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In the
# Supreme Court of Ohio

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| STATE OF OHIO, | : | Case No. 13-2023 |
| Plaintiff-Appellant, | : | On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District |
| v. | : | |
| LAUREN JONES, | : | |
| Defendant-Appellee. | : | Court of Appeals Case No. 99538 |

## MEMORANDUM OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF JURISDICTION


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## INTRODUCTION

The Fourth Amendment's exclusionary rule "exacts a heavy toll on both the judicial system and society" and "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence." *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011). Although "society must swallow this bitter pill when necessary," *id.*, the pill becomes poison when courts apply the exclusionary rule too broadly. The Eighth District is applying the exclusionary rule well beyond its prescribed reach. This case is now the fourth time that the appeals court for Cuyahoga County—in conflict with other state and federal appellate courts—has excluded evidence by misapplying the exclusionary rule and has let a potentially guilty party go free. For the following reasons, this Court should exercise jurisdiction and reverse.

*First*, the decision creates conflicts among Ohio's appellate districts and between state and federal courts. The Eighth District's decision departs from precedents in the Twelfth and Fifth Districts as well as language (but not holdings) in the Tenth and Seventh Districts. The Eighth District's holding also diverges from federal courts considering the same question.

This disunity has several consequences. It undermines statewide peace-officer training on a subject that is the bread-and-butter of law enforcement—securing warrants to search property for evidence. It also complicates judicial training regarding probable cause—again, an area that is part of the daily docket of many municipal and common pleas judges. And, because much drug activity violates both state and federal law, the disunity means that citizens are treated differently depending on whether the State or the United States prosecutes their drug offense.

*Second*, the Eighth District's decision crimps law-enforcement efforts aimed at protecting the public from the dangers of methamphetamine manufacture. As the General Assembly recognizes, meth labs pose a "risk of explosion or fire" that endangers the "lives, or property, of

. . . officer[s] and other individuals in the vicinity of the illegal manufacture." R.C. 2933.33(A). By forcing officers to investigate more than the Fourth Amendment requires, the Eighth District's decision increases the likelihood that these risks will come to pass. More broadly, the ruling makes the hunt for all illegal drug use, distribution, and manufacture more difficult by telling law enforcement that "additional investigation" is "necessary" for probable cause, beyond discovering drug contraband and evidence of drug manufacture in trash. *State v. Jones*, 8th Dist. No. 99538, 2013-Ohio-4915 ¶ 14 (quoting trial opinion; alteration and internal quotation marks omitted) (hereinafter, "App. Opp."). The Eighth District's opinion unnecessarily restricts law-enforcement activities, which in turn threatens officer and public safety and the fight against crime more generally.

*Third*, the Eighth District's misinterpretation of the Fourth Amendment has consequences in collateral litigation for wrongful-imprisonment and civil-rights violations. Under existing precedent, a ruling that officers violated the Fourth Amendment may be the foundation for wrongful-imprisonment liability under state law (*see* R.C. 2743.48) or civil-rights liability under federal law (*see* 42 U.S.C. 1983). When an appeals court gets the Fourth Amendment wrong—as the Eighth District does here—the consequences reach beyond setting the guilty free.

## STATEMENT OF AMICUS INTEREST

The Attorney General is Ohio's chief law officer, and has a keen interest in decisions that limit police conduct aimed at deterring and prosecuting crime. The Attorney General's interest is especially acute here both because he oversees the Ohio Peace Officer Training Academy and because he has launched statewide efforts to combat methamphetamine production.

The Attorney General always has an interest in cases affecting police conduct. But his oversight of the Ohio Peace Officer Training Academy means taking a special interest in cases that bear on common police practices like seeking warrants. The Ohio Peace Officer Training Academy "oversees training requirements" for peace officers and "provides instruction" to the law-enforcement community on all manner of police practices. *See* http://www.ohioattorneygeneral.gov/Law-Enforcement/Ohio-Peace-Officer-Training-Academy. That includes extensive coursework related to probable cause. The Attorney General and the Academy thus have a strong interest in uniform statewide standards for securing warrants and proving probable cause.

