

In the
Supreme Court of Ohio

KENNETH D. McFADDEN, : Case No. 2007-0705
: :
Plaintiff-Appellant, : :
: :
v. : : On Appeal from the
: : Franklin County
: : Court of Appeals,
CLEVELAND STATE UNIVERSITY, : : Tenth Appellate District
: :
: :
Defendant-Appellee. : : Court of Appeals Case
: : No. 06AP-638
: :

**MERIT BRIEF OF DEFENDANT-APPELLEE
CLEVELAND STATE UNIVERSITY**

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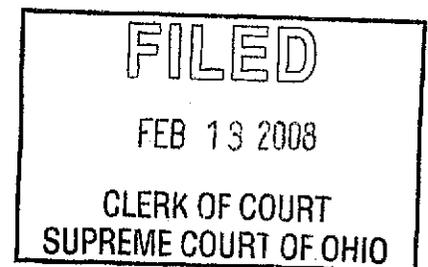


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INTRODUCTION

Cleveland State University (“CSU”) agrees with Plaintiff-Appellant Kenneth D. McFadden that the Ohio Constitution permits en banc review. The text of Art. IV, Sec. 3 allows the General Assembly to pass laws increasing the number of judges in a district, but “[i]n districts having additional judges, three judges shall participate in the hearing and disposition of each case.” This text could be read in two plausible ways: “[T]hree judges shall” might mean that three and only three judges may hear and dispose of a case. Or the text might mean that *at least* three judges must hear and dispose of a case, but *more* than three judges *may* hear and dispose of a case. Although both readings are reasonable, CSU agrees with McFadden that allowing en banc review is the better reading of the text. Policy considerations also favor en banc review so that appellate courts may resolve intra-district conflicts.

But the fact that en banc proceeding may be constitutional does not mean that the Tenth District Court of Appeals erred in this case. Rather, the constitutionality of en banc proceedings is only one of many issues presented here, and these other issues all demonstrate that the Tenth District properly denied McFadden’s request for en banc review. First, en banc review may be authorized by rule, but absent an authorizing rule, a court has no power to convene en banc. See Ohio Const., Art. IV, Sec. 5(B). Because neither this Court nor the Tenth District had promulgated a rule authorizing en banc review, the Tenth District was compelled to deny McFadden’s request for en banc review.

Second, courts should have discretion when deciding whether an intra-district conflict exists and, therefore, whether to review a case en banc. Thus, even if the Tenth District had the power to hear a case en banc, it correctly declined to use the procedure in this case. Here, the court correctly recognized there was no conflict to review. McFadden relied upon an unreported case, *Senegal v. Ohio Dept. of Rehab. & Corr.* (10th Dist.), 1994 Ohio App. Lexis 938, that

subsequent Tenth District panels had not followed. The *McFadden* court instead followed *McCoy v. Toledo Corr. Inst.* (10th Dist.), 2005 Ohio App. Lexis 1753, 2005-Ohio-1848, a case that was consistent with a number of other Tenth District precedents. Therefore, the law within the district was settled. Third, it would have been futile for the Tenth District to consider the matter en banc, because a majority of the Tenth District had already considered and denied claims similar to that of *McFadden's*.

Accordingly, no matter what this Court decides regarding the constitutionality of en banc proceedings, the Tenth District's decision to deny reconsideration and en banc review should be affirmed.

STATEMENT OF THE CASE AND FACTS

CSU terminated *McFadden* from his employment on June 11, 2003. More than two years later, on October 26, 2005, *McFadden* filed suit in Cuyahoga County Common Pleas Court. After voluntarily dismissing that case, *McFadden* sued CSU in the Court of Claims for employment discrimination under R.C. Chapter 4112.

The Court of Claims granted CSU's motion for summary judgment on the basis that the two-year statute of limitations applicable to suits in the Court of Claims barred *McFadden's* claim. R.C. 2743.16(A). The Court relied upon the Tenth Appellate District's decision in *McCoy v. Toledo Corr. Inst.*, 2005-Ohio-1848, holding that the two-year statute of limitations applies to discrimination claims.

On appeal, *McFadden* argued that the Tenth District should follow an unreported 1994 decision, *Senegal v. Ohio Dept. of Rehab. & Corr.*, 1994 Ohio App. Lexis 938, that, unlike *McCoy*, applied a six-year statute of limitations to discrimination suits in the Court of Claims. *McFadden* argued that the *McCoy* court erred in not following *Senegal*. According to *McFadden*, the 1975 Act implementing a two-year statute of limitations did not apply to

discrimination claims against the State because the State had consented to be sued for discrimination prior to the 1975 enactment of the Court of Claims Act. As it did in *McCoy*, the appeals court here rejected this argument, because the State did not consent to be sued for damages in discrimination cases until R.C. 4112.99 was amended in 1987. See *Elek v. Huntington Nat'l Bank* (1991), 60 Ohio St. 3d 135. Accordingly, the court followed *McCoy*, which had relied on several precedents applying the two-year statute of limitations to suits in the Court of Claims. *McFadden v. Cleveland State University* (10th Dist.), 2007 Ohio App. Lexis 244, 2007-Ohio-298, ¶ 10.

