IN THE SUPREME COURT OF OHIO

BETHEL OIL AND GAS, LLC, *et al.*, Appellee, *v.* REDBIRD DEVELOPMENT, LLC, *et al.* Appellants.	: : : : : : : : : :	Supreme Court Case No. 2024-1696 On Appeal from the Fourth Appellate District, Case No. 23-CA-5

BRIEF OF *AMICUS CURIAE* THE OHIO CHAMBER OF COMMERCE AND THE OHIO BUSINESS ROUNDTABLE IN SUPPORT OF DEFENDANT-APPELLANTS K&H PARTNERS LLC AND TALLGRASS OPERATIONS LLC

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I. THE AMICUS INTEREST OF THE OHIO CHAMBER OF COMMERCE AND THE OHIO BUSINESS ROUNDTABLE.

The Ohio Chamber of Commerce ("The Chamber") is the state's leading business advocate and, with over 8,000 member businesses, Ohio's oldest, largest, and most diverse business association. The Chamber champions free enterprise, economic competitiveness, and growth for the benefit of all Ohioans and Ohio businesses and supports Ohio's growing and prosperous economic and business climate. The Chamber promotes a pro-growth agenda in Ohio's courts and selectively files *amicus curiae* briefs advocating for, among other things, (1) a predictable and efficient court system and (2) a commercial environment where all Ohioans grow and prosper. These risks to commerce interests and legal rights directly implicate The Chamber's mission to protect and promote the growth of Ohio business.

The Ohio Business Roundtable (the "OBRT"), established in 1992, was founded for one purpose: to improve Ohio's business climate. Since its inception, the OBRT has worked with Ohio's governors and legislative leaders to make Ohio more business-friendly and more competitive both nationally and internationally. OBRT members—the Chief Executive Officers of many of our state's largest, most successful businesses—have helped bring about momentous change in Ohio's economic landscape. OBRT's executives find vexing, intractable issues facing Ohio's job creators, and devote expertise and resources to pursue policies that make Ohio stronger.

The tension between federal and Ohio pleading standards (1) increases the burden on all litigants, (2) threatens the effectiveness of Ohio's court system, and (3) inhibits the economic growth of Ohio businesses. This issue impacts critical commerce interest and legal rights, and directly implicates the mission of both the Chamber and the OBRT. The Ohio Supreme Court should adopt the plausibility standard for Ohio courts.

II. STATEMENT OF THE CASE AND PERTINENT FACTS

The Chamber and the OBRT adopt the statement of the case and facts in Appellants K&H Partners LLC and Tallgrass Operations LLC's (collectively, "Tallgrass") Memorandum of Support of Jurisdiction, Appellant's Mem. Supp. Jurisdiction, at 3-7, Dec. 9, 2024. The Chamber and the OBRT do, however, underscore that Bethel Oil and Gas, LLC ("Bethel") sued *sixteen* defendants based on an Ohio Department of Natural Resources, Division of Oil and Gas Resources Management ("ODNR") finding that *one* saltwater injection well contaminated *one* of Bethel's gas wells. Bethel's claims indiscriminately targeted nearby operators, regardless of ownership or operational ties to the ODNR-identified well. Appellants moved to dismiss, arguing Bethel's complaint failed to link them to the implicated well or to the alleged damages.

Appellants submit one proposition of law for this Court's review: Ohio's pleading standard under Civil Rule 8 includes the plausibility requirement outlined by the United States Supreme Court in *Iqbal* and *Twombly*. This *amicus* brief supports the Appellants' proposition of law.

III. THE CHAMBER AND THE OBRT SUPPORT THE APPELLANTS' FIRST PROPOSITION OF LAW AND URGES THIS COURT TO ADOPT THE HEIGHTENED PLAUSIBILITY STANDARD.

This Court should formally adopt the plausibility standard established in *Twombly* and *Iqbal* ("*Twombly/Iqbal*") and require parties to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). This standard creates procedural uniformity throughout the state of Ohio, as well as between state and federal courts, reducing forum shopping. It also promotes judicial efficiency and economic growth by allowing Ohio courts to focus on the pled merits to determine what claims can proceed. And, given the increase in electronically stored commercial and personal information, the plausibility standard allows Ohio courts to take the lead in better aligning justice with modern legal practicalities and eliminate extortion through litigation.

Most importantly, requiring plausible pleadings (1) fosters procedural consistency, reduces forum shopping, and enhances judicial efficiency; (2) streamlines expectations for businesses operating across jurisdictions and reinforces Ohio's reputation as a predictable and business-friendly forum; and (3) creates a stable legal environment conducive to economic growth and innovation by eliminating unnecessary litigation to focus on legitimate disputes.

