In the
Supreme Court of Ohio

JOHN DOE 1, et al.,	)	CASE NO: 2024-0056
	)	
Plaintiffs-Appellees,	)	
	)	
vs.	)	
	)	
CITY OF COLUMBUS, et al.,	)	
	)	
Defendants-Appellants.	)	
	)	

MERIT BRIEF OF APPELLEES

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STATEMENT OF THE CASE

On December 5, 2022, the Columbus City Council approved Ordinance 3176-2022, which modified or enacted sections of the Columbus City Codes concerning private gun ownership. These changes included new provisions that prohibited "negligent storage of a firearm" as well as possession of magazines with the "capacity of thirty (30) or more rounds of ammunition for use in a firearm." Plaintiffs-Appellees—five John Does and one Jane Doe (collectively "Appellees")—filed suit in the Delaware County Court of Common Pleas against Defendants-Appellants, the City of Columbus, Columbus City Council President Shannon Hardin, and City Attorney Zach Klein (collectively "Appellants"), asserting the ordinance violated R.C. 9.68 and Article I, Section 4 of the Ohio Constitution.[1] Defendant-Appellant Klein publicly stated that he would prosecute anyone who violated its newly enacted ordinance.

Appellees sought a preliminary injunction against the new ordinance in addition to a permanent injunction. The trial court recognized that enforcing the ordinance would irreparably harm Appellees and, on April 25, 2023, granted the preliminary injunction. Appellants appealed to the Fifth District Court of Appeals, and Appellees filed a motion to dismiss for a lack of a final appealable order. After the Fifth District dismissed the appeal, Appellants appealed again with five propositions of law. This Court agreed to hear two of these propositions specifically concerning the ability to immediately appeal a preliminary injunction: (1) whether the government may, under R.C. 2505.02(B)(4), always immediately appeal orders preliminarily enjoining its laws and (2) whether an order enjoining enforcement of a statute or ordinance causes irreparable harm to the interests of the government, which would warrant an immediate appeal.

[1] Following the preliminary injunction hearing, the Columbus City Council enacted Ordinance 0680-2023 to amend and clarify portions of the code that Appellees challenged. Appellees subsequently filed an amended complaint to include the new ordinance and renewed their motions pending with the trial court.

INTRODUCTION

Appellants and, through its amicus brief, the Ohio Attorney General (the "State"), seek a new rule to allow the government to always immediately appeal a preliminary injunction that prevents enforcement of a statute or ordinance. Appellants and the State would have this Court reject the three-part analysis courts have long used to interpret R.C. 2505.02(B)(4)(b). Their proposed rule appears to create an unfair, one-sided rule benefiting the government and not those challenging the government.

The State justifies this new rule with a new twist on Article I, Section 2 of the Ohio Constitution. "All political power is inherent in the people" and "[g]overnment is instituted for their equal protection and benefit." Ohio Const. art. I, § 2. The State claims that the government is really the people. See State Br. at 18 and 22. It further reasons that since the government acts as "representatives of the people," *id*. at 24, the courts must give special deference to the government's enactments, in particular, to allow immediate appeals of orders blocking enforcement of laws the court finds constitutionally infirm. This argument turns the Constitution on its head. While the government derives its political power from the people, the people retain their constitutionally guaranteed rights. "Indeed, the role of the independent judiciary in our constitutional system is to protect individual rights by ensuring that the political branches do not exceed their constitutionally assigned authority." *State of Arizona v. Arevalo*, 249 Ariz. 370, 379, ¶ 36 (2020) (Bolick, J., concurring). As Hamilton explained, "[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." The Federalist No. 78, at 142 (Alexander Hamilton) (Richard Beeman ed., 2012).

The Appellants and the State misunderstand this governmental structure and further ignore the separation of powers between the legislature and the courts. They urge this Court to adopt a

standard similar to the federal appealability standard—at least as it applies to the government. However, the federal and Ohio rules are distinct. Unlike the federal rules, which allow for appeals of all preliminary injunctions, the Ohio rules require parties to satisfy specific elements in R.C. 2505.02(B). If Appellants wish to have the Ohio rules changed, the proper forum is the General Assembly, not this Court. In fact, after the State filed its amicus brief in this case, the General Assembly amended R.C. 2505.02(B) to create a new rule to allow such appeals for preliminary injunctions against the enforcement of state-enacted—and only state-enacted—laws. 2024 Sub.H.B. No. 301.[2]

