In the
Supreme Court of Ohio

JOHN DOE 1, ET AL.,	:	Case Nos. 2024-0056
	:	
Appellees,	:	On Appeal from the
	:	Delaware County
v.	:	Court of Appeals,
	:	Fifth Appellate District
CITY OF COLUMBUS, ET AL.,	:	
	:	Court of Appeals
Appellants.	:	Case No. 23CAE040028

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

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INTRODUCTION

On the underlying merits of this case, the State of Ohio and the City of Columbus could not disagree more. The City is attempting to impose its own firearms laws on people who live and travel through its jurisdiction—laws in conflict with state law on the topic. In proceedings below, the trial court issued an order preliminarily enjoining the City's laws. It was correct to do so. Ohio's General Assembly has struck a careful balance when it comes to the regulation of firearms. To protect the public from danger, state law imposes several restrictions on firearms. *E.g.*, R.C. 2923.13, 2923.121–.123. To protect the rights of Ohioans to bear arms, state law prohibits municipalities from adding further restrictions to the list. R.C. 9.68(A). State law, in other words, allows one to travel across Ohio without facing a patchwork of local firearms restrictions. Cities have already challenged the State's uniform approach to firearms regulation. Those challenges failed. This Court upheld, as constitutional, R.C. 9.68's restriction on municipal action. *City of Cleveland v. State*, 128 Ohio St. 3d 135, 2010-Ohio-6318 ("*Cleveland Firearms*"). So, at day's end, Columbus's recent efforts to set its own rules for firearms will fail on the merits.

But all of that jumps ahead of the pressing matter at hand. The Court accepted this appeal to decide only whether Columbus could immediately appeal from the trial court's order preliminarily enjoining the City from enforcing its firearm restrictions. On *that* question, the State and the City emphatically agree: the answer is "yes, the City could immediately appeal."

The answer derives from statutory interpretation and first principles. Ohio law limits appellate jurisdiction to review of final orders. Ohio Const. art. IV, §3(B)(2); R.C. 2505.03(A). But Ohio law defines "final order" to include an order granting a preliminary injunction when an appellant satisfies certain conditions. R.C. 2505.02(A)(3), (B)(4). Relevant here, to appeal the grant of a preliminary injunction, an appellant must show that it "would not be afforded a meaningful or effective remedy by an appeal following final judgment." R.C. 2505.02(B)(4)(b).

When a court issues an order preliminary enjoining the enforcement of state law, the State will lack an effective remedy without an immediate appeal. A crucial part of the State's role is "effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quotations omitted). And, when faced with a preliminary injunction, the State loses the effect of its law for however long the injunction remains in place. Combining these points, the State always "suffers a form of irreparable injury" when it is enjoined from giving effect to its law. *Id.*; *accord Abbott v. Perez*, 585 U.S. 579, 602–03 (2018). The State, it follows, needs an immediate appeal to effectively counter the injury it suffers from mistaken preliminary-injunction orders. The same is true for municipalities, which also serve as representatives of the people—albeit to a lesser and more qualified degree than the State.

A contrary answer on appealability would be problematic for at least three reasons. *First*, a holding that States and municipalities cannot appeal preliminary-injunction

orders would make for confusing comparisons. This Court has already held that private parties may immediately appeal adverse rulings to protect their interests in things like trade secrets and attorney-client privilege. *Cleveland Clinic Found. v. Levin*, 120 Ohio St. 3d 1210, 2008-Ohio-6197, ¶13; *In re Grand Jury Proceeding of Doe*, 150 Ohio St. 3d 398, 2016-Ohio-8001, ¶22. Surely the State's interest in giving effect to the choices of the people's elected lawmakers is just as strong as those private interests.

Second, the lack of an appeal would produce troubling incentives. Plaintiffs across Ohio would be tempted—after receiving preliminary relief enjoining the enforcement of state or local laws—to stretch trial proceedings for as long as possible in order to extend their initial victory. This concern is not hypothetical. As discussed more later, a group of plaintiffs recently engaged in such behavior in a high-profile case. *See below* 26.

Third, the lack of an appeal for *grants* of preliminary injunctions would make Ohio's system one-sided. Temporary constitutional violations cause irreparable injury, *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 19 (2020), so plaintiffs alleging such violations can presumably appeal immediately from the denial of a preliminary injunction. *See* R.C. 2505.02(B)(4). An evenhanded approach would allow the State and its municipalities—as defendants in such cases—to also immediately appeal the grant of a preliminary injunction, which (if wrong) causes *them* a form of constitutional harm.

All told, because the trial court's preliminary injunction qualifies as a final order, the Fifth District erred in dismissing the City's appeal. This Court should reverse.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law enforcement officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. This case fits that description. Like the City in this case, the State sometimes faces lawsuits in which trial courts preliminarily enjoin enforcement of its laws. Indeed, in recent years, parties have turned to state courts with increasing frequency, seeking to immediately invalidate state laws they dislike. Making matters worse, these parties sometimes ask a single judge to grant immediate relief *statewide*, for parties not even before the court. *See State ex rel. Yost v. Holbrook*, 2024-Ohio-1936, ¶7 (DeWine, J., concurring). But whether statewide or party specific, preliminary injunctions necessarily trigger serious separation-of-powers concerns. Perhaps most significantly, such injunctions temporarily invalidate the legislature's work. There is no effective way to unwind that disruption through an appeal after a final judgment. After all, even if the State prevails on appeal from final judgment, it cannot retroactively enforce its laws. The State instead loses the effect of its law for however long a preliminary injunction remains in place. Absent an immediate appeal, the Attorney General also loses the ability to effectively defend state law against preliminary attacks.