This case is an ideal opportunity for Ohio to eliminate inconsistencies in pleading standards across Ohio courts and formally adopt the *Twombly/Iqbal* plausibility standard explicitly and implicitly adopted throughout Ohio courts. *Maternal Grandmother, ADMR v. Hamilton Cty. Dep't of Job & Family Servs.*, 2021-Ohio-4096, dissent at ¶28. Clarifying the pleading standard not only creates uniformity in Ohio's courts but also reduces litigant confusion and forum shopping, making Ohio a fairer and more commercially attractive venue.

Adopting the *Twombly* and *Iqbal* plausibility standard will protect businesses from the burdens of frivolous litigation, fostering economic growth. Under Ohio's current pleading standard, a complaint is only ripe for dismissal if "it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief." *Conley v. Gibson*, 355 U.S. 41, 45 (1957). This lenient notice pleading standard allows vague and unfounded claims to proceed, forcing defendants to engage in several months of discovery before courts can ferret out meritless claims. Adopting a plausibility standard protects businesses from the time and expense of engaging in meritless discovery while allowing plausible claims to proceed. This lessens litigation burdens and allows Ohio businesses to put more resources toward economic growth.

Clarifying pleading standards and requiring a plausibility standard enhances judicial efficiency by focusing on <u>tenable</u> claims and issues—clarified by plausible facts—at the beginning of a case. "Plausibility" does not require extensive fact pleading, but a plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This standard weeds out implausible and outlandish claims from the start. This saves courts and litigants from the burden of engaging in useless litigation, making all cases more efficient and focused.

A. Implementing the plausibility standard supports business growth and drives economic development in Ohio.

Requiring complainants to establish plausible claims reduces frivolous litigation and supports economic growth in Ohio. The costs of civil litigation, in terms of time and money, are significant and are only increasing with the development of electronic discovery. A RAND study estimated that each gigabyte of data reviewed in e-discovery costs about $18,000 and that the average e-discovery production cost was $1.8 million. Nicholas M. Pace & Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, RAND Institute for Civil Justice, 17, 20 (2012) . A survey of Fortune 200 companies found that, from 2006-2008, "the average company paid average discovery costs per case of $621,880 to $2,993,567." Lawyers for Civil Justice, Civil Justice Reform Group, *Litigation Cost Survey of Major Companies*, U.S. Chamber Institute for Legal Reform, 3.

Ohio's current pleading standard allows many meritless claims to go forward to discovery, subjecting all parties to exorbitant costs without establishing that a plausible claim exists.[1] The current system emboldens plaintiffs to use litigation costs as a cudgel against defendants, who, after being haled to court, have no exit from litigation without first spending months of time and

[1] While the up-front costs of drafting complaints may rise slightly, potential plaintiffs with legitimate claims generally already know facts sufficient to plead a plausible claim. Any slight initial costs associated with drafting the complaint are outweighed by the long-term savings that stem from an initial clarification of the claims and issues, including reduced pretrial motion practice, discovery disputes, and litigation delays. *See* William H. J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. Empirical Legal Stud. 474, 511-512 (2017).

thousands or millions of dollars in discovery to defend themselves against meritless claims. The rising costs of discovery also harms consumers, as increased litigation exposure forces companies to raise prices to reflect increased costs.[2]

The Wall Street Journal Editorial Board warns that defending against meritless lawsuits significantly burdens businesses, hindering economic growth and innovation; specifically, the U.S. tort system's total monetary cost in 2020 was $443 billion, equating to 2.1% of the United States's GDP, or approximately $3,600 per household. Wall Street Journal Editorial Board, *How Lawsuits Cost You $3,600 a Year*, The Wall Street Journal, Opinion (Dec. 11, 2022).[3] In 2022, the Ohio tort system's total monetary cost was over $12 billion, and has grown on average 5.8% from 2016 through 2022. Nicholas C. Lucas, *Lawsuits Are Out of Control*, U.S. Chamber of Commerce (Nov. 20, 2024).

Rising discovery costs clearly impairs all businesses. Still, Ohio's approximately 1 million small businesses—over 99% of all Ohio businesses, employing over 43% of Ohioans—are particularly harmed as they often cannot absorb such costs and must settle frivolous claims. *2023 Small Business Profile: Ohio*, U.S. Small Business Administration Office of Advocacy, 1. A study by the U.S. Chamber of Commerce Institute for Legal Reform found that while small businesses account for 20% of American business revenues earned in 2021, they bore 48% of the costs of the commercial tort system. David McKnight & Paul Hinton, *Tort Costs for Small Businesses*, U.S. Chamber of Commerce, 3 (Dec. 2023). The same study found that the tort liability per thousand dollars in revenue was *seven times larger* for small businesses with under $1 million in annual

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[2] *See* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 595.

