In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2020-1266
	:	
Appellee,	:	On Appeal from the
	:	Lucas County
v.	:	Court of Appeals,
	:	Sixth Appellate District
EDWARD MADDOX,	:	
	:	Court of Appeals
Appellant.	:	Case No. CL-19-1253

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

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INTRODUCTION

This Court does not decide constitutional issues except in cases that squarely present them. *State ex rel. DeBrosse v. Cool*, 87 Ohio St. 3d 1, 7 (1999) (citation omitted). This rule is part and parcel of the Court's admonition against issuing advisory opinions. *See State ex rel. Essig v. Blackwell*, 103 Ohio St. 3d 481, ¶34 (2004) (citation omitted). And it reflects the "cardinal principal of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more." *State ex rel. Asti v. Ohio Dep't of Youth Servs.*, 107 Ohio St. 3d 262, 2005-Ohio-6432, ¶34 (quoting *PDK Laboratories, Inc. v. United States Drug Enf't Admin.* (D.C. Cir. 2004), 362 F.3d 786, 799 (Roberts, J., concurring in part and in the judgment)).

In this appeal, it is improper, not just unnecessary, to decide Maddox's challenge to the constitutionality of the Reagan Tokes Act. *See* Am.Sub.S.B. 201, 2018 Ohio Laws 157. That law requires courts to impose indeterminate sentences on many felons. The sentence includes a range of prison terms, including a minimum term and a maximum term. R.C. 2929.14(A)–(B). The law presumptively requires that offenders be released after serving the minimum sentence (or at an even-earlier date if the sentence is adjusted based on good behavior). R.C. 2967.271(B); R.C. 2967.271(F)(1). But the Department of Rehabilitation and Correction *may* continue to detain the offender for a "reasonable" period, not to exceed the maximum sentence. It may do so *only* after holding a hearing,

and *only if* it concludes that the offender satisfies one of three requirements for extended detention. R.C. 2967.271(C), (D).

In this direct appeal from the imposition of a felony sentence, Edward Maddox says the Reagan Tokes Act unconstitutionally delegates sentencing authority to the executive branch. The trouble is, the Department has not attempted, and may never attempt, to extend Maddox's detention beyond the minimum term. Maddox does not contend otherwise: he seeks review because he is subject to the Reagan Tokes Act and thus *potentially* eligible for an extended detention. Because it is entirely speculative whether Maddox will suffer any injury at all from the challenged aspects of the Reagan Tokes Act, the case is not yet ripe for review and Ohio courts lack jurisdiction to decide it. *See State ex rel. Elyria Foundry Co. v. Indus. Comm'n*, 82 Ohio St. 3d 88, 89 (1998). The Sixth District thus correctly held that it lacked jurisdiction to pass on the unripe constitutional challenge Maddox pressed before it. This Court should affirm.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law 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. The Attorney General appears here to defend a state law, Am.Sub.S.B. 201, 2018 Ohio Laws 157, against the constitutional challenge Maddox presents here.

STATEMENT OF THE CASE AND FACTS

1. In 2019, Edward Maddox pleaded guilty to two counts of attempted burglary (a third-degree felony) and one count of burglary (a second-degree felony). *State v. Maddox*, 6th Dist. Lucas No. CL-19-1253, 2020-Ohio-4702 ¶2 ("App.Op."). For the burglary count, the trial court sentenced Maddox to an indefinite prison sentence of between four and six years. It imposed twelve-month sentences for each attempted burglary, but made those sentences run concurrently with the four-to-six-year sentence. *Id*. ¶¶1, 3.

The court imposed the burglary sentence pursuant to Am.Sub.S.B. 201, 2018 Ohio Laws 157, commonly called the "Reagan Tokes Act." *Id.* ¶3. The Reagan Tokes Act requires courts to impose indefinite sentences on defendants convicted of first- and second-degree felonies. R.C. 2929.14(A)(1)(a), (2)(a); R.C. 2929.144(C), (D). (This requirement does not apply to cases in which the defendant is sentenced to death or life imprisonment. *See* R.C. 2929.01(FF)(2); R.C. 2929.14(A).) Each indeterminate sentence includes a range of possible prison terms. The minimum prison term is a sentence among those authorized under R.C. 2929.14(A)(1)(a) or (2)(a). The top of the range is determined by a formula that accounts for a variety of factors. R.C. 2929.144(B)(1)–(4), (C), (D).