Notably, the State is also a party to related litigation. Despite this Court's decision in *Cleveland Firearms*, several cities are presently challenging the constitutionality of R.C.

9.68 in pending lawsuits. *See City of Columbus v. State of Ohio*, Franklin C.P. No. 19-cv-2281; *City of Akron, et al. v. State of Ohio*, Summit C.P. No. CV-2019-11-4501; *City of Cincinnati v. State of Ohio*, Hamilton C.P. No. A2300389; *see also State of Ohio v. City of Columbus*, Fairfield C.P. No. 2022-cv-00657 (voluntarily dismissed on July 31, 2023).

STATEMENT OF THE CASE AND FACTS

1. The present matter is but the most recent chapter in an ongoing dispute over who gets to regulate firearms in Ohio. The Attorney General begins with some background on the broader controversy and then turns to this case's specifics.

Ohio law regulates firearms in various ways. One longstanding statute, for example, prohibits certain individuals from having firearms. R.C. 2923.13. That is why felons and fugitives from justice cannot lawfully acquire or carry firearms. *Id.* at (A)(1)–(2). Other statutes prohibit individuals from possessing certain types of firearms. As a result, Ohioans cannot legally possess things like machine guns, sawed-off shotguns, or other military-style weapons. *See* R.C. 2923.11(K); R.C. 2923.17(A). Still other statutes prohibit people from bringing firearms to certain locations—schools, bars, and courts to name a few. *See* R.C. 2923.121–.123. In sum, Ohio imposes commonsense regulations that govern the who, what, and where of firearms possession in the State.

At the same time, Ohioans have constitutional rights that ensure the freedom to keep and bear arms. U.S. Const. amend. II; Ohio Const. art. I, §4. Thus, while Ohio law regulates firearms, it also safeguards individual rights. Key here, almost two decades

ago, the General Assembly enacted R.C. 9.68. That statute ensures uniformity in firearms regulations across Ohio. In its original form, the statute's critical passage said this:

> Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition.

R.C. 9.68(A) (2007). The statute thus established federal and state law as the ceiling for firearms regulation in Ohio. The consequence is that Ohio municipalities cannot regulate firearms in more restrictive ways.

Shortly after R.C. 9.68's passage, the City of Cleveland filed a lawsuit alleging that the statute violated the City's home-rule rights. *Cleveland Firearms*, 128 Ohio St. 3d 135, ¶4. By way of background, Ohio's Home Rule Amendment grants municipalities the authority to exercise local police powers. Ohio Const. art. XVIII, §3. But municipalities cannot exercise those police powers in ways that "conflict with general laws" of the State. *Id.* Cleveland argued that R.C. 9.68 did not count as a "general law" and was thus unenforcable. *Cleveland Firearms,* 128 Ohio St. 3d 135, ¶11. This Court disagreed. Applying the general-law test from *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, this Court upheld the statute as a proper exercise of state authority. *Cleveland Firearms*, 128 Ohio St. 3d 135, ¶¶1, 14. The statute, the Court reasoned, did more than simply limit municipal authority, it relieved citizens "of a confusing patchwork of municipal

regulations involving firearms." *See id.* at ¶¶27–29. Thus, the statute could lawfully block local firearms regulations. *Id.* at ¶1.

Even with the Court's ruling in *Cleveland Firearms*, some cities continued to stack their own firearms regulations on top of state law. *See, e.g.*, *Ohioans for Concealed Carry, Inc. v. City of Cleveland*, 2017-Ohio-1560, ¶2 (8th Dist.); *Buckeye Firearms Found. Inc. v. City of Cincinnati*, 2020-Ohio-5422, ¶2 (1st Dist.). In 2018, therefore, the General Assembly amended R.C. 9.68. Sub. H.B. 228 (2018). The amendments made express that municipal ordinances and other local laws could not place "further license, permission, restriction, delay, or process" on firearms possession. R.C. 9.68(A). The amendments also expanded the statute's coverage to regulations dealing with the manufacturing of firearms. *Id.* (Although irrelevant here, the General Assembly amended the statute again a few years ago to add knives to R.C. 9.68's coverage. Am. Sub. S.B. 156 (2022).) Accounting for these amendments, R.C. 9.68 now says this:

> Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, including by any ordinance, rule, regulation, resolution, practice, or other action or any threat of citation, prosecution, or other legal process, may own, possess, purchase, acquire, transport, store, carry, sell, transfer, manufacture, or keep any firearm, part of a firearm, its components, and its ammunition, and any knife. Any such further license, permission, restriction, delay, or process interferes with the fundamental individual right described in this division and unduly inhibits law-abiding people from protecting themselves, their families, and others from intruders and attackers and from other legitimate uses of constitutionally protected arms, including hunting and sporting activities, and the state by this section preempts, supersedes, and declares null and void any such further license, permission, restriction, delay, or process.

R.C. 9.68(A). In less words, the statute continues to make the constellation of federal and state firearms regulation the ceiling for such restrictions in Ohio.

2. This case arises from an ordinance that the City of Columbus adopted in late 2022. Among other topics, the ordinance addressed magazine capacity. With the ordinance in place, Columbus's municipal code currently provides: "No person shall knowingly possess, purchase, keep for sale, offer or expose for sale, transfer, distribute, or import a large capacity magazine." Columbus Mun. Code §2323.32(A). And the City's code defines "large capacity magazine" as "any magazine, belt, drum, feed strip, clip or other similar device that has the capacity of, or can be readily restored or converted to accept, thirty (30) or more rounds of ammunition for use in a firearm." Columbus Mun. Code §2323.11(N).