Even when analyzing whether the granting of a preliminary injunction would fail to afford the government a meaningful or effective remedy in an irreparable harm analysis, Appellants cannot substantiate a claim that the "proverbial bell cannot be unrung." *State v. Muncie*, 91 Ohio St.3d 440, 451 (2001). Neither theoretical consequences to third parties nor a delay in effectuating a constitutionally challenged ordinance rises—ipso facto—to the level of irreparable harm. *See Columbus v. State*, 2023-Ohio-2858, ¶ 19 (10th Dist.) ("'Irreparable harm' is an injury for which, after its occurrence, there could be no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete."). Nothing suggests the government suffers irreparable harm when it is prevented from enforcing an unconstitutional statute. The State's amicus brief admits as much.[3] Merit Br. of Amicus Curiae Ohio Attorney General Dave

[2] Effective October 21, 2024. Nothing in 2024 Sub.H.B. 301 indicates that the new provision would apply to political subdivisions. Where the revised code applies to political subdivisions, it specifically uses that phrase. *See, e.g.*, R.C. 9.68 (creating "a civil action against the political subdivision"); R.C. 4112.01 (defining employer as "the state, any political subdivision of the state, or . . . any agent of the state, political subdivision, or person"). It does not do so with respect to R.C. 2505.02 in this bill. Further, other unrelated portions of 2024 Sub.H.B. 301 refer to political subdivisions, indicating that if the General Assembly wanted the new R.C. 2505.02 provision to apply to political subdivisions, it would have said so.

[3] The State agrees that trial courts can enjoin unconstitutional laws and that this, when rightfully done, does *not* cause irreparable harm. *See, e.g.*, State Br. at 19 (noting that "courts frustrate the constitutional structure" only "when they *incorrectly* deem a statute unconstitutional"). The State also agrees that the trial court, in this case, "correct[ly]" issued a preliminary injunction of Appellants' ordinances because they exceeded Appellants' constitutional authority, based

Yost ("State Br.") at 19 ("[C]ourts must sometimes enjoin state officials from enforcing unconstitutional laws."). Further, presuming the constitutionality of a law when a city appeals a preliminary injunction makes little sense because the challenging plaintiff must already clear this hurdle at the trial court level. Finally, extra-textual policy arguments premised on judicial economy and plaintiffs putatively gaming the system by extending an initial victory at the preliminary injunction stage fall flat given that a categorical rule would promote additional piecemeal litigation every time a statute or ordinance faces scrutiny.

Although disguised as a debate over interpreting a procedural rule, this case ultimately represents a battle between the government's interests and the rights of Ohio citizens. Granting the government a unique exemption from meeting the statutory criteria required to immediately appeal a preliminary injunction elevates the government above its citizens. However, as this Court has articulated the function of government as it pertains to its constituents, "[t]he reason the legislative, executive, and judicial powers are separate and balanced is to protect the people, not to protect the various branches of government." *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 135 (2000).

LAW AND ARGUMENT

Response to Proposition of Law No. 1: *Under R.C. 2505.02(B)(4), the government may immediately appeal orders preliminarily enjoining its laws only if the requirements of R.C. 2505.02(B)(4) are met. The three factors commonly used by appellate courts are appropriate to determine if an appellant has a meaningful or effective remedy.*

A. Ohio law regarding appealability differs from federal law, and only the General Assembly can change Ohio law to do what Appellants and the State propose.

Appellate courts have developed a systematic approach for applying R.C. 2505.02(B)(4). And yet, instead of relying on Ohio precedent regarding Ohio law, Appellants lean heavily on

on this Court's precedent. *Id.* at 1. Thus, even under the State's proposed test, the trial court's preliminary injunction was correct in enjoining an unconstitutional law, and thus, Appellants have suffered no irreparable harm and cannot immediately appeal the preliminary injunction.

inapplicable federal case law to urge this Court to adopt a skewed federal court rule regarding the appealability of preliminary injunction grants or denials. The federal rule allows immediate appeals of the grant or denial of all preliminary injunctions. Appellants want this—but only for the municipalities, not for those seeking an injunction against municipalities. However, Ohio's General Assembly has not adopted that rule for political subdivisions or plaintiffs. In Ohio, an order granting or denying a preliminary injunction to, *inter alia*, the application of law, statute, or ordinance of a political subdivision "is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial" only when it fulfills both of the following:

> (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).