[3] Online version of article last accessed on Jan. 6, 2025, available at: https://www.wsj.com/articles/how-lawsuits-cost-you-3-600-a-year-tort-system-chamber-of-commerce-institute-for-legal-reform-report-11670460820?st=2gDzZ9&reflink=article_copyURL_share.

revenue than for businesses with over $50 million in annual revenue. *Id.* As litigations costs continue to rise, it is small businesses that shoulder the disproportionate burden of those costs.

Adopting the plausibility standard will allow this Court to (1) deter frivolous lawsuits, (2) reduce the possibility that "discovery extortion" will influence the resolution of claims, and (3) create a more predictable legal environment. As a result, individuals and businesses can spend more time and resources focusing on their work in their respective industries and avoid baseless and unpredictable claims. With more predictable legal processes and lower litigation expenses, Ohio's businesses will have more funds to put towards research and new products.[4] This, in turn, promotes Ohio's economic growth and makes Ohio a more attractive place for businesses to invest and stay.

B. <u>The plausibility standard clarifies Ohio law, promotes consistency, and enhances judicial efficiency.</u>

Both Ohio Civ. R. 8(A) and Fed. R. Civ. P. 8(a) require that a pleading contain "a short and plain statement of the claim showing that the party [pleader] is entitled to relief." The Rules are nearly identical, as "in principle, Rule 8(A) is based on Federal Rule 8(a)." Civ. R. 8, Staff Notes, 1970; *see also Coryell v. Bank One Trust Co. N.A.*, 2004-Ohio-723, ¶ 25 (looking to federal pleading standards in an age discrimination matter because "Ohio's Civ.R.8(A)(1) mirrors the federal rules virtually verbatim"). Despite being based upon the same language, the application of the pleading standard between Ohio and federal courts differs significantly.

Ohio still follows the *Conley* pleading standard set forth by the Supreme Court in 1957, where dismissal of a complaint is only proper if "it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief." *Conley v. Gibson*, 355 U.S. 41, 45

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[4] *See* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform,* 60 Duke L.J. 547, 575.

(1957); *Maternal Grandmother, ADMR v. Hamilton Cty. Dep't of Job & Family Servs.*, 2021-Ohio-4096, ¶13; *see also Doe v. Greenville City Sch.*, 2022-Ohio-4618, ¶ 7 (quoting the requirement for a "short and plain statement of the claim" under Civ. R. 8 as meaning that "Ohio is a notice-pleading state.").

Because the "no set of facts" standard conflicts with the plain language of Fed.R. Civ. P. 8(a), the United States Supreme Court has clarified *Conley*, explaining that "[t]he 'no set of facts' language has been questioned, criticized, and explained away long enough by courts and commentators, and is best forgotten as an incomplete, negative gloss on an accepted pleading standard" and that "*Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, syllabus (2007). Federal courts now interpret Fed. R. Civ. P. 8(a) to require that a complaint contain "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Critically, requiring more detail will not stop meritorious claims from moving forward, but it will prevent courts from getting snarled with claims that, on their face, are implausible and have no chance of success on the merits.[5]

Several appellate courts have cited *Twombly* and *Iqbal* in support of the standard for dismissal of a complaint under Civ. R. 12(b)(6), including the Fifth District,[6] the Ninth District,[7]

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5 Other state supreme courts have successfully adopted the *Twombly/Iqbal* standard, including Colorado, Massachusetts, South Dakota, and Nebraska. *See Warne v. Hall*, 373 P.3d 588, 595 (Col. 2016); *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635 (Mass. 2008); *Sisney v. Best Inc.*, 754 N.W.2d 804, 809 (S. Dakota 2008); *Doe v. Bd. of Regents*, 788 N.W.2d 264, 278 (Neb. 2010). Their experience demonstrates that adopting the federal plausibility standard aligns with the plain text of Civ. R. 8(A), simultaneously reducing inefficiency while promoting fairness.

6 *Bumpus v. Ward*, 2012-Ohio-4647, ¶12 (5th Dist.).