McFadden did not appeal the Court's January 25, 2007, decision dismissing his claim. Instead, McFadden filed a motion for reconsideration on February 2, 2007, arguing that the Tenth District should convene en banc to resolve the alleged conflict between *Senegal* and *McCoy*. McFadden relied on *In re J.J.*, 111 Ohio St. 3d 205, 2006-Ohio-5484, which this Court decided shortly before oral argument in this case, to argue that the Tenth Circuit was "duty bound" to hear his appeal en banc.

The Tenth District issued its opinion denying reconsideration on March 6, 2007. *McFadden v. Cleveland State Univ.*, 170 Ohio App. 3d 142, 2007-Ohio-939. On the same day that it denied reconsideration in this case, the Tenth District issued its decision in *Anglen v. Ohio State University* (10th Dist.), 2007 Ohio App. Lexis 889, 2007-Ohio-935. The panel in *Anglen* again held that the two-year Court of Claims statute of limitations, rather than a six-year limitations period, applies to discrimination suits in the Court of Claims. With the issuance of *Anglen*, six of the eight sitting Tenth District judges (Bryant, French, Klatt, McGrath, Petree,

Sadler) have held that the two-year Court of Claims statute of limitations applies to discrimination claims brought in that court.¹

On April 20, 2007, McFadden appealed the Tenth District's March 6, 2007 decision denying reconsideration; this Court denied jurisdiction. On September 10, 2007, however, McFadden filed a motion for reconsideration, and this Court accepted jurisdiction over McFadden's appeal on October 24, 2007. *10/24/2007 Case Announcements*, 115 Ohio St.3d 1445, 2007-Ohio-5567.

LAW AND ARGUMENT

Appellee Cleveland State University's Proposition of Law No. 1:

Under the Ohio Constitution, courts of appeals may conduct en banc review so long as the proceeding is authorized by a rule promulgated under the Modern Courts Amendment to the Ohio Constitution, Art. IV, Sec. 5(B). Absent a rule, en banc proceedings are ultra vires.

The constitutionality of en banc proceeding is a matter of first impression before this Court. Because of this issue's importance, CSU, although ultimately concluding that the procedure is constitutional, will endeavor to develop the arguments on both sides.

A. Textual and policy arguments support the constitutionality of en banc review.

An analysis of the constitutionality of en banc proceedings begins with the text of Article IV, Sec. 3(A), which states that "three judges shall participate in the hearing and disposition of each case." Because all of Ohio's appellate courts have more than three judges, any en banc convening in an Ohio appellate court would consist of more than three judges. If the language of Art. IV, Sec. 3(A) means that three *and only three* judges may hear a case, en banc proceedings are unconstitutional in Ohio. If, however, "three" creates only a floor and not a ceiling, then the

¹ This Court rejected Anglen's appeal on the merits of the statute of limitation issue. *8-29-07 Case Announcements*, 113 Ohio St. 3d 1509, 2007-Ohio-4285.

provision means that at least three judges must decide a case. Under this reading, more than three judges, however, *may* hear and dispose of a case.

The historical background of Section 3(A), Article IV, provides support for the view that the number “three” has more to do with the minimum quorum requirement rather than a desire to limit important district decisions to less than a majority of the court. *State v. Lett* (8th Dist.), 161 Ohio App. 3d 274, 2005-Ohio-2665, ¶ 53 (Gallagher, J., concurring in part, dissenting in part). In *Lett*, Judge Gallagher argued that the text of the Ohio Constitution only requires appellate courts to have a minimum of three judges to hear and dispose of a case, and that the text does not preclude more than three judges convening en banc. *Id.* “[A] review of Ohio’s judicial history shows that the reference to [three] reflected, in part, the limited size of the early judiciary. . . . Simply put, there were far fewer judges to decide cases in the 19th century, and three judges became the smallest acceptable number for proper review.” *Id.* (footnote omitted).