Under the Reagan Tokes Act, the defendant is *presumptively* to be released upon the earlier of two dates. The first is the expiration of the "offender's minimum prison

term." R.C. 2967.271(B). The second date is the "offender's presumptive earned early release date." *Id*. An offender can secure a presumptive earned early release based on a recommendation of the Director of the Department of Rehabilitation and Correction. The Director may, based on "exceptional conduct while incarcerated or the offender's adjustment to incarceration," R.C. 2967.271(F)(1), recommend a sentence reduction of between 5 and 15 percent of the minimum term. The trial court holds a hearing at which it may accept the recommendation. R.C. 2967.271(A)(2), (F).

Critically for present purposes, the law allows the Department of Rehabilitation and Correction to rebut the presumptive (minimum term) release date based upon a number of factors relating to the offender's conduct in prison. If the Department rebuts the presumption, it can detain the offender in prison for a "reasonable" period *not to exceed* the maximum prison term imposed by the trial court. R.C. 2967.271(C), (D)(1). In order to impose the additional detention period, the Department must conduct a hearing at which it may rebut the presumption in one of three ways. R.C. 2967.271(C). First, the Department may rebut the presumed release date by showing that the offender was placed in extended restrictive housing at any time within the year preceding the date of the hearing. R.C. 2967.271(C)(2). Second, the Department may rebut the presumption by showing that, at the time of the hearing, the offender is classified at one of several security levels. R.C. 2967.271(C)(3). Finally, the Department may show that the offender, during his incarceration, violated state law or prison rules and that his violations

show he has not been rehabilitated and remains a threat to society. R.C. 2967.271(C)(1). Institutional rule infractions that compromise the security of the prison or its staff or inmates, or that cause or threaten physical harm to the staff or inmates, could satisfy this factor. So could an unprosecuted violation of law.

2. Maddox did not object at his sentencing hearing, or otherwise in the trial court, to the Reagan Tokes Act's application. *See* App.Op. ¶¶4, 5. He nonetheless filed an appeal in which he argued that the Reagan Tokes Act is unconstitutional. According to Maddox, the law, by empowering the Department to hold a hearing and to decide whether to detain him past the presumptive release date, violated numerous constitutional provisions. App.Op. ¶¶4, 5.

The Sixth District Court of Appeals determined that these challenges were not yet ripe for review. App. Op. ¶¶11, 14. Maddox, the court concluded, had not yet been subject to the portion of the Reagan Tokes Act he challenged. Further, it remained uncertain whether he *would be* subject to that portion of the law: while Maddox challenged the constitutionality of the law's vesting the Department with the power to detain him beyond his presumptive release date, it was entirely possible the Department would decide not to detain him. *Id.* ¶¶11, 14. Because the case was not yet ripe for review, the court dismissed the appeal. *Id*., Judgment Entry.

Although the Sixth District dismissed Maddox's case, it acknowledged that its ripeness ruling conflicted with rulings from the Second and Twelfth Districts, both of

which reached the merits of challenges to the Reagan Tokes Act. *State v. Leet*, 2d Dist. Montgomery No. 28670, 2020-Ohio-4592; *State v. Ferguson*, 2d Dist. Montgomery No. 28644, 2020-Ohio-4153; *State v. Barnes*, 2d Dist. Montgomery No. 28613, 2020-Ohio-4150; and *State v. Guyton*, 12th Dist. Butler No. CA2019-12-203, 2020-Ohio-3837. It thus certified a conflict on the following question:

> "Is the constitutionality of the provisions of the Reagan Tokes Act, which allow the Department of Rehabilitation and Corrections to administratively extend a criminal defendant's prison term beyond the presumptive minimum term, ripe for review on direct appeal from sentencing, or only after the defendant has served the minimum term and been subject to extension by application of the Act?"
>
> Entry Certifying a Conflict, *State v. Maddox*, 6th Dist. Lucas No. CL-19-1253 (Oct. 14, 2020).