By contrast, federal law casts a much wider net—giving courts of appeals jurisdiction over appeals from "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . . ." 28 U.S.C. 1292. Appellants and the State prefer a self-interested version of the federal rule providing immediate appeals (without meeting the 2404.02(B)(4) factors) exclusively to government actors. But if they prefer that rule, their request should have been (and, in the case of the State, apparently was made successfully) to the General Assembly, which is the proper body to consider such a policy change.

The State's amicus brief relies heavily upon federal law and policy arguments to petition this Court to create an exception for the government as it pertains to R.C. 2505.02(B)(4). It advocates for an equivalent usage of federal law both when the State *and* when one of its municipalities appeals a preliminary injunction preventing enforcement of a statute or ordinance. But, adopting the federal rule would require Ohio's General Assembly to enact that specific public policy by amending R.C. 2505.02. As the State has correctly argued, the General Assembly is "the final arbiter of public policy." *See State v. Bortree*, 2022-Ohio-3890, ¶ 20. And, indeed, during the pendency of this appeal, the General Assembly amended the law, but not in a way to match the position advocated by the State and Appellants. Rather, the legislature's amendment of R.C. 2505.02 permits the State—not municipalities—to immediately appeal a preliminary injunction of state law. New Section 2505.02(B)(8) adds the following as a final appealable order:

> An order restraining or restricting enforcement, whether on a temporary, preliminary, or permanent basis, in whole or in part, facially or as applied, of any state statute or regulation, including, but not limited to, orders in the form of injunctions, declaratory judgments, or writs.

2024 Sub.H.B. No. 301.

The General Assembly undoubtedly was aware of both this appeal and the briefs filed by both the State and Appellants.[4] The General Assembly rejected the position that both the State and

[4] The General Assembly undoubtedly was also aware of arguments already put forth in *Preterm-Cleveland v. Yost*, 2022-Ohio-4540 (1st Dist.), *appeal dismissed*, 2023-Ohio-4570, which addressed essentially the same question as Proposition of Law No. 1 in this case, and which was briefed and argued before this Court in 2023. *See* Jessie Balmert, *What's the future of Ohio's ban on most abortions? Justices raise questions Wednesday* (Sept. 26, 2023), https://www.cincinnati.com/story/news/politics/2023/09/26/ohio-supreme-court-to-hear-arguments-about-ban-on-most-abortions/70931104007/ (explaining an issue on appeal is "Whether Yost can appeal this case at all"). Of course, the Attorney General's office made similar arguments in that case as it is making in this case—except in that case, it only argued for the State to have the privilege of immediate appealability of preliminary injunctions, the position the General Assembly ultimately adopted. *See* Mem. in Support of Jurisdiction of Appellants, *Preterm-Cleveland v. Yost*, 2023-Ohio-4570 (Ohio Jan. 3, 2023).

municipalities can immediately appeal the imposition of a preliminary injunction enjoining the enforcement of a statute or ordinance by not extending this privilege to municipalities. This demonstrates a recognition by the General Assembly that (1) the legislature remains the proper forum to define final appealable orders, (2) 2505.02(B)(4) did not allow for immediate appeal of all preliminary injunctions against state laws, thereby necessitating the amendment insofar as the legislature sought to change the policy to permit such immediate appeals, and (3) the General Assembly never intended for municipalities to immediately appeal preliminary injunctions enjoining the enforcement of ordinances without satisfying the elements of R.C. 2505.02(B)(4). And the addition of 2505.02(B)(8) further demonstrates that *even now* the General Assembly does not intend for municipalities to be exempt from meeting those elements.

B. An order granting a preliminary injunction does not necessarily satisfy R.C. 2505.02(B)(4)(a).

"A preliminary injunction is a provisional remedy, which is defined as a 'remedy other than a claim for relief.'" *McHenry v. McHenry*, 2013-Ohio-3693, ¶ 11 (5th Dist.), quoting R.C. 2505.02(A)(3). See also *Youngstown City School Dist. Bd. of Edn. v. State*, 2017-Ohio-555, ¶ 6 (10th Dist.) (stating that a "preliminary injunction is a provisional remedy, considered interlocutory, tentative, and impermanent in nature"). A preliminary injunction meets the first prong of R.C. 2505.02(B)(4) if it "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." R.C. 2505.02(B)(4)(a).