In *Lett*, Judge Gallagher also argued that the “en banc process is embedded in American jurisprudence” and cited *Textile Mills Securities Corp. v. Commissioners* (1941), 314 U.S. 326. *Id.* at ¶ 54. In *Textile Mills*, the U.S. Supreme Court had to reconcile two statutes. Section 117 of the Judicial Code provided that “[t]here shall be in each circuit a circuit court of appeals, which shall consist of three judges” *Id.* at 328 (citing 28 U.S.C. § 212). But “§ 118 of the Judicial Code provided for four circuit judges” in certain circuits. *Id.* at 329. As the Supreme Court explained, if § 117 was interpreted to mean that a circuit court of appeals had to be composed of only three judges, in circuits where there were four judges, “all [four judges] could not be members of a court of three.” *Id.* at 329-30. Therefore, if “three” created both a ceiling and a floor, the fourth judge in a given circuit would not be part of the court. To give effect to the legislative intent to create in some circuits a circuit court of appeals of four judges, the

United States Supreme Court concluded that the statute “provides merely the permissible complement of judges for a circuit court of appeals” and the language of the statute should not be taken “too literally.” *Id.* at 330, 333-34. The Supreme Court’s approach makes sense. While expanding the number of judges was necessary to accommodate the federal courts’ increased caseload, some method of incorporating the expanded number of judges into a workable system was also required. En banc review allowed for this accommodation, and since the federal statute did not preclude the deployment of more judges on a panel, the court reasonably concluded that such an appeal was permissible. As explained below, Ohio, too, increased its number of appellate judges within a district.

Moreover, a number of policy considerations support en banc review. The positive attributes of the en banc process have a “long pedigree.” Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. Rev. 29, 39 (1988). First, the en banc process is a useful tool for efficiently resolving intra-district conflict. When two panels decide the same issue differently, a mechanism is needed to resolve the split. The federal system uses en banc proceedings to resolve such conflicts, as do a number of States. *Textile Mills*, 314 U.S. at 334 (“Conflicts within a circuit will be avoided.”); John B. Oakley, *Comparative Analysis of Alternative Plans for the Divisional Organization of the Ninth Circuit* (2000-2001), 34 U.C. Davis L. Rev. 483, 534-540 (noting that 19 states use en banc proceedings to resolve intra-district conflicts). Likewise, this Court in *In re J.J.* noted an en banc proceeding’s ability to resolve intra-district conflict. In that decision, this Court was considering a conflict caused by two opposing decisions issued by two separate panels of the Eighth District Court of Appeals on the same day. *In re J.J.*, 2006-Ohio-5484 at ¶ 17. Permitting a district court to sit en banc to resolve a panel split allows the district to avoid legal chaos and resolve an unsettled area of law. Although the Ohio Supreme Court

may resolve an intra-district conflict, an appeal to this Court takes more time than an en banc convening of a district court. Permitting district court judges to sit en banc allows them efficiently to resolve conflicts within their districts.

Second, the en banc process promotes uniformity, predictability, and finality within an appellate district. Solimine, *supra* at 39 (internal citations and quotations omitted); see also *United States v. Am.-Foreign Steamship Corp.* (1960), 363 U.S. 685, 685 (En banc procedures “enable the court to maintain its integrity as an institution . . . by secur[ing] uniformity and consistency in its decisions.”). If panels reach opposite conclusions, litigants will not know which panel decision controls. Roughly 10 percent of intermediate appellate decisions are reviewed by the Ohio Supreme Court, making the district court the court of last resort for most litigants. See Supreme Court of Ohio 2006 Annual Report, pp. 29-35 *available at* http://www.sconet.state.oh.us/publications/annual_reports/annualreport2006.pdf (noting appeals filed and appeals accepted by the Ohio Supreme Court). Because intermediate appellate courts determine much of the law in Ohio, the law within districts needs to be settled for predictability.

Furthermore, because in Ohio, one appellate panel may overrule another, see S. Ct. Rep. Op. R. 4 (“All court of appeals opinions . . . may be cited as legal authority and weighted as deemed appropriate by the courts.”), a district’s panels may simply flip back and forth on an issue and undermine predictability of the law. Without the ability to review en banc, the Fifth District did just that in one context and changed its interpretation of R.C. 119.12 three times in less than two years. See *Campbell v. Ohio BMV* (5th Dist.), 156 Ohio App. 3d 615, 2004-Ohio-1575, ¶¶ 21-22 (interpreting R.C. 119.12 to require an original copy); *Ohio Dep’t of Alcohol & Drug Addiction Servs. v. Morris* (5th Dist.), 161 Ohio App. 3d 602, 2005-Ohio-3053, ¶ 14 (interpreting R.C. 119.12 to *not* require an original copy); *Evans v. Ohio Dep’t of Ins.* (5th Dist.),

2005 Ohio App. Lexis 3603, 2005-Ohio-3921, ¶¶ 21-22, discretionary appeal denied (2005), 107 Ohio St. 3d 1684 (interpreting R.C. 119.12 to require an original copy again). An en banc convening of the Fifth District could have resolved the issue and settled the law for litigants in that district.