3. This Court accepted review of the certified question. *12/28/2020 Case Announcements #2*, 2020-Ohio-6913.

ARGUMENT

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

> *A challenge to the constitutionality of R.C. 2967.271 by an inmate who has not yet had his detention extended is not ripe for review and should be dismissed.*

Maddox challenges the constitutionality of the provision in the Reagan Tokes Act that allows the Department to hold a hearing, rebut the presumptive release date, and thereby to detain inmates beyond their minimum sentences. But before Ohio courts may adjudicate that issue, they must ensure they have jurisdiction to do so. And unless the case is "ripe" for review, it is not justiciable, and they lack jurisdiction. *See State ex*

rel. Elyria Foundry Co. v. Industrial Comm'n, 82 Ohio St. 3d 88, 89 (1998). The Sixth District correctly held that Maddox's constitutional challenge is not ripe for review. This Court should therefore affirm the Sixth District's judgment.

A. The Sixth District correctly held that Maddox's constitutional challenges to a provision that may never apply to him are not ripe for review.

1. Ohio's Constitution vests the State's courts with the "judicial power." art. IV, §1. The "judicial power is the authority vested in some tribunal to hear and determine the rights of persons or property, or the propriety of doing an act; a power involving the exercise of judgment and discretion in the determination of questions of right *in specific cases* affecting the interests of persons or property." *Stanton v. State Tax Comm'n*, 114 Ohio St. 658, 671–72 (1926) (emphasis added). In other words, the judicial power is the power to resolve actual disputes between parties, not the power "to give opinions upon … abstract propositions, or to declare principles or rules of law which cannot affect the matter at issue in" a particular controversy. *Travis v. Pub. Utils. Comm'n*, 123 Ohio St. 355, 359 (1931); *accord Cyran v. Cyran*, 152 Ohio St. 3d 484, 2018-Ohio-24, ¶9; *Fortner v. Thomas*, 22 Ohio St. 2d 13, 14 (1970). The limited reach of the "judicial power" means the courts cannot hear constitutional challenges to a statute unless the challenger is adversely affected by the statute he or she seeks to challenge. *Palazzi v. Estate of Gardner*, 32 Ohio St. 3d 169, 175 (1987).

The "ripeness" doctrine is but a specific application of the rule that the "judicial power" extends only to actual controversies between actual parties. "In order to be justiciable, a controversy must be ripe for review." *Keller v. City of Columbus*, 100 Ohio St. 3d 192, 2003-Ohio-5599, ¶26 (citation omitted). "A claim is not ripe if it rests on contingent events that may never occur at all." *State ex rel. Jones v. Husted*, 149 Ohio St. 3d 110, 2016-Ohio-5752, ¶21 (*per curiam*); *accord State v. Loving*, 180 Ohio App. 3d 424, 2009-Ohio-15, ¶4, (10th Dist.) (citing *Texas v. United States*, 523 U.S. 296, 300 (1998)). The ripeness doctrine counsels against adjudicating claims based on contingent events that may never come to pass. *Elyria Foundry*, 82 Ohio St. 3d at 89. It thus ensures that the "judicial machinery" will be "conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote." *Id*. (citation omitted). The doctrine also protects the separation of powers, keeping the courts from "entangling themselves in abstract disagreements over administrative policies," and instead putting off judicial review of the other branches' work "until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807–08 (2003) (citation omitted). Thus, a claim that is based upon alleged possible future injuries that may not occur is not yet ripe for review. *Cf. Consolo v. City of Cleveland*, 103 Ohio St. 3d 362, 2004-Ohio-5389, ¶23; *see also State v. D.H.*, 120 Ohio St. 3d 540, 2009-Ohio-9, ¶37. As this Court has recognized, an "[a]ppeal lies only on behalf of a party

aggrieved by the final order appealed from" and is "not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the appellant." *State ex rel Newsome v. Hack*, 159 Ohio St. 3d 44, 2020-Ohio-336, ¶9 (quoting *State ex rel. Gabriel v. Youngstown*, 75 Ohio St. 3d 618, 619, 1996-Ohio-445 (1996) (internal quotations and citation omitted), *vacated on other grounds*, *State ex rel. Newsome v. Hack*, 2020-Ohio-4812.