But the State of Ohio does not impose such a limit on magazine capacity. The City's ordinance thus established restrictions beyond the State's existing firearms regulations. Given that approach, Columbus anticipated a conflict with R.C. 9.68. The City's ordinance included a springing "alternative" to magazine-capacity regulation should a court find the City's primary restrictions invalid. *See* Columbus Mun. Code §2323.321.

In addition to regulating magazine capacity, Columbus's ordinance also crafted new requirements for the "safe storage" of firearms. *See* Columbus Mun. Code §2323.11(O). As a result, Columbus's municipal code threatens criminal penalties against people who fail to abide by the City's storage requirements. *See* Columbus Mun. Code §§2303.05(D)–

(E), 2303.14(D)–(E), 2323.191. As with magazine capacity, the city's safe-storage requirements have no equivalent in state law.

3. Last year, a group of individual plaintiffs sued Columbus and its officials. The plaintiffs, who filed pseudonymously, challenged the City's restrictions on magazine capacity and firearms storage. They also moved for a preliminary injunction. Preliminary relief was justified, the plaintiffs argued, because R.C. 9.68 blocks Columbus from adopting firearms regulations that are more restrictive than state law. Renewed P.I. Mot. 10–13 (Mar. 17, 2023). Columbus opposed the plaintiffs' request for preliminary relief. According to the City, it was free to "fill gaps" it perceived "in existing Ohio law" regarding firearms. Memo. Contra. Renewed P.I. Mot. 23 (Mar. 31, 2023).

The trial court sided with the plaintiffs and granted a preliminary injunction. The court held that the plaintiffs were likely to succeed on their claims under R.C. 9.68. P.I. Judgment Entry 17–20 (Apr. 25, 2023). The parties agreed "that Ohio law imposes no limitations of the sort" that Columbus imposes on magazine capacity and firearms storage. *Id.* at 19. It followed, the trial court explained, that Columbus's restrictions conflicted with R.C. 9.68. *Id.* at 18–20. The court acknowledged that Columbus would likely present "a full-throated home-rule argument" against R.C. 9.68 as the case progressed. *Id.* at 19. But that argument was unlikely to succeed, the court estimated, because *Cleveland Firearms* "already rejected" such an argument. *Id.* And even setting

R.C. 9.68 aside, the trial court concluded that Columbus's restrictions likely violate the Ohio Constitution by interfering with the right to bear arms. *Id.* at 20–25.

The trial court next analyzed the remaining factors for awarding an injunction. The court concluded that the balance of harms tipped in the plaintiffs' favor. *Id.* at 28–29. The court reasoned that, even if it found Columbus's restrictions to be well intended as a matter of policy, it was not free to leave an invalid and unconstitutional law in effect. *Id.* at 28. It thus enjoined Columbus and city officials from enforcing restrictions on magazine capacity and firearms storage. *Id.* at 29.

4. Columbus appealed the trial court's grant of a preliminary injunction. But the Fifth District never reached the merits of the City's appeal. Instead, in a short entry, the Fifth District dismissed Columbus's appeal for lack of jurisdiction. Judgment Entry (5th Dist. Jan. 11, 2024) ("App. Entry").

Some context is helpful for understanding the reasons behind the Fifth District's dismissal. Appellate jurisdiction in Ohio is generally limited to review of final orders. Ohio Const. art. IV, §3(B)(2); R.C. 2505.03(A). Ohio law defines "final order" to include the grant or denial of a preliminary injunction under certain circumstances. R.C. 2505.02(A)(3), (B)(4). Of note here, a defendant may appeal the grant of a preliminary injunction if it can show that it would not receive "a meaningful or effective remedy by an appeal following final judgment." R.C. 2505.02(B)(4).

In the proceedings below, the plaintiffs argued that the trial court's preliminary injunction was not a final order from which Columbus could appeal. Mot. Dismiss 5–10 (5th Dist. May 22, 2023). They relied on two growing trends among Ohio's courts of appeals. *First*, many courts of appeals have suggested that when the ultimate relief a plaintiff seeks is a permanent injunction, then the grant of a preliminary injunction is presumptively not appealable. *See id.* at 7 (citing *RKI, Inc. v. Tucker*, 2017-Ohio-1516, ¶10 (11th Dist.)). *Second*, some courts of appeals have exalted the "status quo" as a central factor in deciding whether a preliminary injunction is immediately appealable under R.C. 2505.02(B)(4). *See id.* at 6–7 (collecting cases). If a preliminary injunction acts to preserve the status quo, the argument goes, then the preliminary injunction is not a final appealable order. *See Preterm-Cleveland v. Yost*, 2022-Ohio-4540, ¶¶21, 28 (1st Dist.). Whereas, if a preliminary injunction goes beyond preserving the status quo, then the injunction is immediately appealable. *See City of Columbus v. State*, 2023-Ohio-195, ¶¶13, 18 (10th Dist.); *but see id.* at ¶16 (recognizing that this "status quo" inquiry does not supplant the statutory text).

These concepts, the plaintiffs asserted, supported dismissal. The plaintiffs were seeking a permanent injunction, so they argued that the City's appeal could presumptively wait until after a final judgment. Mot. Dismiss 7–8. The plaintiffs further argued that the preliminary injunction they received simply maintained the status quo

by preventing Columbus from imposing its new firearms regulations while the case was pending. *Id.* at 9.