Third, en banc review “permit[s] the full complement of judges to pass on cases of “exceptional importance.” Solimine, *supra* at 39 (internal citations and quotations omitted). By allowing involvement and interaction of more judges, en banc review improves a district’s decision-making process, because the participation of all the judges will contribute to institutional harmony by permitting the entire court to participate in “important cases.” *Id.* at 39-40 (footnotes and internal quotations omitted). The process may also signal to outside constituencies the importance of a particular case or issue. *Id.* at 40 (“With regard to outside constituencies, particularly the bar, an en banc decision is assumed to command greater authority and compliance, since it is not simply the product of a three-judge panel.”).

B. Countervailing arguments opposing the constitutionality of en banc review also exist.

The arguments that Section 3(A), Article IV should be read to require three judges—no less, no more—to hear and decide all intermediate appellate cases are also considerable. In the Memorandum Decision denying McFadden’s request for reconsideration, the Tenth District concluded simply that en banc proceedings were unconstitutional because they “would appear to result in more than three judges on an appellate court participating in the hearing and disposition of a case.” *McFadden*, 2007-Ohio-939 at ¶ 8 (citing *Schwan v. Riverside Methodist Hosp.* (10th Dist.), 1982 Ohio App. Lexis 15078, *1 (holding motion for en banc rehearing must be overruled since the Ohio Constitution precludes such a hearing)).

The Tenth District is not alone in this conclusion. Judge Karpinski, dissenting in *State v. Lett*, similarly interpreted the language of Section 3(A), Article IV as mandatory: “There is no

authority for an appellate panel of more than three judges. Nor is there any authority for an entire court sitting en banc to overrule a majority decision of a three-judge panel.” *Letz*, 2005-Ohio-2665 at ¶ 76 (Karpinski, J., dissenting). Judge Karpinski dismissed the reasoning of *Textile Mills* as inapplicable to whether en banc proceedings are permitted in Ohio. In *Textile Mills*, the U.S. Supreme Court had to resolve an “anomalous situation” whereby one statute created circuits with more than three judges, but a previous statute maintained three-judge panels. *Id.* at ¶ 78 (Karpinski, J., dissenting). To solve the ambiguity, the Court interpreted “three” as the minimum but not the maximum number of judges who may hear a case. According to Judge Karpinski, however, “[n]o such anomaly occurs in the Ohio Constitution,” making *Textile Mills* unhelpful for this inquiry: “A major difference between Ohio’s Article IV and Sec. 117 of the U.S. Judicial Code, Section 43, Title 48, U.S. Code is that Article IV specifies three judges in the explicit context of the ‘hearing and disposition of each case.’ In contrast, the United States Supreme Court never addresses the ‘sitting court’ or ‘the number who may hear and decide a case.’ The explicit language of the Ohio Constitution and the Ohio Revised Code prevents any ambiguity or anomaly.” *Id.* at ¶ 87 (Karpinski, J., dissenting).

Although parts of the historical record support the view that en banc review is constitutional, the Tenth District’s and Judge Karpinski’s conclusion that en banc proceedings are unconstitutional also finds some support in the historical record documenting the development of the Ohio judiciary. See generally Auman, *The Development of the Judicial System in Ohio* (1998), 41 J. of Ohio Historical Society 195. Under the Ohio Constitution of 1851, the district courts were composed of the Common Pleas judges of the districts and one Supreme Court judge, any three of whom formed a quorum. *Id.* at 215, 217. As the judicial business of the State increased, this arrangement proved unworkable, and the General Assembly

created circuit courts in 1884. *Id.* at 223. Seven Circuits were established, each with three elected judges. *Id.* As the population of the State steadily increased, further improvement of the judicial system was necessary. At Ohio's constitutional convention of 1912, Delegate Hiram Peck, a lawyer from Cincinnati, offered a proposed constitutional amendment reforming the judiciary. After months of debate and repeated amendments of Delegate Peck's Proposal 184, Section 6 of the Proposal remained essentially intact—it provided that the Courts of Appeals would consist of three judges. See amended Proposal 184 offered by Mr. Worthington, Ohio Const. Convention (1912), *Proceedings and Debates*, Vol. I, p. 1062; amended Proposal 184 offered by Mr. Taggart, *Id.*, p. 1067; Proposal 184 passed, *Id.*, Vol. II, p. 1163. Peck repeatedly assured the delegates that his proposal would simplify litigation by providing for one trial and one review. *Id.*, Vol. II, p. 1150. The amendment replaced the circuit courts with courts of appeals of three judges. *Id.*, Vol. II, pp. 1833-1834. The 1912 delegates' concern with "one review" may indicate that they never contemplated a further layer of review, making en banc proceedings impermissible.