This Court has stated that a preliminary injunction only fulfills the requirements of R.C. 2505.02(B)(4)(a) if "there existed nothing further for the trial court to decide with respect to the provisional remedy." *In re Special Docket No. 73958*, 2007-Ohio-5268, ¶ 6. As a general rule, preliminary injunctions do satisfy this requirement, but it would be inappropriate for the Court to

create a flat rule stating that they always do—this is still an element that an appellant must satisfy. Indeed, the State's amicus brief admits that "if a trial court's ruling on the provisional remedy appears 'tentative' in nature, an appeal will be premature." State Br. at 15, citing *Medpace, Inc. v. Icon Clinical Rsch., LLC*, 2022-Ohio-4540, ¶ 14 (1st Dist.). While in this case, Appellees concede that the preliminary injunction at issue satisfies R.C. 2505.02(B)(4)(a), the fact the State concedes that not all cases will meet this requirement[5] mitigates against this Court creating a blanket rule.

C. The preliminary injunction in this case does not prevent Appellants from being afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

Under R.C. 2505.02, a preliminary injunction is only immediately appealable if "[t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment . . . ." R.C. 2505.02(B)(4)(b). "Needless to say, any party losing a preliminary injunction decision can muster some claim of immediate harm, but [R.C. 2505.02(B)(4)(b)] keeps our eyes on the 'meaningful or effective remedy' standard." *Preterm-Cleveland*, 2022-Ohio-4540, at ¶ 22 (1st Dist.), *appeal dismissed*, 2023-Ohio-4570. The meaningful or effective remedy standard is—properly—an imprecise standard. Its general wording facilitates the application of unique facts in each case to the standard. It is hard to imagine a precise rule that could be applied to all situations unless the General Assembly adopts the federal rule. *See* 28 U.S.C. 1292. The General Assembly has declined to do so; but recently adopted a different rule. 2024 Sub.H.B. No. 301. Consequently, Ohio courts of appeals have generally looked at three factors to determine if a party will be afforded a meaningful or effective remedy: (1) whether the preliminary injunction preserves the status quo, (2) the extent to which the provisional remedy matches the final remedy

[5] "[A]ny question as to [2505.02(B)(4)(a) regarding preliminary injunctions] will be 'easily answered' in *most* cases." (Emphasis added.) State Br. at 15.

sought, and (3) whether the granting or denial of an order causes irreparable harm to the party wishing to appeal. *Cincinnati v. State*, 2024-Ohio-2425, ¶ 16 (1st Dist.).

First, if the appeals court determines that the preliminary injunction preserves the status quo, then the appealing party will oftentimes have an opportunity at a trial or dispositive motion stage for a meaningful or effective remedy. Encapsulating the purpose of a preliminary injunction, or "preserv[ing] the status quo pending a resolution of the case on the merits," the status quo analysis ensures that the preliminary injunction performed its intended function and did not extend beyond this boundary. *Dimension Serv. Corp. v. First Colonial Ins. Co.*, 2014-Ohio-5108, ¶ 18 (10th Dist.). In other words, the status quo analysis reflects the long-standing premise in Ohio jurisprudence that "no injustice is done" when an interlocutory order preserves the *rights* of all parties. *Tipling v. Randall Park Holding Co*., 94 Ohio App. 505, 509 (8th Dist. 1952).

For conflicts between private parties, determining the status quo includes looking at the surrounding facts and the relationship between the parties prior to litigation. *See Clean Energy Future, LLC v. Clean Energy Future-Lordstown, LLC*, 2017-Ohio-9350, ¶ 6 (11th Dist.). As such, a trial court order that maintains contractual and business relations and protects those interests would satisfy the status quo analysis, which would weigh against the ability to immediately contest that decision. *See Medpace, Inc. v. ICON Clinical Research, LLC*, 2023-Ohio-4552, ¶ 29 (1st Dist.)*; see also Neamonitis v. Gilmour Academy*, 2009-Ohio-2023 (8th Dist.) (holding a granted preliminary injunction preventing a private school from expelling a student was not final and appealable because the order preserved the plaintiff's enrollment status during litigation). Conversely, an order that disrupts these relationships by changing the dynamic between the parties, such as forcing compliance with cost-prohibitive measures, would fail the test and help justify an interlocutory appeal. *See England v. 116 West Main LLC*, 2023-Ohio-3086, ¶¶ 21–30 (2d Dist.)

(finding a preliminary injunction preventing the demolition of a building maintained the status quo and was beyond immediate appellate review, whereas, the portion of the trial court's order commanding a party to "shore up" partially demolished building changed the status quo and was immediately appealable).