The Fifth District apparently found these arguments persuasive. It dismissed Columbus's appeal "for the reasons set forth" in the plaintiffs' motion to dismiss. App. Entry 1.

5. Columbus appealed to this Court, submitting five propositions of law. The city's first two propositions were about whether, under R.C. 2505.02(B)(4), the government may immediately appeal orders preliminarily enjoining the enforcement of its laws. Columbus's remaining propositions concerned the underlying merits of this case and whether the plaintiffs could permissibly file their lawsuit using pseudonyms. The Court accepted only the first two propositions for review. *04/02/2024 Case Announcements*, 2024-Ohio-1228.

ARGUMENT

The Attorney General addresses Columbus's two propositions of law through a single proposition. He agrees that the State and its municipalities may immediately appeal from orders preliminarily enjoining the enforcement of their laws.

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

> *Under R.C. 2505.02(B)(4), the State and its municipalities may immediately appeal orders preliminarily enjoining the enforcement of their laws.*

Ohio law permits aggrieved parties to appeal a preliminary-injunction order if (1) the trial court has finally decided the preliminary-injunction issue and (2) there is no way for

a later appeal to effectively redress the harm the preliminary injunction inflicts. R.C. 2505.02(B)(4). When a trial court issues an order preliminarily enjoining the enforcement of state law, the State will be able to make both showings. The same is true for municipalities when a trial court issues an order preliminarily enjoining the enforcement of local law.

I. R.C. 2505.02(B)(4) permits appeals from preliminary-injunction orders if two conditions are satisfied.

The Ohio Constitution says that the courts of appeals "shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of" inferior courts. Ohio Const. art. IV, §3(B)(2). "The 'provided by law' part of the constitutional grant is effectuated through the definition of a 'final order' contained in R.C. 2505.02(B)." *State v. Craig*, 159 Ohio St. 3d 398, 2020-Ohio-455, ¶9; *accord State v. Yontz*, 169 Ohio St. 3d 55, 2022-Ohio-2745, ¶14. In the ordinary case, Ohio's definition of final order does not permit a party to appeal from an interlocutory order. *E.g.*, *Stevens v. Ackman*, 91 Ohio St. 3d 182, 186 (2001). That is for good reason. Reviewing all claims of error "in a single appeal after final judgment" promotes efficiency by avoiding piecemeal litigation. *See State v. Glenn*, 165 Ohio St. 3d 432, 2021-Ohio-3369, ¶10.

But even accepting the general wisdom of "avoiding piecemeal litigation, occasions may arise in which a party seeking to appeal from an interlocutory order would have no adequate remedy from the effects of that order on appeal from final judgment." *State v. Muncie*, 91 Ohio St. 3d 440, 451 (2001). Ohio's definition of "final order" recognizes as

much. *See* R.C. 2505.02(B). Relevant here, an order granting or denying a provisional remedy sometimes qualifies as a "final order." *Id.* at (B)(4).

A deeper dive into the statutory text reveals which orders concerning provisional remedies are immediately appealable. Begin with the meaning of provisional remedy. For purposes of appealability, a "'[p]rovisional remedy' means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction." R.C. 2505.02(A)(3).

Turn next to the circumstances that make a preliminary-injunction order appealable. An "order that grants or denies a provisional remedy" qualifies as a final order if "both of the following apply":

> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

R.C. 2505.02(B)(4). Thus, a party seeking to appeal the grant or denial of a provisional remedy must satisfy two conditions.

To satisfy the first condition, an appellant must show that the order in question "prevents a judgment" for the appellant "with respect to the provisional remedy" *itself*. R.C. 2505.02(B)(4)(a). Trial courts have broad discretion to revisit interlocutory orders. *State ex rel. Miller v. Brady*, 123 Ohio St. 3d 255, 2009-Ohio-4942, ¶13 (*per curiam*). For that

reason, the first condition within R.C. 2505.02(B)(4) establishes that if a trial court's ruling on the provisional remedy appears "tentative" in nature, an appeal will be premature. *Medpace, Inc. v. Icon Clinical Rsch., LLC*, 2022-Ohio-4540, ¶14 (1st Dist.). Said in reverse, the appealed ruling must "definitively" resolve the provisional remedy, without leaving the provisional remedy open to further "contest" before the trial court. *Muncie*, 91 Ohio St. 3d at 450–51. All this might sound more complicated than it actually is. For example, an appellant seeking to appeal a preliminary injunction must merely show that, absent appeal, there is no chance for victory *at the preliminary-injunction stage*. Thus, any question as to the first condition will be "easily answered" in most cases. *Id.*; *see also Glenn*, 165 Ohio St. 3d 432, ¶21.

The second condition requires a bit more discussion. For that condition, an appellant must show that it would not be "afforded a meaningful or effective remedy" if forced to await final judgment before appealing. R.C. 2505.02(B)(4)(b). This Court's cases flesh out what this language requires. The Court has described that a meaningful remedy is lacking under R.C. 2505.02(B)(4)(b) when "the proverbial bell cannot be unrung." *Muncie*, 91 Ohio St. at 451 (quotations omitted). That is, courts must ask whether "an appeal after final judgment on the merits" will be enough to "rectify the damage" done to the appellant while the case is pending. *Id.* (quotations omitted). In related contexts—addressing final orders under R.C. 2505.02(B)(2)—this Court has added that even "*potential* rather than certain injuries" can "dictate[] the need for immediate review" if

they "cannot be remedied" later. *Thomasson v. Thomasson*, 153 Ohio St. 3d 398, 2018-Ohio-2417, ¶32 (emphasis added). Thus, even the "possibility" of unfixable injuries can be enough to justify an immediate appeal. *Cleveland Clinic Found.*, 120 Ohio St. 3d 1210, ¶13.