The Attorney General also has a heightened interest in this case because he has spearheaded the statewide efforts to combat methamphetamine abuse in Ohio. *See* http://www.ohioattorneygeneral.gov/Law-Enforcement/Local-Law-Enforcement/Drugs/Meth. Methamphetamine is a scourge and "methamphetamine laboratories pose a per se danger to occupants, officers, and the community." *State v. Armbruster*, 9th Dist. No. 26645, 2013-Ohio-3119 ¶ 8 (citation and internal quotation marks omitted). Any unnecessary impediment to discovering and shutting down these labs threatens public safety and the safety of officers charged with protecting the public.

## STATEMENT OF THE CASE AND FACTS

A search of Lauren Jones's residence turned up "several dishes with methamphetamine residue, white pills, coffee filters with methamphetamine residue, a scale with methamphetamine residue and methamphetamine." App. Op. ¶ 6. The grand jury indicted Jones for, among other things, possession of chemicals used to manufacture a controlled substance, two counts of trafficking, and three counts of possession. *Id.*

Police conducted the search of Jones's house only after a judge issued a warrant authorizing the search. The warrant rested on the following facts. A Cleveland narcotics detective learned from a reliable informant that a female named Lauren was manufacturing methamphetamine. *Id.* ¶ 2. The detective also learned that Jennifer Chappel manufactured methamphetamine. *Id.* The detective later saw Chappel and a woman matching the informant's description of Lauren sitting next to each other at the Cuyahoga County Justice Center. *Id.* ¶ 4. After learning that the woman was Lauren Jones, the detective collected the curbside trash from the front of Jones's house. In the trash, the detective recovered "mail addressed to Jones" at the house's address, "empty chemical bottles, plastic tubing, used coffee filters and a plastic bottle." *Id.* ¶ 5. Field testing of the items "yielded positive results for methamphetamine." *Id.*

Using this information, the detective secured a warrant and searched Jones's house the day after the trash collection. *Id.* ¶ 6.

In the trial court, Jones filed a motion to suppress. The trial court granted the motion. It focused on what the police should have done, noting that they did not conduct "multiple trash pulls" or additional "surveillance . . . [showing] circumstances giving rise of drug activity." *Quoted* at App. Op. ¶ 14. The trial court also noted that the warrant application disclosed no facts "associated with a drug house." Quoted at *id.* ¶ 13.

The Eighth District affirmed, adopting the trial court's reasoning and citing its own prior cases to the effect that "discovery of the discarded contraband must be viewed in isolation" and cannot support probable cause. *Id.* ¶ 15.

## THIS CASE RAISES A SUBSTANTIAL CONTITUTIONAL QUESTION OF PUBLIC AND GREAT GENERAL INTEREST

The Eighth District misinterpreted the federal Constitution in a way that obstructs police investigations. That makes the case a matter of public and great general interest on a substantial constitutional question meriting review by this Court. More specifically, the decision below calls out for further review because it: (1) represents a deepening divide in Ohio district courts; (2) departs from federal precedents on the same topic; (3) undercuts law-enforcement efforts to combat a dangerous public problem; and (4) threatens collateral consequences for wrongful-imprisonment and civil-rights litigation.

*First*, the Court should review this case because the Eighth District's holding deepens its conflict with other districts over whether contraband found in a single inspection of residential trash supports probable cause to search the residence when a tip (even anonymous) leads police to suspect drug crimes at a particular location. Most directly, the Twelfth District has held on several occasions that "the existence of the [drug contraband] provide[s] probable cause to search the home . . . regardless of who live[s] there." *State v. Akers*, 12th Dist. No. CA2007-07-163, 2008-Ohio-4164 ¶ 22; *see also State v. Quinn*, 12th Dist. No. CA2011-06-116, 2012-Ohio-3123 ¶ 24 (single trash pull that yielded drugs established probable cause); *State v. Young*, 12th Dist. No. CA2005-08-074, 2006-Ohio-1784 ¶ 26 (warrant supported by probable cause when trash pull yielded "items indicative of methamphetamine manufacturing"). The Fifth District ruled similarly when it concluded that "marijuana residue" found in a single trash pull

corroborated an anonymous tip and supplied probable cause. *State v. McGorty*, 5th Dist. No. 2007CA00257, 2008-Ohio-2643 ¶ 16.