Just as some policy considerations favor en banc review, there are also downsides in allowing the procedure. First, en banc proceedings may politicize the courts. Judge Frank M. Coffin, a veteran judge on the First Circuit Court of Appeals, observed that "[c]ourts sitting en banc resemble a small legislature more than a court." Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* 5 (1994) (cited in Christopher Banks, *The Politics of En Banc Review in the Mini-Supreme Court* (1997), 13 *Journal of Law & Politics* 377, 377). Professor Banks notes that the most legitimate critique of en banc review is that it is too political. *Id.* at 389. Judges purportedly abuse the process by overturning panel outcomes that are incongruous with the prevailing ideological view of the court. *Id.*

Indeed, en banc review in the federal courts has, at times, been controversial. For example, some commentators have observed a polarization along party lines when calling for en banc review. See, e.g., *id.* at 378 (“[T]he D.C. Circuit’s use of the en banc process creates judicial inefficiency and results in politically motivated decisions.”); Note, *The Politics of En Banc Review* (1989), 102 Harv. L. Rev. 864, 874 (noting the increased frequency of en banc review in civil rights cases once Regan-appointed judges dominated the Seventh Circuit). Politically motivated en banc proceedings undermine a primary justification of the *Textile Mills* decision’s legitimization of en banc review: promoting stability and consistency of decisions. *Textile Mills* (1941), 314 U.S. at 334-335. Further, if judges appear to be calling for en banc review simply to promote their own policy choices, judges’ integrity may be questioned.

Moreover, en banc proceedings might frustrate collegiality among judges, souring the mood of the Court. “Collegiality cannot exist if every dissenting judge feels obligated to lobby his or her colleagues to rehear the case Politicking will replace the thoughtful dialogue that should characterize a court” *Bartlett v. Bowen* (D.C. Cir. 1987), 824 F.2d 1240, 1243-44 (Edwards, J., concurring in denial of en banc review). Illustrating the Sixth Circuit’s experience, Judge Moore recently dissented to express her “befuddlement regarding the reasons for rehearing this case en banc.” *Bell v. Bell* (6th Cir.) (en banc), 2008 U.S. App. Lexis 155, at *24 (“[R]ehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire Court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Sixth Circuit precedent.”). Appellate courts should not convene en banc to exercise plenary review over panel decisions, yet there is a risk that other members of a court might simply want to overrule a panel decision when they disagree in an ordinary case.

Finally, en banc review adds another layer of court review and lengthens the litigation process. *Lett*, 2005-Ohio-2665 at ¶ 90 (Karpinski, J., dissenting). As Judge Karpinski notes, the en banc procedure is potentially even less efficient in a district with an even number of judges, such as the Eighth (twelve) or the Tenth (eight). A tie vote may throw the case back to the original three-judge panel or might actually affirm the trial court decision if the panel decision has been vacated. This arrangement would waste judicial time and resources. In addition, en banc proceedings create administrative issues. For example, would an en banc review delay the deadline for filing an appeal to this court? Meaning, if a litigant has filed a petition for re-hearing en banc, will that litigant receive 45 days from the date of denial to file a notice of appeal with this Court? Or conversely, if a litigant petitions for a re-hearing en banc and files a notice of appeal with this Court and the re-hearing en banc is granted, must this Court wait for the en banc decision before granting jurisdiction? If en banc proceedings are to be used effectively and fairly, these administrative issues will need to be resolved.

C. Conclusion: The Ohio Constitution permits en banc review.

Despite the arguments against, the better conclusion is that en banc review is constitutional. Like the federal courts, Ohio continually added judges to its appellate districts to accommodate the increase in judicial business. See Auman, *The Development of the Judicial System in Ohio* (1998), 41 J. of Ohio Historical Society 227. It makes sense, then, to adopt judicial procedures, like en banc review, that reflect the increased number of judges and allow for the more efficient administration of justice. Therefore, like the federal statute, the constitutional text requiring three judges should not be taken “too literally,” *Textile Mills*, 314 U.S. at 330, and “three judges shall participate in the hearing and disposition of a case” shall be read only to prescribe the permissible minimum complement of judges assigned to sit on a particular appellate panel.