A few concrete examples help illuminate which harms can or cannot be "unrung" without an immediate appeal. On one end of the spectrum, most discovery orders are not immediately appealable because harms associated with such orders can be cured through later evidentiary orders. *See Glenn*, 165 Ohio St. 3d 432, ¶24. On the other end, orders compelling criminal defendants to take dangerous medications obviously cannot be remedied later. *Muncie*, 91 Ohio St. 3d at 452. Along similar lines, criminal defendants who argue that prosecution is barred by double jeopardy may immediately appeal adverse decisions—so as to avoid the harm of having to defend against a second trial. *State v. Anderson*, 138 Ohio St. 3d 264, 2014-Ohio-542, ¶59.

Not all immediately appealable harms, however, rise to life-threatening or double-jeopardy levels. For instance, this Court has suggested that even uncertain harms to "autonomy"—based on the appointment of a guardian during civil proceedings—can necessitate "immediate review." *See Thomasson*, 153 Ohio St. 3d 398, ¶¶29, 32. This Court has also said that orders potentially exposing confidential information, such as trade secrets or attorney-client communications, can be immediately appealed. *See, e.g.*, *Cleveland Clinic Found.*, 120 Ohio St. 3d 1210, ¶13; *In re Grand Jury Proceeding of Doe*, 150 Ohio St. 3d 398, ¶22; *Burnham v. Cleveland Clinic*, 151 Ohio St. 3d 356, 2016-Ohio-8000, ¶25

(lead op.). In short, this Court's cases illustrate that a wide range of irreparable harms can justify immediate appeals.

II. When the State and its municipalities appeal orders preliminarily enjoining the enforcement of their laws, they satisfy R.C. 2505.02(B)(4)'s conditions.

The task remains to apply the above principles to orders preliminarily enjoining the enforcement of state or local law. Some initial considerations refine the inquiry. As already mentioned, a "preliminary injunction" always qualifies as a "provisional remedy" under the relevant statutory text. *See* R.C. 2505.02(A)(3). Thus, preliminary injunctions automatically trigger the two-condition analysis that R.C. 2505.02(B)(4) outlines. And orders preliminarily enjoining the enforcement of state or local laws will almost always satisfy the provision's first condition. *See, e.g.*, *Preterm-Cleveland*, 2022-Ohio-4540, ¶14; *Columbus*, 2023-Ohio-195, ¶10. In other words, the grant of a preliminary injunction will almost always "prevent[] a judgment" in the government's favor "with respect to the" preliminary injunction. R.C. 2505.02(B)(4)(a). Said yet another way, trial courts faced with preliminary-injunction decisions usually make definitive rulings, either granting or denying injunctive relief for the pendency of a given case. Any further consideration then awaits the *permanent-injunction stage*. This common sequence makes it impossible for the government "to later obtain a judgment denying" the preliminary injunction. *See Glenn*, 165 Ohio St. 3d 432, ¶21.

The second condition, therefore, becomes the central focus. Can the State and its municipalities obtain "a meaningful or effective remedy" if they are unable to

immediately appeal preliminary-injunction orders? *See* R.C. 2505.02(B)(4). The answer is "no," as this brief now explains. It begins with a discussion of why preliminary orders blocking state law irreparably harm the State. It then explains why the same conclusion extends to municipalities.

A. Orders enjoining the enforcement of state law irreparably harm the State for however long they remain in place.

An order enjoining the enforcement of state law injures Ohio every day it remains in place. This follows from the fact that injunctions blocking state law necessarily inflict irreparable harm on the State—irreparable harm that "only an interlocutory appeal" can stop. *Abbott*, 585 U.S. at 602–03; *see also King*, 567 U.S. at 1303 (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (*per curiam*).

These conclusions flow from first principles. Start with this foundational premise: "All political power is inherent in the people." Ohio Const. art. I, §2. The people "instituted" the government to exercise that power for their benefit. *See id.* And the government they created vests each branch with different responsibilities. Ohioans elect legislators to represent their will in the General Assembly. *See* Ohio Const. art. II, §1. They elect executive-branch officers to enforce and defend the laws the General Assembly enacts. *See* Ohio Const. art. III, §§1, 6; R.C. 109.02. And they elect judges to exercise the "judicial power," Ohio Const. art. IV, §1, by adjudicating "suits and actions," *De Camp v.*

Archibald, 50 Ohio St. 618, 625 (1893). This separation of powers, some have said, represents the "true mettle" of our constitutional system—"the true long-term guardian of liberty." *In re MCP No. 165*, 20 F.4th 264, 269 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing *en banc*).

With the separation of powers in mind, consider the implications of injunctions against state law. In exercising their judicial power, courts must interpret and apply the law to adjudicate cases. *See TWISM Enters., LLC v. State Bd. of Registration for Pro. Eng'rs & Surveyors*, 172 Ohio St. 3d 225, 2022-Ohio-4677, ¶33. And because the Constitution prevails over other laws in the event of a conflict, courts must refuse to enforce laws that contradict the Constitution. *Rutherford v. M'Faddon* at 4 (1807) (unpublished), in Ervin H. Pollack, *Ohio Unreported Judicial Decisions Prior to 1823* (1952) 71; *Murphy v. NCAA*, 584 U.S. 453, 488 (2018) (Thomas, J., concurring). Put in terms of remedy, courts must sometimes enjoin state officials from enforcing unconstitutional laws.