Two other districts have endorsed the rule that a single trash pull can supply probable cause for a search warrant, albeit the endorsements were admittedly not the narrow holdings of those courts. *See State v. Edwards*, 10th Dist. No. 12AP-992, 2013-Ohio-4342 ¶ 27 (noting that other averments in a warrant application may be "corroborated by illegal drug activity gleaned from a trash pull"); *State v. Robinson*, 7th Dist. No. 10 CO 37, 2011-Ohio-6639 ¶ 21 ("Courts have held that even a single trash pull conducted just prior to the issuance of the warrant corroborating anonymous tips and background information involving drug activity will be sufficient to establish probable cause.").

The Eighth District decisions on this point of law are outliers among Ohio's appellate districts, and the split shows no sign of abating on its own. This case represents the fourth time that the Eighth District has rejected a warrant founded on discovering drug contraband in residential trash. Illustrative is *State v. Weimer*, which ruled that "the discovery of discarded contraband . . . from a single trash pull . . . does not, of itself, give rise to probable cause to issue a search warrant." 8th Dist. No. 92094, 2009-Ohio-4983 ¶ 25, *review denied*, 124 Ohio St. 3d 1493, 2010-Ohio-670. *Weimer* is bracketed by two decisions, one reversing a denied motion to suppress and one affirming a successful one, each holding that a single trash pull yielding drug contraband cannot support probable cause. *See State v. Williams*, 8th Dist. No. 98100, 2013-Ohio-368 ¶ 18 ("While the single trash pull did reveal various drug paraphernalia . . . the discovery of this evidence must be viewed in isolation.") (reversing conviction), *review denied*, 136 Ohio St. 3d 1450, 2013-Ohio-3210; *State v. Kelly*, 8th Dist. No. 91137, 2009-Ohio-957 ¶ 20

(the "affidavit failed to state how many trash bags were pulled in order to find one clear, plastic bag with suspected marijuana residue") (affirming successful motion to suppress).

The decision below now shows that the court's stance has solidified into a bright-line rule. In the earliest case "the suspected marijuana residue" found in the trash was not tested before the officers sought a warrant. *Kelly*, 2009-Ohio-957 ¶ 20. And, in another case, there was "nothing on the trash cans identifying whether the trash was from the upstairs unit or the downstairs unit" of a two-unit residence. *Williams*, 2013-Ohio-368 ¶ 18 (the trash did contain mail with the suspect's name, but no address). These features arguably distinguish those cases from this one, but in ways that reinforce rather than undermine the case for review. Here, testing "yielded positive results for methamphetamine" and the trash contained mail "addressed to Jones" at the residence. *Jones*, 2013-Ohio-4915 ¶ 5. The Eighth District's rule has become increasingly absolute and increasingly at odds with districts like the Twelfth and Fifth. Review is needed now.

*Second*, the Court should grant review because the Eighth District's decision subjects police conduct to different rules depending on the sovereign (state or federal) that charges the crime. Manufacturing methamphetamine is a federal crime as well, *see* 21 U.S.C. § 841, and a challenge to a warrant in federal court calls for federal, not state, precedent. *See, e.g.*, *United States v. Beals*, 698 F.3d 248, 263 (6th Cir. 2012) ("While the states are free to impose rules for searches and seizures that are more restrictive than the Fourth Amendment, those rules will not be enforced in a federal criminal proceeding."). In federal court, the trash pull conducted in this case would survive a Fourth Amendment challenge. *See, e.g.*, *United States v. Lawrence*, 308 F.3d 623, 627 (6th Cir. 2002) ("district court correctly noted that, even [without informant's statements] . . . , the remaining information obtained through the search of Lawrence's trash

supplied sufficient probable cause for the search warrant"); *United States v. Pressley*, No. 90-3190, 1991 WL 32362, *4 (6th Cir. March 11,1991) (affidavit supporting warrant "sufficient" when it identified "baggies containing traces of cocaine base in defendant's curbside trash").