Moreover, some of the policy arguments against en banc review have been overstated. See, e.g., Solimne, *supra* at 61 (finding that “[t]he data do not support the charge that . . . judges are using the en banc procedure as an ideological tool”). But more importantly, Ohio district court judges should be trusted to follow their own rules, or, if this Court so chooses to promulgate, the Supreme Court rules regarding en banc proceedings. Judges should be presumed to use en banc proceedings sparingly and only when needed, not to promote their own political agendas. Cf. *United States v. Martin* (6th Cir. 2006), 438 F.3d 621, 634 (“In the absence of clear evidence to the contrary, courts presume that [public officials] have properly discharged their official duties.” (quoting *United States v. Chem. Found., Inc.* (1926), 272 U.S. 1, 14-15)). As the Eighth District’s experience has shown, panel decisions will remain the default procedure. To CSU’s knowledge, since the en banc procedure was first adopted in 1976, the Eighth District has assembled en banc in only a handful of cases. See *State Leitina Co. v. Vandra Bros Constr.* (8th Dist.), 1998 Ohio App. Lexis 4109; *State v. Lett*, 161 Ohio App. 3d 274, 2005-Ohio-2665; *State v. Atkins-Boozer* (8th Dist.), 2005 Ohio App. Lexis 2522, 2005-Ohio-2666; *State v. Delgado* (8th Dist.), 1998 Ohio App. Lexis 1615. The experience of the federal courts is similar. See, e.g., *Newdow v. U.S. Congress* (9th Cir. 2003), 328 F.3d 466, 470; *cert. granted on other grounds*, (2003), 540 U.S. 945 (noting that in 2002 the Ninth Circuit decided 5,190 cases on the merits, more than 98% of which were decided by three-judge panels); Tracey E. George (1999), *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 Wash. L. Rev. 213, 214 (explaining that federal courts of appeals resolve less than one percent of their cases en banc). The infrequency of en banc review demonstrates that most of the time judges exercise restraint.

Finally, this Court under Art. IV, Sec. 3(B) may promulgate rules regarding the use of en banc proceedings for all appellate districts to ensure uniformity and predictability among the districts. After determining the need for a more uniform en banc petition and hearing, Congress amended Federal Appellate Rule 35 to outline the procedure to petition a federal circuit court to sit en banc. Likewise, this Court may exercise its authority and promulgate a uniform rule for en banc review.

D. When en banc review is not authorized by rule, en banc proceedings are ultra vires and cannot be maintained.

CSU agrees with McFadden that this Court *may* constitutionally adopt a rule to allow for and regulate en banc proceedings. But neither this Court nor the Tenth District has done so, making any en banc review in the Tenth District ultra vires. The Modern Courts Amendment supplies the mechanism by which this Court may promulgate rules governing judicial procedures. This Amendment provides:

The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Ohio Const., Art. IV, Sec. 5(B) (first paragraph). Section 5(B) sets forth a process, complete with filing requirements and deadlines for submission of the rules and amendments in the form of calendar dates, and protects “such rules” by invalidating all laws in conflict with them. “Such rules” can only be understood to mean rules that were promulgated according to Section 5(B)’s promulgation process. To interpret “such rules” to include something less than all “rules of

practice and procedure” announced by this Court, regardless of how they came about, would render Section 5(B)’s promulgation process merely an optional exercise.

In the absence of a rule promulgated by this Court, the district courts may promulgate their own rules regarding the use of en banc proceedings. Ohio Const., Art. IV, Sec. 3(B) explicitly gives local courts power to promulgate their own rules: “Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court.” With respect to en banc proceedings, Ohio Const., Art. IV, Sec. 3(B) permits district courts to make either choice. Thus, the Eighth District—which has 12 judges—promulgated an Amendment to Article 8(b) entitled Resolution En Banc Conference, which governs en banc proceedings. *In re J.J.*, 2006-Ohio-5484 at ¶ 20. On the other hand, the Third District Court of Appeals, for example, has only four judges and has neither promulgated an en banc rule nor convened en banc.

Without a rule authorizing en banc review, a court cannot sit en banc, because it would be acting outside its authority, and its judgment and decrees would be *ultra vires*. See *State ex rel. Adams v. Gusweiler* (1972), 30 Ohio St. 2d 326. In *Gusweiler*, the Court explained: “We are convinced that whatever may be the reach of R. C. 2711.04, it falls short of authorizing the Court of Common Pleas in this case to appoint a *second or appellate* arbitrator to conduct a *second or appellate* arbitration of the same issues which were already tried by an arbitrator whose decision is ‘final and binding upon the parties.’” *Id.* at 328. See also *Miller v. Miller* (1951), 154 Ohio St. 530, 536 (holding that “[i]n a divorce, alimony, custody, support and maintenance proceeding the trial court is without power to make a decree with reference to the maintenance of minor children beyond the date when such children shall arrive at their majority,” and any such decree is “*ultra vires* and void . . .”) (internal quotations omitted); cf. *Cooley v. Bradshaw* (6th Cir.

2003), 338 F.3d 615, 616 (Clay, J., concurring) (explaining that once an en banc panel assumes jurisdiction the previous three-judge panel loses jurisdiction and any subsequent decision from the three-judge panel is ultra vires or without legal meaning).

