causation. Both fail.

First, Balmert argues that marijuana metabolites, even if over the statutorily prohibited amount, have "no biological effect on the nervous system" and thus no effect on Balmert's ability to drive. Balmert Br.20. And he argues that changing societal attitudes on marijuana should be taken into account in deciding this appeal. *See* Balmert Br.21. But, these arguments ask this Court impermissibly to second-guess a determination that the General Assembly already made: that marijuana metabolites above the statutorily prohibited levels *per se* impair driving ability. This case is not the appropriate place to attack these legislative determinations. *See State v. Vega*, 12 Ohio St. 3d 185, 188 (1984); *City of Cincinnati v. Ilg*, 141 Ohio St. 3d 22, ¶¶23–24. Even if such legislative determinations could be challenged in court, that challenge belongs in a constitutional due-process challenge to the technical-impairment provision for

marijuana-metabolite levels which Balmert has not pressed before *any* court. Balmert cannot backdoor a constitutional challenge into the proximate-cause discussion here. At any rate, it is unlikely that any such challenge will pass muster because there is a substantial state interest in promoting road safety by removing unsafe impaired drivers from the roads. *Tanner*, 15 Ohio St. 3d at 6. And, as discussed above, the per-se marijuana-metabolite impairment levels are carefully calibrated to rationally relate to that state interest. *See id.*; *above* at 16–17.

Next, Balmert argues that the State needed to show beyond a reasonable doubt that Balmert was actually impaired—in the factual sense under (A)(1)(a), as opposed to the *per se* statutory impairment that he cannot dispute—to establish proximate cause. Balmert Br.20–21. Rather than argue that the collision was an unforeseeable result of his driving impaired, Balmert tries to relitigate whether he was impaired at all—a point that the General Assembly has already resolved against Balmert. He tries to attribute signs of impairment that he displayed at the scene of the accident, like the tremors in his eyes and body, to arthritis. Balmert Br.21. He points out his calmness despite having high blood pressure as a sign of sobriety. *Id.* And he tries to discredit the examining officers. *Id.* While all of that is relevant to actual impairment and featured prominently in the trial as conflicting evidence of actual impairment, none of it goes to whether, assuming Balmert was impaired (as the technical-impairment statute requires the factfinder to do), the collision was a "direct, natural, reasonably foreseeable consequence, as opposed to an

extraordinary or surprising consequence, when viewed in the light of ordinary experience." *Evans*, 2023-Ohio-2688, ¶55 (quotation omitted).

An analogy to familiar negligence-per-se cases is helpful here. Ordinarily, "a cause of action for negligence requires proof of (1) a duty requiring the defendant to conform to a certain standard of conduct, (2) breach of that duty, (3) a causal connection between the breach and injury, and (4) damages." *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 2015-Ohio-229, ¶23. However, when a statute sets forth "a positive and definite standard of care whereby a jury may determine whether there has been a violation thereof by finding a single issue of fact, a violation of that statute constitutes negligence *per se*." *Sikora v. Wenzel*, 88 Ohio St. 3d 493, 496 (2000) (emphasis original) (quotation omitted). That duty of care is one that a prudent person would exercise in taking reasonable precautions against foreseeable risks. *Id.* When "a statutory violation constitutes negligence *per se*, the plaintiff will be considered to have *conclusively established* that the defendant breached the duty that he or she owed to the plaintiff. *Id.* (second emphasis added) (quotation omitted). *Id.* Because the statute "serves as a legislative declaration of the standard of care of a reasonably prudent person applicable in negligence actions," the "reasonable person standard is supplanted by a standard of care established by the legislature." *Id.* (quotation omitted). Of course, negligence *per se* is not equivalent to liability *per se*. *Id.* at 496–97. Establishing negligence *per se* relieves the plaintiff only of its burden of proving the first and second elements—duty and breach—of a negligence

claim. The plaintiff still must prove proximate cause and damages. *Robinson v. Bates*, 2006-Ohio-6362, ¶23 (2006).

Bringing that analogy to this case, marijuana-impaired driving can be shown in two ways: either with proof that the driver's behavior shows impairment, R.C. 4511.19(A)(1)(a), or by legislative determination that driving with marijuana-metabolite of at least thirty-five nanograms per milliliter urine *per se* constitutes impairment, R.C. 4511.19(A)(1)(j)(viii)(II). The latter establishes "a positive and definite standard" on which a factfinder can "determine whether there has been a violation": lab results establishing a level of marijuana metabolite above a statutorily established level. That legislative determination supplants the ordinary requirement that the State prove impairment through proof based on the defendant's behavior and thus establishes impairment *per se*. That is what happened here. The State proffered lab results establishing a statutory violation of the impairment statutes. This "*conclusively established*," by legislative determination, that Balmert was impaired. *Sikora*, 88 Ohio St. 3d at 496 (emphasis added). The only question remaining was whether driving while impaired foreseeably causes traffic collisions like the one at issue here. It does.

