SUMMARY OF TESTIMONY
OPPOSING PROPOSED OHIO CIVIL RULE 53(C)(2)

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Chairman Eklund, Vice-Chair Manning, Ranking Member Thomas, and distinguished members of the Senate Judiciary Committee:

Thank you for the privilege testifying before you.

Currently, the Ohio Rules of Civil Procedure allow magistrates to preside over jury trials if all parties consent. When magistrates do so, however, their rulings are subject to review by the elected trial-court judges who referred the case.

Proposed Civil Rule 53(C)(2) would revise that process. The supreme court’s stated reason is to streamline it. The court’s rule would do so by prohibiting the trial-court judge from reviewing the magistrate’s judicial actions in jury trials. The proposal would change existing Ohio law in four specific ways:

1) By prohibiting trial judges from exercising their own initiative to review those rulings;
2) By prohibiting litigants from asking trial judges to review any of the rulings;
3) By requiring the judges to sign the journal entry just as magistrates prepared it without review or amendment; and
4) By transferring all review of magistrates’ rulings away from trial judges and to appellate courts.

These four measures were lifted selectively from the Federal Magistrate Act.

Our objections to Proposed Rule 53(C)(2) are at two levels. First and foremost, we believe that the proposal to prohibit review by common pleas judges plainly violates the Ohio Constitution. Second, we are concerned that the proposal does not address the potential for undue influence or coercion that litigants face in deciding whether to consent to a magistrate’s presiding over a jury trial. In my remarks today, I will address only our constitutional based objection but will be happy to address the other concern at the conclusion if the Committee wishes.

The Modern Courts Amendment, over its 40-year existence, has been prolific in generating controversies of constitutional magnitude. The General Assembly has considered a number of resolutions to disapprove proposed rules. Some drew wide attention from the bar. Some even have generated heated debate. There have also been upwards of 40 significant cases litigated in the Ohio Supreme Court that turned on the meaning of the Modern Courts Amendment. To date, all of these controversies have been about whether the supreme had authority to promulgate an existing rule or whether the General Assembly, in enacting a statute, infringed on the court’s rulemaking authority.

The constitutionality of the current proposal turns on a quite different question. It is not a ques-
tion of whether the Ohio Supreme Court or the General Assembly has the constitutional authority to prohibit the trial-court judge from reviewing or supervising the magistrate’s judicial actions. Rather, it whether either of them has that authority.

The plain text of the Ohio Constitution provides the answer: no. The supreme court’s decision to follow Congress’s scheme rests on an unspoken — but false — assumption. The assumption is that the Ohio Constitution permits the simple, surgical placement of the federal model for magistrates’ consent-based authority into the Ohio court system.

The assumption is wrong because the text of the Ohio Constitution is fundamentally different from the text of the federal constitution in the way it establishes and allocates judicial power.

A. The reason why federal magistrate judges may serve as surrogates independently of federal judges.

Federal magistrate judges have no more authority under the federal constitution to exercise judicial power than do magistrates under the Ohio Constitution. Under federal statutory law, however, a magistrate judge may sit in the place of an Article III, lifetime judge and may preside over all proceedings in a case — including trial to a jury — provided that all parties in the case consent. Magistrates may exercise judicial power if all parties agree. “Judicial power,” by the way, is the power to decide cases and enter judgments that are legally binding on the parties.

The federal system of substitute judges is possible because the U.S. Constitution neither establishes lower courts nor provides any detail — with one exception — about how they must be constituted. The one exception, of course, is that federal judges must be appointed for life. Nothing in the Constitution, however, requires that lifetime judges must be the only jurists in any lower court it might create whom Congress can authorize to exercise judicial power.

It is this silence on who may exercise federal judicial power that, according to federal courts’ interpreting the Constitution, allows Congress to empower federal magistrate judges to perform functions identical to those of lifetime, Article III judges — provided all parties consent. Courts that have interpreted the federal constitution on this point say that, although every litigant in a federal court has an absolute right to have the case decided by a judge who has been appointed for life, the Constitution’s silence gives Congress the latitude to offer litigants an opportunity to waive that right. The right to a have lifetime judge decide a case is said to be personal right. In other words, trial before an Article III judges is not the sole alternative that is structurally available under the U.S. Constitution.