Furthermore, requiring courts to promulgate rules regarding en banc proceedings before sitting en banc makes practical sense. In *Western Pacific*, the U.S. Supreme Court made clear that “certain fundamental requirements should be observed,” and that litigants who appear before a court must understand the practice “whereby the court convenes itself *en banc*.” 345 U.S. 260. Without a promulgated rule, a sua sponte en banc convening is not only unauthorized, but it also leaves a litigant unsure of what to expect during the course of litigation. The Ohio Rules of Appellate Procedure allow courts of appeals to adopt rules, but “*only* after the court gives appropriate notice and an opportunity for comment.” App. R. 41(B) (emphasis added). If the court finds that there is “an immediate need” for a rule, the court may adopt the rule without prior notice, but must promptly afford notice and opportunity for comment. *Id.* This rule demonstrates the importance of litigants’ access to rules of court. Otherwise, a litigant may be blindsided. The Tenth Circuit has not promulgated rules to sit en banc and has previously stated its position regarding en banc proceedings. See *Schwan*, Ohio App. LEXIS 15078, at *1. McFadden’s expectation that this Court should force an appellate court to hear a case en banc, without actual en banc procedures in place, disserves litigants.

Appellee Cleveland State University’s Proposition of Law No. 2:

A court must have discretion in determining the necessity of en banc review, and the Tenth District Court of Appeals properly declined en banc review in this case.

A. The decision whether to sit en banc should be based on appropriate considerations and left to the sound discretion of the court.

Assuming that a rule is promulgated authorizing en banc review, a court must have discretion in determining whether actually to review a case en banc. In the federal system, the

Tenth District's decision to decline en banc review would be unreviewable. See *Western Pacific R.R. Corp. v. Western Pacific R.R. Co.* (1952), 345 U.S. 247, 259 (“[E]ach Court of appeals is vested with a wide latitude of discretion to decide for itself how that power [to convene en banc] shall be exercised.”); *In re Byrd* (6th Cir. 2001), 269 F.3d 585, 593 (“[T]he Supreme Court has determined that the process by which a federal appellate court decides to rehear a matter en banc is inherently internal, beyond the review of litigants or even the Supreme Court itself.” (citing *Shenker v. Balt & O. R.R.* (1963), 374 U.S. 1, 5)).

An Ohio appellate court must have the authority to decide whether a conflict within its district in fact exists and whether en banc review is necessary. It is the judges of a district, and not a particular litigant, who can best make that determination. Any other rule would lead to satellite litigation asserting an appellate court's duty to proceed en banc. Leaving en banc review to the discretion of the appellate courts will instead allow the judges, who know their districts best, to determine when en banc review is necessary. Moreover, this Court will still be able to review a panel decision that is denied en banc review, if and when the losing litigant appeals to this Court.

B. Rehearing McFadden's case en banc would have been a futile gesture because six of the eight Tenth District judges had already adopted the opinion that the two-year statute of limitations applies in Court of Claims discrimination cases.

When the Tenth District issued its decision in *Anglen v. Ohio State University*, 2007-Ohio-935, on the same day that it denied reconsideration in this case, six of the eight judges on the Court formally adopted the opinion that the two-year Court of Claims statute of limitations applies to discrimination claims brought in that court. The three judges on the *Anglen* panel (Bryant, Sadler, Petree) joined their colleagues on the panels that decided *McCoy v. Toledo Corr. Inst.*, 2005-Ohio-1848 (French, Klatt, McGrath), and *McFadden v. Cleveland State University*, 2007-Ohio-298 (Sadler, Bryant, McGrath). These six judges were well aware of the alleged

conflict between *McCoy* and *Senegal*, because that conflict was pointed out in each case. Judge Sadler, in her Memorandum Decision denying reconsideration, recognized that the majority of the Tenth Circuit judges had already ruled on the issue: “Between our decision in this case and the decision of the panel in *McCoy*, five of the eight sitting judges on this court have held that claims such as appellant’s are subject to the two-year statute of limitations set forth in R.C. 2743.16. There is no reason to believe that more formal en banc proceedings would produce a different result.” *McFadden*, 2007-Ohio-939 at ¶ 10.

Anglen, *McCoy*, and *McFadden* join a long line of cases in which the Tenth Appellate District has applied the two-year Court of Claims statute of limitations to discrimination cases. See *Schaub v. Div. of State Hwy. Patrol* (10th Dist.), 1996 Ohio App. Lexis 864, appeal not allowed (1996), 76 Ohio St.3d 1473; *Ripley v. Ohio Bur. of Employment Services* (10th Dist.), 2004 Ohio Lexis App. 5010, 2004-Ohio-5577; *Hosseinipour v. State Med. Bd. of Ohio* (10th Dist.), 2004 Ohio Lexis App. 1063, 2004-Ohio-1220; *Obasuyi v. Wright State Univ.*, 10th Dist. Ohio Lexis App. 5529, 2002-Ohio-5521. Only *Senegal* applied a different statute of limitations. As the Tenth District said in *McCoy*, it was an aberration. *McCoy*, 2005-Ohio-1848 at ¶ 10. Accordingly, a remand for an en banc review would require the Tenth District to perform a futile act and waste judicial resources.