Without review, the same police conduct could pass muster in federal litigation, but would be condemned in state litigation in the Eighth District. To be sure, Ohio's Constitution can afford suspects more protection than the federal Fourth Amendment. *See, e.g.*, *State v. Brown*, 99 Ohio St. 3d 323, 2003-Ohio-3931 ¶ 25 (conduct can violate Ohio Constitution Article I, Section 14, even when consistent with the Fourth Amendment). But here the Eighth District applied *only* the federal Fourth Amendment. *See* App. Opp. ¶¶ 10-11. The court did not suggest that it fashioned an Ohio rule that diverges from federal law to give greater protection under the Ohio Constitution. And even if the appellate court did interpret Ohio's Constitution, it should be for this Court, not the courts of appeals, to finally settle whether the Ohio Constitution differs from its "virtually identical" federal counterpart. *Brown*, 2003-Ohio-3931 ¶ 28 (O'Connor, J., dissenting) (noting that the federal standard "provides a useful instrument for law enforcement officers to use in their discretion in carrying out their duties to protect . . . citizens").

*Third*, in addition to the disunity that arises from the Eighth District's repeated decisions, the Court should grant review because that decisions also hamper efficient law enforcement and administration. Without uniformity in search-and-seizure law, statewide peace-officer training is more difficult and must account for regional variations. That problem is acute because search and seizure is part of the everyday actions of law enforcement. The disagreement also injects uncertainty into judicial training on a topic that is part of the recurring diet of a common pleas or municipal judge. Lastly, the disunity means that citizens face different outcomes if their drug crime is prosecuted in state or federal court. That is inherently unfair.

The Eighth District rule also inappropriately limits law-enforcement efforts to combat a serious public problem—methamphetamine production. Both the General Assembly and the courts recognize that methamphetamine production poses a grave danger to officers and citizens. The General Assembly has declared that the "risk of explosion or fire" from methamphetamine labs "constitutes [an] exigent circumstance[]." R.C. 2933.33(A). And one appellate district has concluded that methamphetamine laboratories pose a "per se danger to occupants, officers, and the community." *Armbruster*, 2013-Ohio-3119 ¶ 8. According to the Eighth District, law enforcement must do more than they did here before securing a warrant to search a probable methamphetamine manufacturing location. That rule poses an unacceptable real-world risk to officers and the public that the Fourth Amendment simply does not demand.

*Fourth*, and finally, disunity in the law and hampered law enforcement are not the end of the ripple effect from the Eighth District's rule. The Court should also grant review to avoid potential collateral consequences for wrongful-imprisonment and civil-rights litigation. Existing cases in some appellate districts at least now support compensation under the wrongful-imprisonment statute if a conviction is reversed because of an illegal search. *See Hill v. State*, 10th Dist. No. 12AP-635, 2013-Ohio-1968, *review granted* 136 Ohio St.3d 1509, 2013-Ohio-4657. And a Fourth Amendment violation can be the basis for civil-rights liability. *See, e.g.*, *Gessner v. Schroeder*, 2d Dist. No. 21498, 2007-Ohio-570 ¶ 34 (reversing summary judgment for officer on 42 U.S.C. § 1983 claim alleging Fourth Amendment violation). When the Eighth District improperly reverses convictions on Fourth Amendment grounds, it creates potential claimants that should not be compensated in later civil proceedings. The Eighth District's misreading of the Fourth Amendment has downstream consequences beyond setting the guilty free and undermining law enforcement.

## ARGUMENT

***Amicus Curiae*'s Proposition of Law No. I:**

> *When examination of trash from a specific residence yields illegal drugs, or materials for manufacturing those illegal drugs, probable cause supports a warrant to search the residence.*

A search warrant may issue to search a place so long as there is a fair probability that contraband or evidence of a crime will be found there. That is certainly true here, as the positive tests for methamphetamine residue and common items for its manufacture found in the trash the day before the search left little doubt that contraband or evidence would be found in the residence. The Eighth District departed from this straightforward and commonsense analysis because it wrongly focused on Jones, not the residence, and downplayed the significance of contraband in the trash the day before the police executed the warrant.

### A. A nexus between contraband found in the trash and a resident is not necessary to establish probable cause to search the associated residence.