Critically, however, courts frustrate the constitutional structure when they *incorrectly* deem a statute unconstitutional and enjoin its enforcement. Such orders, even when preliminary, displace the legislature's work and thwart the executive's ability to enforce the law. It follows that such orders deny the other branches (at least temporarily) the ability to exercise powers that the people delegated to them. Think of it this way. This Court has repeatedly taught that the General Assembly, not any court, is "the final arbiter of public policy" for Ohio. *State v. Bortree*, 170 Ohio St. 3d 310, 2022-Ohio-3890, ¶20. And

underlying every statute the General Assembly enacts is a policy judgment about the way things should be. Thus, when a court improperly enjoins the enforcement of a statute—even temporarily, and even with respect only to the proper parties to the suit—the court effectively vetoes a policy judgment that voters have entrusted to their lawmakers.

This is the bottom line: whenever a State is wrongly "enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *King*, 567 U.S. at 1303 (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd.*, 434 U.S. at 1351 (Rehnquist, J., in chambers)); *accord Thompson*, 976 F.3d at 619. Such injunctions always alter the distribution of governmental power—a distribution that the people adopted and charged the State with protecting. So unless a "statute is unconstitutional," an order enjoining it "seriously and irreparably harm[s] the State" by denying it the ability to faithfully execute powers entrusted to it by the people. *Abbott*, 585 U.S. at 602 (footnote omitted). "[O]nly an interlocutory appeal can protect that State interest," as only an interlocutory appeal allows the State to avoid the irreparable harm it will suffer while it is blocked from carrying out the duties assigned to it. *Id.* at 602–03. In this Court's words, an order preliminarily enjoining the enforcement of a constitutionally valid law rings a "bell [that] cannot be unrung" after final judgment. *Muncie*, 91 Ohio St. 3d at 451 (quotations omitted). Because the State loses the effect of its law every day a preliminary-injunction order remains in place, a later appeal after final judgment cannot fix the interim harm erroneous preliminary injunctions cause.

Admittedly, all of this puts courts in a tough spot. On the one hand, if a law is unconstitutional, a court protects the Constitution by enjoining enforcement of that law. On the other hand, if a court mistakenly deems a law unconstitutional, the court offends the Constitution by enjoining the enforcement of the law. But for purposes of the effective-remedy inquiry under R.C. 2505.02(B)(4)(b), the State gets the benefit of a presumption that its law is constitutional. That is, when assessing whether a later appeal would provide "a meaningful or effective remedy," *id.*, this Court naturally assumes that the appellant has a meritorious argument. In *Anderson*, for example, the Court assumed that the criminal defendant who wished to appeal had a viable double-jeopardy claim. 138 Ohio St. 3d 264, ¶55. The Court's analysis in *In re Grand Jury Proceeding of Doe* similarly assumed that the appealing party had a legitimate claim of attorney-client privilege. 150 Ohio St. 3d 398, ¶22. Such assumptions make perfect sense. Otherwise, R.C. 2505.02(B)(4)(b) would require appellate courts to resolve the merits of a case *before* resolving their jurisdiction to hear the merits. That backwards approach cannot be what the statute envisions. *See Moore v. City of Middletown*, 133 Ohio St. 3d 55, 2012-Ohio-3897, ¶23 ("It is well settled that standing does not depend on the merits of the plaintiff's contention that particular conduct is illegal or unconstitutional.").

One further point before moving on. The just-identified harm to the State compares favorably to other harms that justify immediate appeal. This Court has said that the harms that flow from the disclosure of trade secrets or attorney-client privilege are

enough to justify immediate appeal. *Cleveland Clinic Found.*, 120 Ohio St. 3d 1210, ¶13; *In re Grand Jury Proceeding of Doe*, 150 Ohio St. 3d 398, ¶22; *Burnham*, 151 Ohio St. 3d 356, ¶25 (lead op.). It has also suggested that even potential harms to personal autonomy are enough to necessitate an immediate appeal. *See Thomasson*, 153 Ohio St. 3d 398, ¶¶29, 32. Certainly the State's ability to give effect to the decisions of the people's elected representatives ranks with such private interests.

B. Orders enjoining local laws irreparably harm municipalities.

Of course, this appeal is about an order enjoining the enforcement of local law, not an order enjoining enforcement of state law. That begs this question: are municipalities also entitled to immediately appeal orders enjoining their officials from enforcing their laws? They are. To fully appreciate why, it helps to return to first principles.

Once again, "All political power is inherent in the people." Ohio Const. art. I, §2. In our federalist system, the States are the default representatives of the people and thus the default holder of the people's power. As one sign of this, when the British Crown ended the Revolutionary War, it surrendered its claim of sovereignty not to the Continental Congress, but directly to the thirteen "independent States." Definitive Treaty of Peace, U.S.-Gr. Brit., art. I, Sept. 3, 1783, 8 Stat. 80, 81. In joining the Union, the States surrendered a portion of their sovereignty—they gave the federal government limited, enumerated powers. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). But the States kept the remainder. *Id.*; U.S. Const. amend. X. Of particular note, the States retained the "broad

authority to enact legislation for the public good," which is "often called a 'police power.'" *Bond v. United States*, 572 U.S. 844, 854 (2014).