C. Unlike the situation in *In re J.J.*, there was not a conflict in the Tenth District below that needed to be resolved through en banc proceedings.

As the appeals court noted in its Memorandum Decision denying reconsideration en banc below, the alleged conflict between *Senegal* and *McCoy* was not the type of conflict considered by this Court in *In re J.J.*, 2006-Ohio-5484. *McFadden*, 2007-Ohio-939 at ¶ 10. In that case, this Court held that the Eighth Circuit was “duty bound” to resolve the conflict, but there are two key differences between this case and *In re J.J.* First, the Eighth Circuit had promulgated a rule

outlining the procedure to sit en banc. Here, the Tenth District has no such rule and has never sat en banc.

Second, in *In re J.J.*, two panels of the Eighth District issued conflicting opinions on the same day. In contrast, *Senegal*—the opinion on which McFadden relies—was issued in 1994, eleven years before *McCoy*. And no other case—either in the Tenth District or otherwise—ever cited or relied upon *Senegal*. As an unreported, pre-2002 appellate decision, *Senegal* was not controlling authority. See former Sup. Ct. R. 2(G); see also *Painter and Dennis*, Ohio Appellate Practice, 2007-2008 Ed. §1.49 (“Before the 2002 citation and reporting rule changes, unpublished opinions were not controlling authority except within narrow limits, but may be considered persuasive authority.”). Rather, the Tenth District was only obligated to consider the *Senegal* decision as persuasive authority. *Id.* The *McCoy* court found *Senegal* to be an unpersuasive “aberration.” *McCoy*, 2005-Ohio-1848 at ¶ 10. Indeed, it was. Other than *Senegal*, no case had ever applied a six-year statute of limitations to suits in the Court of Claims, and a long line of other published and unpublished cases applied the two-year statute of limitations. See *Schaub v. Div. of State Hwy. Patrol* (10th Dist.), 1996 Ohio App. Lexis 864, appeal not allowed (1996), 76 Ohio St.3d 1473; *Ripley v. Ohio Bur. of Employment Services* (10th Dist.) 2004 Ohio Lexis App. 5010, 2004-Ohio-5577; *Hosseini pour v. State Med. Bd. of Ohio* (10th Dist.), 2004 Ohio Lexis App. 1063, 2004-Ohio-1220; *Obasuyi v. Wright State Univ.*, 10th Dist. Ohio Lexis App. 5529, 2002-Ohio-5521.

Finally, at the time McFadden submitted his en banc request in his motion for reconsideration, filed on February 2, 2007, there was no conflict at all, because the Tenth District in its first *McFadden* decision expressly overruled *Senegal*: “We believe *McCoy* more accurately reflects the law applicable to appellant’s claim. Therefore, we reiterate the holding

from *McCoy* that the two-year statute of limitations in R.C. 2743.16 applies to claims such as appellant's that seek monetary damages for discrimination against the state. To the extent that we did not explicitly overrule *Senegal* in our decision in *McCoy*, we do so now." *McFadden*, 2006-Ohio-298 at ¶ 10. As explained previously, unreported decisions prior to 2002, like *Senegal*, only have persuasive effect on a subsequent panel. Moreover, unlike in the federal system, Ohio appellate panels may overrule previous panel decisions. See *Med. Personnel Pool of Akron & Canton, Inc. v. Ott* (9th Dist.), 1988 Ohio App. Lexis 1412, *2 (overruling previous panel decisions); compare *Salmi v. Sec'y of Health & Human Servs.* (6th Cir. 1985), 774 F.2d 685, 689 ("A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision."). Therefore, it was within the *McFadden* court's authority to recognize *Senegal's* lack of support and explicitly overrule it.

Thus, contrary to *McFadden's* assertions, the consistent application of the two-year statute of limitations was clearly the law in the Tenth District. En banc's primary purpose—to resolve conflict and settle the law—was, therefore, not needed in this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the Tenth District's decision denying McFadden's request for reconsideration and en banc review.

Respectfully submitted,

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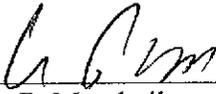
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Defendant-Appellee Cleveland State University was served by U.S. mail this 13th day of February, 2008 upon the following counsel:

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