A search warrant may designate a "place" to be searched and the "things" to be seized without naming a particular person. U.S. Const. Amend. IV. And probable cause exists if there is "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Put another way, the question is "whether the information . . . conveyed to the magistrate makes it fairly probable that there will be additional contraband or evidence of a crime *in the place* to be searched." *United States v. Brooks*, 594 F.3d 488, 494 (6th Cir. 2010) (emphasis added). When a warrant seeks to search a specific location, the affidavit must establish "a nexus between the place to be searched and the evidence to be sought." *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (en banc) (internal quotation marks omitted).

Searches of places are distinct from arrests of suspects. "In the case of arrest, the conclusion concerns the guilt of the arrestee, whereas in the case of search warrants, the conclusions go to the connection of the items sought with crime and to their present location." 2 Wayne R. LaFave, *Search & Seizure* § 3.1(b), 9-11 (5th ed. 2012). "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978); *State ex rel. Ohio Bell Tel. Co. v. Williams*, 63 Ohio St. 2d 51, 56 (1980) ("search warrants are directed at places or things rather than at persons").

The Eighth District departed from these bedrock principles when it focused on the "target residence of the suspected drug dealer," App. Op. ¶16, and demanded "evidence that Jones was involved in illegal drug activity," *id.* ¶ 17. This focus is a sweeping error because it confuses probable cause to arrest with probable cause to search. Those are distinct categories, and both federal courts and state supreme courts routinely reverse when lower courts commit this type of error. As a recent Sixth Circuit case indicates, "[p]robable cause to search a location is not dependent upon whether the officers already have probable cause or legal justification to make an arrest. The question is whether the information known by the affiant and conveyed to the magistrate makes it fairly probable that there will be additional contraband or evidence of a crime in the place to be searched." *Brooks*, 594 F.3d at 494. Examples of state supreme courts correcting the same error include the highest courts of New Jersey and Delaware. *See State v. Chippero*, 987 A.2d 555, 558 (N.J. 2009) (reversing lower court because "evidence that is insufficient to justify the arrest of a person nonetheless may be sufficient to justify the search of a home in connection with the investigation of a crime"); *Boardley v. State*, 612 A.2d 150, 155

(Del. 1992) ("In requiring the State to establish probable cause that [a third party] had engaged in criminal activity, the [lower court] was clearly in error.") (noting error, but concluding that error was harmless where defendant was blocked from securing evidence from third party).

Whether Jones was a "drug dealer" or was personally "involved in illegal drug activity," App. Op. ¶¶ 16-17, should have been irrelevant to assessing probable cause to search the residence. All that should have mattered was the discovery that the trash contained methamphetamine residue and items used to manufacture methamphetamine. As one federal appellate court put it, Jones "could be as innocent of the [drug dealing] as Snow White and there still [would] be probable cause to believe that the house . . . contained evidence of those crimes." *United States v. Lopez*, 649 F.3d 1222, 1245 (11th Cir. 2011). The Eighth District's insistence to the contrary is a categorical error that means setting the guilty free despite bountiful precedent that a search warrant need not link a person to a crime in order to search a place.

**B. Drug residue and materials for manufacturing that drug, discovered in a premise's curbside trash, establish probable cause to search the premises.**

Even excusing the categorical error conflating persons and places, the Eighth District's growing body of cases is also wrong to hold or hint that a single trash pull cannot support probable cause. Federal courts and state supreme courts alike have held that drug residue in the trash provides probable cause to search the residence. One Sixth Circuit case held that "plastic bags containing wrappers with cocaine residue" found in the trash "supplied sufficient probable cause for the search warrant." *Lawrence*, 308 F.3d at 626-27. Another concluded that an affidavit supporting a warrant was "clearly . . . sufficient" when it recited "substantive evidence" of "baggies containing traces of cocaine base in defendant's curbside trash." *Pressley*, 1991 WL 32362, at *4. And the Eighth Circuit ruled that "marijuana stems and seeds recovered from . . . garbage" established probable cause to search the residence. *United States v. Briscoe*, 317 F.3d

906, 909 (8th Cir. 2003). The Michigan Supreme Court considered the question in 2007, and reversed a wayward lower court. That court held that discovering marijuana in the trash was "direct evidence of illegal activity" and provided "a substantial basis for concluding that probable cause existed." *State v. Keller*, 739 N.W.2d 505, 514, 512 (Mich. 2007) (internal quotation marks omitted).