2. Maddox's constitutional claim on appeal is unripe because it "rests on contingent events that may never occur." *Jones*, 2016-Ohio-5752 at ¶21. Again, he seeks to challenge the constitutionality of the provision in the Reagan Tokes Act that permits the Department, after holding a hearing and making one of several showings, to detain inmates beyond their minimum sentences or presumptive early release dates. The problem for Maddox is that it is entirely speculative whether any of this will occur. The Department may never even attempt to hold Maddox beyond his minimum sentence or presumptive early release date, meaning Maddox may not even face a hearing to *consider* the possibility of extending his detention. If the Department does hold such a hearing, it will be allowed to extend Maddox's detention only if it shows:

> (1) that Maddox, while incarcerated, committed prison-rule or legal violations suggesting his failure to reform;
>
> (2) that Maddox was placed in extended restrictive housing within a year before the hearing; or
>
> (3) that Maddox, at the time of the hearing, is classified as a level three or higher security risk.

R.C. 2967.271(C)(1)–(3). Unless Maddox does something to implicate one of these three conditions, there would be no reason for the Department to even hold a hearing, and no reason for extending the hearing if it chooses to hold one.

In sum, it is entirely uncertain whether Maddox will be affected by the extended-sentence provision in the Reagan Tokes Act. In that respect, it is distinct from cases in which regulated parties seek to challenge administrative regulations, such as environmental rules, that will control the manner in which they may permissibly run their businesses. *See, e.g.*, *Williams v. Akron*, 54 Ohio St. 2d 136, 145–46 (1978). In this case, unlike in those cases, Maddox's constitutional claim "rests on contingent events that may never occur at all." *Jones*, 2016-Ohio-5752 at ¶21. While Maddox *may be* affected by the extended-detention provisions in the Reagan Tokes Act, regulated parties burdened by an administrative regulation are immediately harmed by a rule that dictates the manner in which they are to operate. The challenge is therefore unripe, and the Sixth District correctly held that it lacked jurisdiction to decide the challenge.

Awaiting a concrete factual situation in which to consider Maddox's challenges will, in addition to complying with the ripeness doctrine, serve one of that doctrine's principal purposes: ensuring "an adequate record to permit effective review and decisionmaking." *Artway v. Att'y Gen.*, 81 F.3d 1235, 1247 (3d Cir. 1996). The legal question presented may be informed by numerous still-unknown questions. *Contra* Ohio Public Defender Amicus Br.5. For example: How will the Department identify the legal or

prison-rule violations that trigger a hearing? How will the Department review the inmate's record? By awaiting a case that presents a concrete application of the Reagan Tokes Act, the Court will benefit from added insight about the Act's operation.

B. Maddox's and his *amici*'s arguments in favor of deciding the constitutional issues now are unavailing.

Maddox's attempts to save his case from ripeness come up short.

Consider, for example, his suggestion that the Reagan Tokes Act's extended-sentence provision already harmed him. Maddox says the potential of an extended sentence hindered his ability to secure a favorable plea deal by obscuring the "maximum penalty" for his crimes. *See* Maddox Br.7. This argument rests on a false premise. Contrary to Maddox, every defendant potentially subject to the extended-sentence provision *does* know the maximum penalty to which he may be subject. The reason is that, under the Reagan Tokes Act, any extended detention imposed by the Department "*shall not exceed the offender's maximum prison term.*" R.C. 2967.271(D)(1) (emphasis added). And the "maximum prison term" is easily calculable: the Reagan Tokes Act provides a precise formula that the State, the trial court, and the defendant can use to determine what the maximum prison term is. *See*, *e.g.*, R.C. 2929.144(B). Thus, the possibility that the Department might invoke the Reagan Tokes Act to hold someone beyond his minimum sentence does not keep defendants in the dark about the "maximum penalties" they face.