At any rate, Balmert's sufficiency challenge fails. Before explaining why, however, the Attorney General notes that Balmert has framed his challenge before this Court entirely as a sufficiency challenge to the evidence supporting the proximate-cause

element of his aggravated vehicular assault charge. Balmert Br.11–12. He has thus forfeited any manifest-weight challenge of which he may have sought to avail himself.

Returning to the sufficiency challenge, to prevail, Balmert must establish that even "after viewing the evidence in a light most favorable to the prosecution," a "rational trier of fact" could not "have found" proximate cause "proven beyond a reasonable doubt." *State v. Fork*, 2024-Ohio-1016, ¶14; *State v. Dent*, 2020-Ohio-6670, ¶15. Rather than assess the record, however, Balmert wholly ignores it. He does not mention the expert evidence the State *did* proffer of the natural effects of marijuana use on driving reflexes. *See* Balmert Br.20–21; *id.* at 22. Recall that Sergeant Francway testified that marijuana use at the levels established in Balmert's urine test would slow any driver's reflexes, making it more difficult to brake or swerve to avoid traffic obstructions. Tr. 95–96. And the State proffered evidence that the intersection where the accident happened was likely to have such unexpected obstructions such that a driver navigating it would need unimpaired reflexes to safely drive through it. And, in delivering its verdict, the court acknowledged all this record evidence and concluded that the *per se* impaired driving "cause[d]" the accident. *See* Tr. 312–13.

Ignoring all that, Balmert offers one counter-explanation for the accident: that he was "blinded" by his car's A-pillar when he took the turn. Balmert Br.22. Balancing that against the record evidence (which Balmert ignores) establishing that marijuana use slows normal reflexes does nothing to move the needle. And any such balancing is

irrelevant to the sufficiency inquiry, which looks to whether the record *can* support the conviction and not whether the reviewing court would have come to a different conclusion. This Court should reject Balmert's improper offer to "sit as the thirteenth juror" and supplant the factfinder's resolution of competing evidence in this sufficiency challenge as it would in a manifest-weight challenge. *See State v. Jordan*, 2023-Ohio-3800, ¶17.

One last point on the sufficiency analysis is worth mention. To the extent Balmert is simply dissatisfied by the court's "analysis" of proximate causation, Balmert Br.21, his dissatisfaction carries no legal weight. "In a bench trial, the court is presumed to know and apply the law correctly unless the record affirmatively demonstrates otherwise." *State v. Travis*, 2022-Ohio-1233, ¶19 (8th Dist.); *see State v. Arnold*, 2016-Ohio-1595, ¶39 (2016). Nothing, much less *affirmative* record evidence, suggests that the trial judge acted anything but lawfully in carefully considering the evidence to conclude that Balmert's impairment was the proximate cause of the accident. Tellingly, Balmert points to no affirmative demonstration of error here.

All this explains why Balmert's reliance on *Moore* is inapposite. In *Moore*, the driver had an unlawful concentration of cocaine metabolites in her blood under R.C. 4511.19, establishing technical impairment, when she hit a tree and killed a passenger in the car. *State v. Moore*, 2019-Ohio-3705, ¶3 (6th Dist.). Among other charges, this incident gave rise to an aggravated-vehicular-assault charge predicated on her per-se technical

impairment under R.C. 4511.19. *Id.* at ¶¶21–28. But, because the State proffered no evidence at all as to the effects of driving while under the influence of cocaine, the court found insufficient evidence to support proximate cause. *Id.* at ¶27. That is not the case here, where the State offered expert testimony as to the effects of marijuana use on driving and evidence on the accident circumstances that would have required any driver to have full control of his reflexes to navigate. *Above* at 15–16.

Balmert also maintains that *Moore* is "legally and scientifically" accurate and reflects evolving attitudes on substance use. Balmert Br.22. That is neither here nor there because *Moore* did not compel proof of the defendant's impairment. To the contrary, it accepted that the defendant was impaired *per se* because she had the requisite levels of cocaine to constitute technical impairment. *Moore* simply asked that the State connect impairment to the traffic accident. The State has more than satisfied that here.

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

> *This Court should dismiss Balmert's second and third propositions of law as improvidently allowed.*

Balmert raises two propositions of law asking whether the trial court improperly considered evidence supporting actual impairment to satisfy the proximate-cause element of aggravated vehicular assault. Neither question is implicated here because the trial court did not consider evidence of actual impairment at all in convicting Balmert of the aggravated vehicular assault premised on the technical-impairment violation. The judge was clear on that: Balmert "cause[d] serious physical harm" while operating a

vehicle with an impermissible "level of metabolite in [his] system," which is a *per se* violation of R.C. 4511.19. Tr. 312. By the trial judge's own words, the guilty verdict for aggravated vehicular assault was based on the "lab result" that "show[ed]" that Balmert was violating R.C. 4511.19(A) when he collided with the Trooper. Tr. 312. And after the trial court convicted Balmert of the technical impairment and aggravated vehicular assault, he claimed that was "the end of the case" and only then turned to his reasons for acquitting Balmert on actual impairment and reckless driving. Tr. 312–14. All in, actual-impairment evidence had no place in the trial court's convicting Balmert on aggravated vehicular assault based on an underlying offense of driving while technically impaired. The second and third propositions of law should thus be dismissed as improvidently granted.