In a dispute over the constitutionality of a statute or ordinance, the status quo manifests as the legally uncontested state of the law "preced[ing] the enforcement of [the] challenged law." *Preterm-Cleveland*, 2022-Ohio-4540, at ¶ 22 (1st Dist.), *appeal dismissed*, 2023-Ohio-4570; *accord Taxiputinbay, LLC v. Put-in-Bay*, 2021-Ohio-191, ¶ 17 (6th Dist.) (noting that status quo means "the last, actual, peaceable, uncontested status which preceded the pending controversy"). A determination of whether a preliminary injunction preserved the status quo boils down to whether the order altered the state of the law in effect. *Columbus v. State*, 2023-Ohio-195, ¶ 18 (10th Dist.). In these circumstances, the analysis recognizes that a city or the State can almost always claim some sort of harm when an order enjoins a constitutional law. *Preterm-Cleveland* at ¶ 22. However, if the granting or denial of a preliminary injunction maintains the state of the law and, thus, the status quo, then "the party isn't truly harmed (at least in the manner contemplated by R.C. 2505.02(B)(4)(b))." *Id*.

Appellants assert that the status quo analysis is circular: "[I]f an injunction that preserves the status quo is *not* immediately appealable simply because it does so, and if *every* injunction by definition preserves the status quo, then it logically follows that a preliminary injunction can never be a final appealable order." Merit Br. of Appellants at 9. This theory, although enticing in its simplicity, fails for two reasons. First, the status quo factor is—and should be—only one factor to determine if the appellant will have a meaningful or effective relief absent an immediate appeal. Courts have not treated this factor as dispositive, and indeed, even when a preliminary injunction

maintains the status quo, courts have allowed interlocutory appeals of preliminary injunctions where "absent an immediate appeal, the right cannot be vindicated." *See Preterm-Cleveland* at ¶ 24 (listing cases). Second, Appellants' theory has not been true in practice. Appellate courts can and do allow an appeal when they determine that the trial court's preliminary injunction did not—in fact—preserve the status quo. *E.g., Columbus,* 2023-Ohio-195 (10th Dist.) (finding that the trial court's preliminary injunction of a state statute disrupted the status quo and was thus a final and appealable order). By contrast, Appellants' "argument is tantamount to a conclusion that *any* preliminary injunction of a [ ] statute warrants an immediate appeal." *Id*. at ¶ 26. But R.C. 2505.02(B)(4) does not endorse that approach.

Similarly, the State contends in its amicus brief that it makes no difference whether a law was already effective or was about to go into effect as to whether the government can appeal the preliminary injunction of a statute. *See* State Br. at 29. Scrutinizing the State's erroneous argument here actually demonstrates the value of the status quo analysis. Take for instance (a) an order that enjoins a law that has been upheld as constitutional for a substantial period and (b) one that prevents the enforcement of a new law. In the former, a granted order upends the state of the law by enjoining a previously upheld statute. In such cases, the status quo is not maintained, and the government likely would be entitled to an immediate appeal. This is part of the three-factor analysis. *See Columbus*, 2023-Ohio-195 (10th Dist.) (holding a preliminary injunction enjoining the entirety of R.C. 9.68 disrupted the status quo in part because the statute had already been upheld as constitutional for over twelve years). Conversely, in the latter, delaying appeal risks no violation of citizens' rights or infringement on the government's authority because a granted preliminary injunction maintains the current, uncontested state of the law while courts determine the legality of the new law.

Both Appellants and the State also challenge the status quo analysis because the statute does not contain the words "status quo." But their adherence to textualism ends there. Indeed, Appellants and the State advocate for a rule that has no textual basis in Ohio law, and is not even an actual textual reading of the federal law that they do rely upon, but rather is found exclusively the non-bilateral policy that they prefer. Moreover, abandoning the case-by-case evaluation using the three factors would have broader implications than just appeals by the government. R.C. 2505.02(B)(4) determines the appealability of all cases involving preliminary injunctions. *See, e.g., Obringer v. Wheeling & Lake Erie Ry. Co.*, 2010-Ohio-601, ¶ 20 (3d Dist.) (holding trial court's order preventing railroad from infringing upon rights of property owners with alleged easement to cross maintained the status quo). Examination of the uncontested state of affairs prior to litigation can help courts of appeals determine whether the aggrieved party suffered harm sufficient to prevent the opportunity for effective remedy. *See England*, 2023-Ohio-3086 (2d Dist.) (holding a trial court's granted preliminary injunction was a final and appealable order as it created an affirmative obligation to repair a building, disrupting the status quo due to the cost of the operation). *See also Columbus*, 2023-Ohio-195, at ¶ 16 (10th Dist.) (identifying the status quo analysis as a "meaningful guidepost" in the effective remedy inquiry).