Here, the curbside trash contained methamphetamine residue and materials used to manufacture methamphetamine. Both methamphetamine possession and methamphetamine manufacture are crimes in Ohio. *See* R.C. 2925.04(A),(C)(3); 2925.11(A),(C); 3719.41. To describe this evidence is to prove the warrant's validity because there was a "fair probability," *Gates*, 462 U.S. at 238, if not a strong likelihood, that contraband or evidence of a crime would be found by searching the house the day after finding these items in the trash.

Swimming against this tide, the Eighth District cites only its own (recently minted) precedent and one federal district-court decision from 1984. That 1984 case reasoned that a "single instance" of past drug use evidenced by discarded marijuana cigarettes and stems did not equal probable cause. *United States v. Elliott*, 576 F. Supp. 1579, 1582 (S.D. Ohio 1984). That case is not persuasive. For starters, federal-district court decisions do not create binding precedent, even upon the same judge in later cases. *See Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011). In any event, the Sixth Circuit recently commented on *Elliott*, noting its very narrow holding and reminding that it "should not be read to stand for the proposition that evidence of minor past drug consumption is, in all cases, insufficient to establish probable cause to search a location." *Brooks*, 594 F.3d at 495 n.5. Yet the Eighth District treated *Elliott* expansively and excluded the evidence discovered after the search of Jones's house despite significant evidence of methamphetamine manufacture discovered in the trash the day before.

*Elliott* is shaky (and non-binding) precedent, but even taken at face value it provides no grounding for the Eighth District holding here.

Ultimately, the Eighth District's increased scrutiny of these types of warrants may prove counterproductive. The "per se danger" that methamphetamine labs pose "to occupants, officers, and the community," *Armbruster*, 2013-Ohio-3119 ¶ 8, means that law enforcement must be seriously motivated to shut them down. If warrants like the one issued here do not let police search the associated residence, "police might well resort to warrantless searches" by seeking consent. *Gates*, 462 U.S. at 236. Consent of course, is less effective when the targeted property is housing illicit activity. And even a consented search is inferior to a search based on a judicially approved warrant because "the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Id.* (internal quotation marks omitted).

### C. Even if the warrant lacked probable cause, the evidence should have been admitted under the good-faith exception to the exclusionary rule.

A Fourth Amendment violation, of course, "does not necessarily mean that the exclusionary rule applies." *Herring v. United States*, 555 U.S. 135, 140 (2009). And exclusion "has always been our last resort, not our first impulse." *Id.* (internal quotation marks omitted). As this discussion shows, the officers who searched Jones's home had the right to rely on the warrant issued for the search. The later second-guessing, even if it properly invalidated the warrant, did not mandate excluding the evidence discovered in the home. *See, e.g.*, *Akers*, 2008-Ohio-4164 ¶¶ 31-36 (probable cause supported warrant because trash pull yielded marijuana residue; in the alternative, good-faith exception required affirming denial of motion to suppress). At minimum, the judgment excluding the evidence should be reversed.

## CONCLUSION

This Court should accept jurisdiction over this case and reverse the Eighth District's judgment.

Respectfully submitted,

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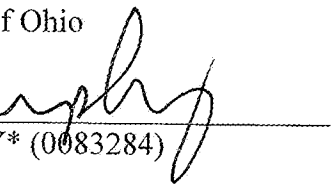

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I hereby certify that a copy of the foregoing Memorandum of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Jurisdiction was served on December 23, 2013, by U.S. mail on the following:

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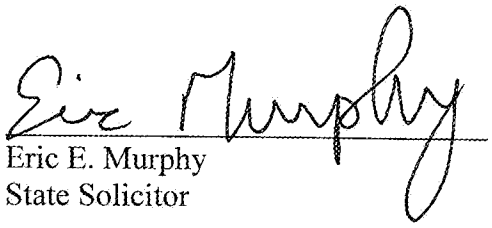

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