The relationship between the States and their municipalities is much different than the relationship between the federal government and its States. Unlike the States, municipalities do not possess any "inherent" sovereignty. *Campbell v. Cincinnati*, 49 Ohio St. 463, 474 (1892). Municipalities are instead mere "creatures" of the States, which the States create "for the purpose of exercising a part of" their powers. *Atkin v. Kansas*, 191 U.S. 207, 220 (1903). It follows that, rather than possessing any inherent or reserved powers, municipalities possess only the powers that the States have granted them. *Campbell*, 49 Ohio St. at 474. And, in Ohio's early years, Ohio followed the so-called "Dillon rule" for construing the power of municipalities. George D. Vaubel, *Municipal Home Rule in Ohio*, 3 Ohio N.U. L. Rev. 1, 12 (1975) (citing 1 J.F. Dillon, *Commentaries on the Law of Municipal Corporations* §239 (5th ed. 1911)). Under the Dillon rule, municipalities were presumed to *lack* power unless the General Assembly "expressly granted" municipal power or "clearly implied" that it was doing so. *Bloom v. Xenia*, 32 Ohio St. 461, 465 (1877).

Ohio eventually decided that this presumption against municipal power was too cumbersome. *See* Harvey Walker, *Municipal Government in Ohio Before 1912*, 9 Ohio St. L.J. 1, 12–13 (1948). Specifically, in 1912, Ohioans adopted the "Home Rule Amendment" located at Article XVIII, Section 3 of the Ohio Constitution. The amendment authorizes

municipalities "to adopt and enforce" police-power regulations so long as those regulations "are not in conflict with general laws." Ohio Const. art. XVIII, §3. As that language and the corresponding convention debates reflect, the point of the Home Rule Amendment was *not* to make municipal power "dominant" or "absolute" in relation to the State. *See* 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio, 1456–57, 1860–61 (1912). Rather, the "main thing" the amendment sought to accomplish was to "reverse" the "old order of things" under which municipalities were presumed to lack power and needed "specific authority" from the General Assembly to act. *Id.* at 1433, 1461; *see also id.* at 1439–41, 1447, 1458, 1471. In other words, with the Home Rule Amendment's adoption, municipalities are now presumed to have police power to act for their residents *until* the State steps in with conflicting law.

For present purposes, the takeaway from this home-rule history is simple. The State of Ohio, via the Ohio Constitution, delegates a qualified power to municipalities to act as the representatives of the people. It follows that the local laws of Ohio's municipalities reflect the will of the people, albeit on a smaller scale than state laws. And it follows from there that orders mistakenly enjoining the enforcement of local laws inflict irreparable harm for however long they remain in place. *See above* 18–21.

C. Other considerations further support appealability here.

For the above reasons, the Court should conclude that orders wrongly enjoining the enforcement of state or local laws inflict irreparable harm while they remain in place—

meaning that an immediate appeal is needed to provide "a meaningful or effective remedy." R.C. 2505.02(B)(4)(b). To hold as much, the Court need not look beyond the statutory text and first principles. But, to the extent any doubt lingers, a few other considerations support the State's position.

Begin with this Court's recent precedent. Two years ago, this Court reviewed an order that granted, in part, municipalities' request for a preliminary injunction against state law. *Newburgh Heights v. State*, 168 Ohio St. 3d 513, 2022-Ohio-1642. Within its opinion, this Court noted that the parties had disputed appealability below. *Id.* at ¶15. Since this Court had an independent duty to consider its jurisdiction, and since it expressly noted the jurisdictional issue, it stands to reason that the Court was satisfied that it had jurisdiction to hear the case. True, *Newburgh Heights* did not directly resolve jurisdiction, so it is not binding in a formal sense. But the case provides strong inferential support for the notion that orders preliminarily enjoining the enforcement of a state law are immediately appealable.

Along more practical lines, *see* R.C. 1.49(E), a holding contrary to the State's position would promote gamesmanship. If the State and its cities cannot appeal orders preliminarily enjoining enforcement of their laws, then plaintiffs challenging those laws will have an incentive to (1) obtain a preliminary injunction and then (2) slow walk trial-level proceedings.

A recent high-profile case serves as the blueprint. After the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), an Ohio law regulating the performance of abortions went back into effect. *See Preterm-Cleveland v. Yost*, 2022 WL 2290526, at *2 (S.D. Ohio June 24, 2022). A group of plaintiffs sued in state court to block Ohio's revived law, and a trial court issued an order preliminary enjoining enforcement of the law. *Preterm-Cleveland*, 2022-Ohio-4540, ¶6. Soon after receiving preliminary relief, and despite the highly legal nature of the case, the plaintiffs asked for a lengthy case schedule that—even disregarding any appeal—would have kept Ohio law on hold for roughly eighteen months while the parties completed discovery and other trial-level activities. *See* Joint Scheduling Report, *Preterm-Cleveland v. Yost*, Hamilton C.P. No. No. A 2203203 (Dec. 8, 2022). As this example illustrates, if Ohio cannot appeal from preliminary-injunction orders, then a challenged state law might go years without effect or enforcement, even if the law proves constitutional in the end.

Finally, it is worth remembering that the appealability of preliminary-injunction orders is a two-way street. Recall that a final order includes an order "that grants *or denies* a provisional remedy" if the two statutory conditions are met. R.C. 2505.02(B)(4) (emphasis added). Under the State's reading of the statutory scheme, when plaintiffs allege that a state or local law violates their constitutional rights, they may also immediately appeal from adverse rulings at the preliminary-injunction stage. That is because the denial of constitutional rights, even for short periods, constitutes irreparable

harm. *Roman Catholic Diocese*, 592 U.S. at 19. Thus, like temporary constitutional harms to the State, *above* 18–21, temporary constitutional harms to plaintiffs cannot be effectively remedied through an appeal after final judgment. The statutory text does not suggest any asymmetry between the appellate rights of plaintiffs and the government. This Court should not create asymmetry through its holding in this case.