As another factor in deciding if the appealing party will have an opportunity for a meaningful or effective remedy, Ohio courts have looked to the ultimate relief sought in the initial suit. *Fatica Renovations, LLC v. Bridge*, 2017-Ohio-1419, ¶ 13 (11th Dist.). If a plaintiff seeks a preliminary injunction as the provisional remedy and a permanent injunction as the ultimate relief, this can weigh against the immediate appealability since the affected party can obtain relief either by winning at trial or by appealing the permanent injunction. *Preterm-Cleveland* at ¶ 19; *see also Taxiputinbay, LLC*, 2023-Ohio-1237 (6th Dist.) (holding a trial court erred in granting a permanent

injunction against an ordinance after initially dismissing an immediate appeal of a preliminary injunction for lack of a final appealable order). This would be especially true in cases where the trial court indicates that it will rule quickly on the permanent injunction or if the preliminary injunction is narrow or has a limited duration. Immediate appeals in such cases needlessly prolong the trial court's final determination of the merits. Additionally, the State's proposed categorical rule raises practical concerns, as it mandates that appellate courts must always decide preliminary injunctions challenged by the municipalities even if based on a limited and incomplete record—whether or not the municipalities would have a meaningful or effective remedy at the conclusion of the case. *See Taxiputinbay, LLC,* 2021-Ohio-191 at ¶ 14 (6th Dist.). That bright line test is inconsistent with the statutory mandate.

Accordingly, this Court should endorse the status quo analysis, as well as an examination of the ultimate relief sought in the suit as factors to decide whether the appellant would be afforded a meaningful or effective remedy by an appeal following final judgment.

The last factor Ohio courts apply in determining whether a party has a meaningful or effective remedy is whether the appellant will suffer irreparable harm absent an immediate appeal. *Cincinnati*, 2024-Ohio-2425, ¶ 16 (1st Dist.). All parties seem to agree on this. However, Appellants ultimately rely on harm to third parties—individual residents of Ohio—rather than harm to the government. *See, e.g.,* Merit Br. of Appellants at 9–10 ("Presumably, the government enacted the challenged law to remedy a hazard or harm to . . . its citizens, and that harm persists unabated so long as the injunction is in place."); Mem. in Support of Jurisdiction of Appellants at 9 (same); *see also* Merit Br. of Appellants at 13 ("[A] preliminary injunction of a duly enacted law or ordinance is such a rare circumstance, especially where, as here, the injunction also imposes serious harm on the citizens whom the ordinances were crafted to protect."); *id.* ("The City

defendants ask the court to hold that an order enjoining enforcement of a statute or ordinance causes irreparable harm to the sovereign interests of the government, and when coupled with irreparable harm to the citizenry, is immediately appealable."). But speculative consequences to third parties are irrelevant to whether the "appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment," R.C. 2505.02(B)(4)(b). See *Preterm-Cleveland,* 2022-Ohio-4540, at ¶ 25 (1st Dist.), citing *Mentor Way Real Estate Partnership v. Hertanu*, 2016-Ohio-4692, ¶ 11 (8th Dist.) (dismissing the appeal for want of a final appealable order upon concluding that harm to a third party would not deny the appellant a meaningful or effective remedy). Appellants strongly suggest that absent an immediate appeal, the city of Columbus will be less safe while the preliminary injunction remains in effect. But, in this case, the common pleas court found that it had "no evidence before [it] that might support or refute" the view that the challenged ordinances would make Columbus safer. Mem. in Support of Jurisdiction of Appellants Exhibit B at 28. *See also Taxiputinbay, LLC* at ¶ 14 (finding alleged harm to third parties too speculative due to incomplete record). Accordingly, even if harm to third parties could satisfy the requirement for harm to the appellant (it does not), in this case, even that harm is absent.[6]