Identifying no error in the trial court's reasoning, Balmert focuses entirely on the Ninth District's considering actual-impairment evidence to affirm his conviction for the aggravated vehicular assault. Balmert Br.23–29. Even if the Ninth District's reasoning introduced an error that the trial judge did not commit, that is no barrier to this Court's affirming, because the judgment is correct. This Court "will not reverse a correct judgment supported by flawed reasoning." *Duncan*, 2022-Ohio-323, ¶14; *State ex rel. McGrath v. Ohio Adult Parole Auth.*, 2003-Ohio-5062, ¶8; *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 284 (1944).

This Court should especially avoid Balmert's third proposition of law, in which he asks this Court to overturn his conviction on the basis that using acquittal evidence (here, the actual-impairment evidence) to convict on a compound charge (here, the aggravated-vehicular-assault charge) violates the Double Jeopardy Clauses of the State and federal constitutions. *See* Balmert Br.23. For one thing, that issue is not presented in this case because the trial court did no such thing. And "[i]t is well settled that this court will not reach constitutional issues unless absolutely necessary." *In re D.S.*, 2017-Ohio-8289, ¶7. This Court should reject Balmert's invitation to answer a constitutional question that is not presented.

Should this Court reach the constitutional question, though, Balmert's arguments all fail. Even if the trial court had rendered an inconsistent verdict by acquitting on actual impairment by using that same evidence to convict on the compound, aggravated-vehicular-assault offense, it is well-established that Ohio and federal law permit such inconsistent verdicts to stand. *United States v. Powell*, 469 U.S. 57 (1984); *State v. Lovejoy*, 79 Ohio St. 3d 440, 444–45 (1997); *see State ex rel. Zander v. Judge of Summit Cty. Common Pleas Court*, 2019-Ohio-1704, ¶6; *State v. Gardner*, 2008-Ohio-2787, ¶81; *State v. Gapen*, 2004-Ohio-6548, ¶¶137–38; *State v. Hicks*, 43 Ohio St. 3d 72, 78 (1989); *State v. Adams*, 53 Ohio St. 2d 223, 228 (1978), *rev'd on other grounds sub nom. Adams v. Ohio*, 439 U.S. 811 (1978); *State v. McNicol*, 143 Ohio St. 39, 47 (1944); *State v. Browning*, 128 Ohio St. 62, 62 (1929); *Griffin v. State*, 18 Ohio St. 438, 444–45 (1868). That is because an irrational

verdict "shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Powell*, 469 U.S. at 64–65. Thus, although such verdicts are "error[oneous]," the convictions should stand undisturbed because it is "unclear whose ox has been gored." *Id.* at 65. What is more, because an inconsistent verdict rendered in a single proceeding does not place a defendant in jeopardy twice, such verdicts may not have double-jeopardy implications at all. *Cf. Hollins v. Smith*, 2024 U.S. App. LEXIS 22718, *7 (6th Cir. September 5, 2024); *see McElrath v. Georgia*, 601 U.S. 87, 93 (2024) ("The 'controlling constitutional principle'" of the Double Jeopardy Clause "focuses on prohibitions against multiple trials.").

Conceding much of this, Balmert Br.27–28, Balmert next invites this Court to interpret the Ohio Constitution as more protective than the federal Constitution. This Court has held that the two clauses are coextensive, and that Ohio Const., art. I, § 10 affords no greater double-jeopardy protection than the Fifth Amendment of the United States Constitution. *State v. Smith*, 2020-Ohio-4441, ¶27; *State v. Pendleton*, 2020-Ohio-6833, ¶22. Although Balmert references the Ohio Constitution, he offers no argument why the Court should depart from its precedent reading the two constitutional provisions as co-extensive. Balmert Br.28. Nor did he press the constitutional argument (or *any* constitutional argument) in the court below. *See* Balmert App. Br. This Court has declined to reconsider whether the Double Jeopardy Clauses of the Ohio and U.S.

Constitutions are coextensive when the parties fail to argue otherwise. *See Girard v. Giordano*, 2018-Ohio-5024 , ¶6. It should do so here as well.

Perhaps recognizing all of this, Balmert changes tack, arguing that the *trial* court did not render an inconsistent verdict, but that the *Ninth District* did, so that the just-discussed law does not apply. Balmert Br.28. If that is so (and it is), then all parties agree that the issue is not before the Court. And to the extent Balmert accuses the Ninth District of creating an inconsistent verdict, that makes no sense; it is the trial court, acting as factfinder, and not the reviewing court, that issued the verdict. The conviction should be left undisturbed even if the intermediate appellate court judgment affirming a correctly decided verdict was based on erroneous reasoning.

CONCLUSION

For the above reasons, the Court should affirm the Ninth District.

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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 Appellants was served this 4th day of December, 2024, by e-mail on the following:

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