7 *Presutto v. Hull*, 2018-Ohio-3103, ¶6 (9th Dist.).

the Sixth District,[8] and the Eighth District.[9] The Ninth District, at least, has stated it felt that such citation to federal pleading standards was appropriate because "[a]lthough *Twombly* refers to the Federal Rules and the Ohio Rules are applicable here, the pleading requirements under Fed.R.Civ.P. 8(a) and Civ.R. 8(A) are virtually identical. Additionally, the Ohio Rule was based on the Federal Rule." *Vagas v. City of Hudson*, 2009-Ohio-6794, fn. 1 (9th Dist.). However, though Ohio district courts frequently cite *Twombly* and *Iqbal's* plausibility standard, they still frequently apply the less stringent "no set of facts" standard, confusing litigants regarding which standard is being used. *See Tuleta v. Medical Mut. of Ohio*, 2014-Ohio-396, ¶24-30 (8th Dist.) (gathering cases); *Sacksteder v. Senney*, 2012-Ohio-4452, ¶39-45 (2nd Dist.) (gathering cases).

The divergence between the Ohio and federal pleading rules has caused pleading standards to be inconsistently applied in Ohio.[10] This confusion leads to unpredictable outcomes and erodes public confidence in the judiciary, as litigants are uncertain which pleading standard a given court will cite or apply when evaluating a motion to dismiss. This environment is even more confusing for litigants where courts may cite the principles of *Twombly/Iqbal* while claiming not to use the standard. Adopting the plausibility standard eliminates this conflict, reduces inconsistencies, and streamlines Ohio's judicial system.

C. The plausibility standard disincentivizes undesirable forum shopping.

The U.S. Supreme Court has long aimed to discourage forum shopping and avoid inequitable administration of the laws. *See Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). Applying different pleading standards in state and

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[8] *Randall v. JM Smucker Co.*, 2024-Ohio-4725, ¶15 (6th Dist.).

[9] *Harper v. Weltman, Weinberg & Reis Co., L.P.A.*, 2019-Ohio-3093, ¶30 (8th Dist.); *see also Digiorgio v. City of Cleveland*, 2011-Ohio-5878, ¶ 41 (8th Dist.).

[10] *See* Darcy Jalandoni & David Shouvlin, *Ohio and Twombly/Iqbal: Plausible?*, Ohio Lawyer, May/June 2015, https://www.porterwright.com/content/uploads/2017/11/ohiolawyer-jalandoni-shouvlin-may-june2015.pdf.

federal courts allows different application in each forum, and Ohio should adopt the plausibility pleading standard to discourage forum shopping and ensure equal administration of the law.

"Because the Ohio Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, federal law interpreting the federal rule is appropriate and persuasive authority in interpreting a similar Ohio rule." *Felix v. Ganley Chevrolet, Inc.*, 2015-Ohio-3430, ¶24, citing *Stammco, L.L.C. v. United Tel. Co. of Ohio, 2013-Ohio-3019, ¶18*. And, this Court has adopted federal interpretations of similarly drafted federal rules in the past. *See, e.g., Stammco, L.L.C. v. United Tel. Co. of Ohio*, 2013-Ohio-3019 (relying upon Supreme Court precedent to clarify the application of Civ. R. 23); *State v. Creech*, 2016-Ohio-8440, ¶35 (adopting the Supreme Court's reasoning in a case interpreting a nearly identical counterpart of Evid. R. 403(A)); *Myers v. City of Toledo*, 2006-Ohio-4353, (relying on Supreme Court precedent to determine that a court-ordered physical examination under Civ. R. 35 did not affect a substantial right).

The evolution of the federal plausibility standard should guide this Court's strict interpretation of the text of Civ. R. 8(A).[11] The U.S. Supreme Court reasoned that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions" and that "factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Therefore, "[w]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). This interpretation applies with equal force to the plain text of Ohio's Civ. R. 8(A). Resolving current divergence will resolve lower court confusion while filtering out implausible claims at the pleading stage, freeing up judicial resources for meritorious cases.

[11] The relevant portion of Ohio Civ. R. 8(A) and Fed. R. Civ. P. 8(a) are essentially identical—the Ohio rule differs only in the use of the term "party" instead of "pleader."

D. The plausibility standard will not limit the resolution of legitimate claims.

The plausibility standard preserves litigants' court access while ensuring a more robust judicial process. William H. J. Hubbard, "The Effects of Twombly and Iqbal," 14 J. Empirical Legal Stud. 474, 479 (2017). And many studies have found no increase in dismissals with prejudice since the plausibility standard was adopted. *Id.* Instead, more courts dismiss claims without prejudice, allowing plaintiffs to provide more detailed pleadings. *Id*; Joe S. Cecil et al., *Motions to Dismiss for Failure to State a Claim After Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules*, Federal Judicial Center, March 2011, p. 13-14 (finding that after the *Twombly* and *Iqbal* rulings, while motions to dismiss were granted at a higher rate, the increase extended only to grants of motions to dismiss with leave to amend the complaint).