[6] The Ohio Council of Churches ("OCC") amicus brief addresses the third element of the preliminary injunction test (what injury to others will be caused by the granting of the injunction). Br. of Amicus Curiae OCC at 13. OCC takes issue with how this element was applied, "or more accurately not applied," by the trial court. *Id.* While Appellees agree that firearm owners should safely store their firearms, the question before the trial court was whether the State can regulate this question to the exclusion of the city. Further, the question of whether the trial court correctly applied the third preliminary injunction factor is not before this Court. OCC shoehorns its arguments into the relevant question before this Court by broadly stating that harm to third parties will continue to happen if the government cannot immediately appeal injunctions on its laws. *See id.* at 2. However, OCC provides no arguments that unsafe storage would be curtailed by a law that punishes such storage, particularly when existing state law permits prosecution for such conduct—thereby casting doubt on the deterrent effect. *See, e.g., State v. Wyatt*, 2004-Ohio-6546, ¶ 27 (9th Dist.) (holding the defendant "clearly" created a substantial risk by leaving "a loaded, semiautomatic gun on the floor of a bedroom easily accessible to" minor children); *State v. Howard*, 2007-Ohio-3170 ¶ 87 (7th Dist.) (holding that evidence that a defendant "left a loaded, cocked, ready-to-be-fired handgun under a bed in the house where his [minor] sons had access to it was competent evidence on which the jury could have found him guilty of child endangering"). Nor does OCC provide any detail on how an immediate appeal shortens the time a preliminary injunction would prevent such laws from being enforced (as compared to a trial on the merits) or what happens if the appeals court agrees with the trial court.

The issue of whether *Appellants* are irreparably harmed purely by virtue of an injunction against the enforcement of an ordinance is addressed in the Response to Proposition of Law No. 2.

Response to Proposition of Law No. 2: *An order enjoining enforcement of an ordinance does not cause irreparable harm to the government's interests and, thus, is not automatically immediately appealable.*

A rule that the government is irreparably injured every time a court enjoins the enforcement of a law or ordinance and, therefore, is entitled to an immediate appeal, is not statutorily sound. Yet, that is exactly what the State proposes. *See* State Br. at 18–24. Appellants' position is less clear. Appellants state, "The City is not necessarily suggesting that the injunction would be per se irreparable harm, immediately enforceable in all cases." Merit Br. of Appellants at 12. But then Appellants "ask the Court to hold that an order enjoining enforcement of a statute or ordinances causes irreparable harm to the sovereign interests of the government . . . ." *Id.* at 13. This proposition comes from inapplicable federal law. It has no basis in the Ohio statute.

"[T]his court has found that an appeal after the conclusion of a case would not afford a meaningful remedy in only a few situations—all of which involve orders affecting a *right* that, once lost, can never be regained." (Emphasis added.) *State v. Jordan*, 2023-Ohio-2666, ¶ 25 (DeWine, J., dissenting). The key word here is "right[s]." Generally speaking, governments do not have rights, they have power and authority. *United States v. Emerson*, 270 F.3d 203, 228 (5th Cir. 2001) ("the people" have "rights" and "powers," but federal and state governments only have "powers" or "authority", never "rights"), *abrogated on other grounds by New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1 (2022); *compare* Ohio Const., art. I, § 1 ("All men . . . have certain inalienable rights . . . .") *with* Ohio Const. art. XVIII, § 3 ("[M]unicipalities shall have authority to exercise all powers of local self-government . . . ."); *see Ohioans for Concealed Carry,*

Inc. v. Clyde, 2008-Ohio-4605 ¶ 30 (noting that the "first step of the home-rule analysis, as noted, is to determine whether the ordinance is an exercise of police power or [power] of local self-government); *see also Schaad v. Alder*, 2024-Ohio-525 ¶ 29 ("[T]he state Constitution is a limitation of powers."), quoting *Angell v. City of Toledo*, 153 Ohio St. 179, 181 (1950). Temporary restrictions on governmental power generally do not constitute irreparable harm. Courts typically have found irreparable harm and thus the "absence of an adequate remedy after final judgment," in cases that have involved—for example—"orders compelling the production of documents containing trade secrets or privileged communications, and in cases involving the denial of requests to enforce covenants not to compete." *McHenry*, 2013-Ohio-3693, ¶ 16 (5th Dist.). *Compare Wessell Generations Inc. v. Bonnifield*, 2011-Ohio-1294 (9th Dist.) (potential disclosure of privileged information through testimony justified immediate appeal) *with Lightbody v. Rust*, 137 Ohio App.3d 658 (8th Dist. 2000) (order compelling attorney's legal opinion during discovery did not constitute irreparable harm). In addition, an order that creates a "particularly severe interference" with the appealing party's *rights* can meet this standard. *Muncie*, 91 Ohio St.3d at 452 (holding an order requiring involuntary administration of psychotropic medication to an incompetent defendant was final and appealable). The key feature of cases allowing interlocutory appeals of preliminary injunctions because of irreparable harm is that the proverbial bell rung by the preliminary order cannot be unrung. *Id.* at 451.