III. The Fifth District's contrary holding was wrong.

The Fifth District did not outline its reasons for dismissing Columbus's appeal. It instead issued a short entry incorporating the analysis from the plaintiffs' motion to dismiss. App. Entry 1. Reading between the lines, however, the Fifth District seems to have accepted two final-order notions that are percolating in the courts of appeals. *See above* 11–12. Both notions are mistaken.

The first mistaken notion is that a general presumption exists against appeals from preliminary-injunction orders. Multiple Ohio courts of appeals have said that an order granting a "preliminary injunction, in a suit in which the ultimate relief sought is a permanent injunction, is generally not a final appealable order." *RKI, Inc.*, 2017-Ohio-1516, ¶10 (quotations omitted); *see also Preterm-Cleveland*, 2022-Ohio-4540, ¶18; *Taxiputinbay, LLC v. Village of Put-In-Bay*, 2021-Ohio-191, ¶12 (6th Dist.); *Jacob v. Youngstown Ohio Hosp. Co.*, 2012-Ohio-1302, ¶5 (7th Dist.). The statutory text offers no support for such a presumption. To be sure, R.C. 2505.02(B)(4) says that preliminary-injunction orders will be appealable only sometimes, when two conditions are met. But

those conditions are not tied to whether a plaintiff seeks a permanent injunction. And the statute gives no sign of how often preliminary-injunction orders will satisfy the conditions for immediate appeal. As in any other setting, "the party who knocks on the courthouse door" has the burden of establishing jurisdiction. *Glenn*, 165 Ohio St. 3d 432, ¶22. But beyond that, Ohio's definition of final order places no presumptive thumb on the scales.

The second mistaken notion concerns the "status quo." Several Ohio courts of appeals have elevated the status quo as a critical factor in analyzing whether preliminary injunctions are appealable. The supposed rule is that "a preliminary injunction which acts to maintain the status quo pending a ruling on the merits is not a final appealable order under R.C. 2505.02." *Preterm-Cleveland*, 2022-Ohio-4540, ¶21 (quoting *Quinlivan v. H.E.A.T. Total Facility Solutions, Inc.*, 2010-Ohio-1603, ¶5 (6th Dist.)) This approach to appealability also lacks a basis in the text. The text of R.C. 2505.02(B)(4)(b) focuses on the harms the appealing party faces without an immediate appeal, not the status-quo-preserving nature of injunctive relief. To make matters worse, determining the status quo is often quite difficult, as there are many defensible "conception[s] of the status quo" and "there is no sound or principled reason to pick one over another." *Labrador v. Poe*, 144 S. Ct. 921, 930 (2024) (Kavanaugh, J., concurring in the grant of stay). In any event, even assuming that the status quo sometimes serves as a "meaningful guidepost" for gauging the harms a private party will face without appeal, *see Columbus*, 2023-Ohio-195,

¶16, a status-quo inquiry is a poor fit for orders preliminarily enjoining the enforcement of state or local laws. Regardless of whether a law was already in effect or was about to go into effect at the time of an injunction, the State and its municipalities face irreparable harm without an immediate appeal.

A few other potential objections to the State's position are worth addressing. It is true that the State's argument above relies in part on principles explained in federal caselaw. *See Preterm-Cleveland*, 2022-Ohio-4540, ¶16. And it is true that, under federal law, "orders granting a preliminary injunction are *always* appealable." *Id.* (citing 28 U.S.C. §1292(a)(1)). But none of that defeats the State's argument. The key question for purposes of R.C. 2505.02(B)(4)(b) is the effectiveness of an appeal after final judgment. And federal authority helps explain why the State is irreparably harmed by orders preliminarily enjoining the enforcement of its laws. That irreparable harm demonstrates, in turn, why a later appeal would *not* be effective. So the federal authority cited above proves deeply relevant to the inquiry under R.C. 2505.02(B)(4)(b).

What is more, adopting the State's position would not mean that Ohio may appeal *all* preliminary injunctions. *Contra Preterm-Cleveland*, 2022-Ohio-4540, ¶26. The State's argument that an injunction always inflicts irreparable harm applies only to injunctions that prohibit enforcement of state or local law. The argument does not apply to injunctions that affect the State or municipalities in their proprietary functions. For

example, an order enjoining the State from terminating an employee or enforcing a contract would not necessarily impose irreparable harm.

The State does, admittedly, propose a narrower categorical rule: that States and municipalities satisfy R.C. 2505.02(B)(4)(b) when they immediately appeal from orders preliminarily enjoining their officials from enforcing their laws. But there is nothing remarkable about drawing this type of bright line. As one example, in the context of property appraisal, this Court has applied a "24-month rule" for gauging what amounts to "a reasonable length of time." *Akron City Sch. Dist. Bd. of Educ. v. Summit County Bd. of Revision*, 139 Ohio St. 3d 92, 2014-Ohio-1588, ¶¶12, 28 (quoting former R.C. 5713.03). Along similar lines, despite the fact-intensive nature of the Fourth Amendment's reasonableness standard, the U.S. Supreme Court has deemed some categories of behavior automatically reasonable. *See Riley v. California*, 573 U.S. 373, 398 (2014). The State's proposed rule is analogous. Although the question whether an appellant has a "meaningful or effective remedy by an appeal following final judgment" is context-dependent, the State's rule recognizes one context in which R.C. 2505.02(B)(4)(b)'s requirement is always satisfied.

CONCLUSION

For the foregoing reasons, the Court should reverse the Fifth District's dismissal and remand for further proceedings.

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