While some may contend that the plausibility standard limits access to the courts, the record shows that plaintiffs are consistently afforded meaningful opportunities to amend their pleadings when fairness and justice so require.

Critically, the Ohio Constitution provides that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Ohio Const., art. I, § 16. The plausibility standard completely complies with this core principle of justice. First, requiring plaintiffs to include sufficient detail in their pleadings to establish plausible claims, whether through their initial pleading or through amendment[12], (1) enhances open access to remedies by promptly filtering meritless cases, (2) reduces docket congestion, and (3) and protects parties from costly discovery. Next, the plausibility standard allows judges to play their important gatekeeping role to ensure that legitimate claims proceed in the due course of law. Finally, a

[12] Civ. R. 15(A) allows for amendment of the pleadings "when justice so requires," and courts can order amendment of the pleadings for legitimate claims, rather than outright dismissal.

plausibility analysis allows for more effective evaluation of claims without delay and allows courts to enforce Ohio's strong public policy standards against frivolous filings.[13]

E. A plausibility standard aligns Ohio courts with the demands of modern legal practice while disincentivizing "discovery-extortion."

As business communications increasingly occur via email and chat applications such as Microsoft Teams and Slack, even small businesses may have a wealth of electronic communications relevant to discovery requests. Most companies (large and small) and individuals store their records digitally. Some experts estimate that 99% of the world's information is now generated electronically.[14] However, this electronic data is more expensive to produce than paper documents, and as companies accumulate more digital data, they must face the costs of preserving such data over time.[15] As more parties face the burden of e-discovery, and as discovery becomes more complex, burdensome, and costly, courts must ensure that claims are plausible before subjecting the parties to the discovery process. The plausibility standard encourages plaintiffs to only bring credible claims rather than take a shotgun approach to pleading. This increases clarity at the early stages of litigation, provides more consistency, and protects Ohio businesses from defending against implausible claims. It also limits the potential for plaintiffs to leverage the high cost of sifting through near-limitless information from unlimited defendants to extort parties; further protecting all parties from baseless claims.

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[13] *See* Civ. R. 11; Ohio Rules of Professional Conduct 3.1; R.C.§ 2323.51. Ohio clearly has a strong public policy disfavoring frivolous lawsuits, and empowering courts to more readily curb abusive filings will promote this policy.
[14] *See* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 564 .
[15] *Id.* at 565-570.

IV. CONCLUSION

This case offers a pivotal opportunity for this Court to lead the way in aligning Ohio's judiciary with contemporary legal realities while supporting the economic vitality of its business community. Ohio's Courts of Common Pleas reported 107,944 new civil cases in their General Divisions alone in 2024, with an average of 442 incoming new cases per judge.[16] By contrast, Ohio's two federal district courts only saw 8,227 new civil cases in 2024.[17] Furthermore, the Ohio judicial system has been facing budgeting difficulties for years.[18] The effects of an overworked judicial system are felt deeply—Ohio courts report that the areas most impacted by budget issues are related to sufficiently staffing, training, and paying employees.[19] Given that most new cases are brought in state court, Ohio courts must be *at least* as efficient as federal courts at filtering out implausible claims.

Modernizing Ohio's civil procedure will strengthen Ohio's economy by fostering a legal system that prioritizes fairness and efficiency, enabling businesses to focus on innovation and growth rather than costly legal battles. Accordingly, The Chamber and the OBRT urge this Court to formally adopt the plausibility standard, creating a foundation for fairness, economic growth, and judicial integrity across the state.

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[16] *State of Ohio Court Statistics*, The Supreme Court of Ohio & The Ohio Judicial System, "State of Ohio Courts of Common Pleas, General Division: Caseload and Performance Measures," https://analytics.das.ohio.gov/t/SCPUB/views/FormA-judge-state-PROD/CaseloadandPerformance?iframeSizedToWindow=true&%3Aembed=y&%3AshowAppBanner=false&%3Adisplay_count=no&%3AshowVizHome=no (last accessed Jan. 3, 2025).

[17] Federal Judicial Caseload Statistics, "Civil Cases Filed, Terminated, and Pending, by Jurisdiction," U.S. Courts, https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2024-tables (last accessed Jan. 3, 2025).

[18] *Report and Recommendations of the Supreme Court of Ohio Task Force on the Funding of Ohio Courts*, Task Force on the Funding of Ohio Courts, November 2015, p. 3.

[19] *Id.* at p. 23-24.

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I certify that I served a copy of this document via electronic mail on May 2, 2025, upon:

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