Appellants have presented no Ohio authority showing that a preliminary injunction preventing enforcement of an ordinance rings a "bell" that cannot be unrung. *See Preterm-Cleveland*, 2022-Ohio-4540 at ¶ 16 (1st Dist.) (federal case law holding that enjoining a valid state law inflicts "serious[ ] and irreparabl[e] harm" on a state is irrelevant to Ohio's appellate scheme).

In its amicus brief, the State argues that both it and municipalities suffer irreparable harm

when a court grants a preliminary injunction against an enacted statute or ordinance. First, the statute does not use the term irreparable; rather, that is one of the factors Ohio courts have used to determine if an appealing party will have a meaningful or effective remedy. But the State plows forward lamenting that the government has no recourse for the period the order prevented the statute or ordinance from becoming effective. Its harm, it asserts, is the government's inability to act as the legislative representatives elected by the people. However, this presumes the constitutionality of the statute in question—which is a dubious presumption. *See Arevalo*, 249 Ariz. at 378, ¶ 32 (Bolick, J., concurring) (noting that when laws infringe on *fundamental rights*, the presumption of constitutionality should fall away); *contra State v. Dorso*, 4 Ohio St.3d 60, 61 (1983) ("It is axiomatic that all legislative enactments enjoy a presumption of constitutionality."). Even federal courts have explained that "there can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute." *Joelner v. Vill. of Washington Park, Illinois*, 378 F.3d 613, 620 (7th Cir. 2004). *See also Connection Distributing Co. v. Reno*, 154 F.3d 281 (6th Cir. 1998) (affirming the denial of a preliminary injunction against a record-keeping statute but acknowledging substantial harm to the government depends on whether the order prevented enforcement of a *constitutional* law).

Appellants and the State functionally concede this point by limiting their irreparable harm analyses to "wrongly" or "improperly" granted preliminary injunctions. *E.g.,* Merit Br. of Appellants at 13 (noting "improperly entered injunctions" cause harm to "duly enacted" and "legally passed" laws); State Br. at 19 (noting that preliminary injunctions cause harm when courts "*incorrectly* deem a statute unconstitutional"); *id.* at 20 (noting that "the bottom line" is irreparable harm occurs only "whenever a State is wrongly 'enjoined'"); *id.* at 24 (arguing that "the Court should conclude that orders wrongly enjoining the enforcement of state or local laws inflict

irreparable harm"). So, as the State and the federal courts that it relies on agree, if a statute is unconstitutional, an order enjoining it does not irreparably harm the government. *See* State Br. at 20 (agreeing with the limitation in *Abbott v. Perez*, 585 U.S. 579 (2018), harm only occurs to injunctions of constitutional statutes). Because the plaintiff must show—and the trial court must find—"by clear and convincing evidence" that the law is likely unconstitutional, it is unclear how the government is prejudiced by being denied an immediate appeal. Oral Argument at 03:20, *Preterm-Cleveland v. Yost*, 2023-Ohio-4570 (No. 2023-0004) (question of Brunner, J.). "[I]f the [government] is ultimately interested in being fair to the people, wouldn't it want the court to take its time to ensure that a law that could be and seemed to be likely to be unconstitutional wouldn't be imposed upon the people unnecessarily?" Oral Argument at 03:40, *Preterm-Cleveland v. Yost*, 2023-Ohio-4570 (No. 2023-0004) (question of Brunner, J.).

As the State points out, statutes are presumed to be constitutional. *See State v. Mole*, 2016-Ohio-5124, ¶ 10. That is why a plaintiff challenging the constitutionality of a statute and seeking a preliminary injunction as relief must overcome a presumption of constitutionality by clear and convincing evidence. *Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 2002-Ohio-2427, ¶ 62. But the presumption of constitutionality does not mean that a finding of unconstitutionality and an accompanying preliminary injunction irreparably harms the government. There is no logic in that. Under the three-factor analysis used by Ohio appellate courts, an affected government has the opportunity to show irreparable harm, but that degree of harm is not self-evident or automatic.

For the foregoing reasons, Appellees urge this Court to hold that irreparable harm does not—ipso facto—occur when a preliminary injunction prevents government officials from enforcing an unconstitutional statute or ordinance.

CONCLUSION

Appellees ask this Court to uphold the judgment of the Fifth District Court of Appeals and remand the case to the Delaware County Court of Common Pleas for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a true and accurate copy of the foregoing Merits Brief of Appellees has been served by e-mail to counsel of record for Defendants-Appellants this 31 day of July 2024.

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