Maddox also asserts that treating his claim as ripe before sentencing is necessary to avoid imposing an invalid sentence. Maddox Br.8. Along the same lines, he says that his entire sentence can be appealed, right now, as "contrary to law," pursuant to R.C. 2953.08(A)(4). *Id*. at 10; *see also* Ohio Public Defender Amicus Br.8. The problem with these arguments is that the sentence "imposed" by the trial court is valid, not contrary to law, even on Maddox's own theory. Maddox does not dispute the legality of his indefinite sentence. Instead, he challenges the extended detention to which he *might* be subject *only if* the Department seeks to extend his detention and *only if* he is eligible for an extension. As of now, nothing the trial court did threatens Maddox with any imminent or actual harm. Instead, the sentence, in light of the Reagan Tokes Act, threatens *speculative* harm. That is the very definition of an unripe case. *Elyria Foundry*, 82 Ohio St. 3d at 89.

The fact that Maddox is not now subject to an illegal sentence is what distinguishes his case from cases like *State v. Smith*, 131 Ohio St. 3d 297, 2012-Ohio-781, ¶10 (2012) (cited by Maddox Br.11). In *Smith*, the Court heard a direct appeal in which a defendant challenged his sentence on the ground that the trial court failed to give a legally required notice before imposing the sentence. *Id*. In that case, the trial court's failure to provide the required notice subjected the defendant to an illegal sentence. *Id*. *see also State v. Moss,* 186 Ohio App. 3d 787, ¶21 (4th Dist. 2010). Here, in contrast, the sentence

is perfectly legal—Maddox seeks only to challenge an extended detention that might not ever occur.

Maddox also suggests that the failure to provide for an immediate appeal would contravene the right to appointed trial and appellate counsel. Maddox Br.11–13; *see also* Ohio Public Defender Amicus Br.8–9. Under the State's theory, prisoners wishing to challenge a detention extended under the Reagan Tokes Act may do so through habeas corpus petitions at the appropriate time—even though they may not do so through direct appeals from their initial convictions—because a habeas petition is a proper approach to securing immediate release from custody. Petitioners may even file a habeas petition directly in this Court, and seek expedited review, the moment their challenge to the Reagan Tokes Act becomes ripe. Maddox says habeas is not a viable solution because, while criminal defendants are represented by appointed counsel on direct appeal, they have no such right to counsel during habeas review. Maddox Br.11–12. This argument fails. Assuming for argument's sake that inmates have a constitutional right to counsel in challenges to prison-term extensions imposed under the Reagan Tokes Act, the solution is for courts to appoint counsel in such cases, not to allow a direct appeal by overlooking jurisdiction-defeating ripeness problems.

Finally, the Ohio Public Defender argues that the Reagan Tokes Act "retreats from" the "lauded goal of truth in sentencing." Ohio Public Defender Amicus Br.3. That policy argument has nothing to do with the jurisdictional question presented here. Nor

does it have anything to do with Maddox's merits argument. The General Assembly, not the courts, dictates sentencing policy. *See, e.g.*, *State v. South*, 144 Ohio St.3d 295, 304 (2015) ¶32 (O'Connor, C.J., concurring) (citing *State v. Fischer*, 128 Ohio St.3d 92 (2010), ¶22 (citation omitted), *overruled on other grounds by State v. Harper*, 2020-Ohio-2913, ¶40. Those who think the Reagan Tokes Act undermines the goal of truth in sentencing should direct that complaint to the legislative branch.

*

While the Attorney General believes Maddox's case is not yet ripe for review, he understands the Court may disagree. If it does, it should remand this case to the Sixth District to resolve the merits of Maddox's claim in the first instance. The certified conflict that this Court agreed to hear involves only the jurisdictional issue, not the underlying merits of Maddox's challenge. Thus, any merits ruling has been inadequately briefed. Because this is "a court of review, not of first view," *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (quotation omitted), the Court should resolve the merits in a case where those merits have been fully briefed and passed upon by a lower court.

CONCLUSION

The Court should affirm the Sixth District's decision dismissing Maddox's challenge to the constitutionality of R.C. 2967.271 as unripe.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee State of Ohio was served this 10th day of March, 2021, by e-mail on the following:

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