At bottom, the federal law allowing litigants to choose whether a judge or a magistrate will exer-
cise federal judicial power in their case rests on Congress’s constitutional authority to set up lower courts in whatever way it wishes.

**B. The reasons why magistrates under the Ohio Constitution may not serve as surrogates independently of elected judges.**

The Ohio Supreme Court’s attempt to emulate Congress’s Federal Magistrate Act is ill conceived because nothing in the Ohio Constitution recognizes the personal right of litigants in Ohio courts to choose whom they want to exercise the state’s judicial power in their cases. In fact, the Ohio Constitution positively eliminates that possibility. Under it, the placement of judicial power is nothing less than a direct, structural allocation that specifies precisely in what courts the judicial power of the state resides and who must exercise that power.

Three provisions in the Ohio Constitution — none of which exists in the U.S. Constitution — combine to create Ohio’s materially different approach to allocation of judicial power. First is Art. IV, §1. The text specifically establishes three levels of courts and unequivocally vests them directly with the judicial power of the state. It states that “[t]he judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and . . . such other courts inferior to the supreme court as may from time to time be established by law.”

Second is Art. IV, §18. The text is explicit in assigning the judicial power at each court level to the individual judges of that court. According to §18, the several judges who sit on the courts that are identified and constitutionally established in §1 “shall, respectively, have and exercise” the judicial power allocated to the court on which they sit. This language explicitly ordains judges as the agents who must exercise the judicial power allocated to their respective courts.

There is no comparable prescription like §18 in the U.S. Constitution. Because there isn’t, Congress is free to ordain other agents in addition to lifetime judges — provided litigants consent. Not so in Ohio. The text of §18 prescribes who must “have and exercise” the state’s judicial power.

Art. IV, §18 goes a bit further. It states that Ohio judges exercise their authority “as may be directed by law.” Notice that this provision does not say that judges exercise their authority “except as may...”

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1 Ohio Constitution, Art. IV, §1: Judicial Power Vested in Court

   The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be established by law.

2 Id., Art. IV, §18: Powers and Jurisdiction of Judges

   The several judges of the Supreme Court, of the common pleas, and of such other courts as may be created, shall, respectively, have and exercise such power and jurisdiction, at chambers, or otherwise, as may be directed by law.
be directed by law.” Nor does it say they exercise it “unless the parties agree otherwise.” The text of §18 is clear. The judges who “shall have . . . exercise” the state’s judicial power must exercise that power in such manner as the law may direct. In other words, §18 does more than merely set up a presumption that common pleas judges must exercise the state’s judicial power unless a court-promulgated rule or a statute takes that authority away.

This ordination of judges applies uniformly to each of the three levels of courts identified in §1. As a result, the supreme court has no more authority to adopt a rule prohibiting a common pleas court judge from exercising the judicial power allocated under §18 to the court of common pleas than the General Assembly would have authority to enact a statute barring justices of the supreme court from exercising the judicial power that §18 allocates to their court. The inviolable authority of judges and justices is derived equally from the same constitutional provision.

Finally, Art. IV, §6 makes explicit that all these judges who “shall . . . exercise” the state’s judicial power must be elected. The constitution does not recognize — either expressly or implicitly — that unelected agents may exercise judicial power in place of elected judges.

These three specific constitutional provisions establish the infirmity in proposed Rule 53(C)(2). The proposal is unconstitutional because that it purports to bar the elected judges of the common pleas court from exercising judicial power that the constitution explicitly states that they “must . . . exercise.”

If the same three provisions were in the federal Constitution, Congress’s consent-based system of surrogate judges would be as unconstitutional as that system is under the Ohio Constitution.

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3 Art. IV, §06 Election of judges; compensation
(A)(1) The chief justice and the justices of the Supreme Court shall be elected . . .
(2) The judges of the courts of appeals shall be elected . . .
(3) The judges of the courts of common pleas and the divisions thereof shall be elected . . .
**Endnotes**

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