In the

Supreme Court of Ohio

PRETERM-CLEVELAND, ET AL.	:	Case No. 2023-0004
	:	
Appellees,	:	On appeal from the Hamilton County Court of Appeals,
	:	
v.	:	First Appellate District
	:	
DAVE YOST, ATTORNEY GENERAL OF OHIO, ET AL.,	:	Court of Appeals Case No. C-220504
	:	
Appellants.	:	

BRIEF OF APPELLEES PRETERM-CLEVELAND, ET AL. REGARDING THE PASSAGE OF ISSUE 1

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INTRODUCTION

Today, the Right to Reproductive Freedom with Protections for Health and Safety takes effect, adding a clear right to abortion to the Ohio Constitution. *See* Ohio Const. art. I, §22. In Appellant Yost's own words, S.B. 23, which bans abortion at around six weeks, "[can]not exist" now that the Constitution has been so amended. Appellees agree. The Court should therefore dismiss this appeal.

As a result of the new constitutional protections, Appellees will move to amend their complaint, adding a claim under the new constitutional provision, and intend to file a case-dispositive motion shortly thereafter. The trial court should promptly enter a final judgment declaring that S.B. 23 violates the Ohio Constitution based upon the amendment. This Court no longer needs to decide the issues before it since a final judgment on new constitutional grounds is highly likely. A final judgment reflecting that S.B. 23 clearly violates the amendment will moot the State's appeal of previously granted preliminary relief. And because standing is claim-specific, granting judgment on the new claims will moot the question of whether plaintiffs had standing to bring the original claims that led to the grant of preliminary relief.

Should the Court nevertheless choose to rule, it is even clearer that the order preliminarily enjoining S.B. 23 cannot be immediately appealed. The State suffers no harm while S.B. 23 is enjoined: it cannot be harmed by being prevented from enforcing a law that the Attorney General himself has now admitted violates the Ohio Constitution.

FACTUAL BACKGROUND

S.B. 23, which bans nearly all abortions in Ohio, is currently enjoined from enforcement by a preliminary order of the Court of Common Pleas for Hamilton County for violating Article I, Sections 1, 16, and 21, and Article I, Section 2, of the Ohio Constitution. *Preterm-Cleveland v. Yost*, Hamilton C.P. No. A 2203203 (Oct. 12, 2022) ("PI Order"). The State appealed that

preliminary injunction. The First District Court of Appeals deemed the State's appeal improper because the injunction did not "satisfy the requirements of a final appealable order." *Preterm-Cleveland v. Yost*, 1st Dist. Hamilton No. C-220504, 2022-Ohio-4540, ¶¶ 28-29. The State then appealed to this Court. On March 14, 2023, this Court accepted jurisdiction over two questions: when the State can immediately appeal orders preliminarily enjoining state laws and whether Appellees have standing to assert specific claims regarding S.B. 23. On September 27, 2023, this Court heard argument on both questions.

All the while, a citizen-led effort to amend the Ohio Constitution to explicitly protect reproductive freedom, including the right to an abortion, was underway. On the ballot as Issue 1 was the question of whether to amend Ohio's constitution to include "The Right to Reproductive Freedom with Protections for Health and Safety." In advance of the election, Attorney General Yost published a message to Ohio voters analyzing the ballot issues. In this analysis, Attorney General Yost explicitly acknowledged that the "[p]assage of Issue 1 would invalidate the Heartbeat Act." Ohio Att'y Gen., *Issue 1 on the November 2023 Ballot: A legal analysis by the Ohio Attorney General.*

On November 7, 2023, Ohioans voted to amend Ohio's constitution to include "The Right to Reproductive Freedom with Protections for Health and Safety." This right, codified in the constitution as Article I, Section 22, provides that, *inter alia*, "[e]very individual has a right to make and carry out one's own reproductive decisions, including … abortion" and that the "State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against" those rights, including the right to an abortion, "unless the State demonstrates that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care." *Id.*

The Right to Reproductive Freedom with Protections for Health and Safety ("the Amendment") takes effect on December 7, 2023, enshrining the explicit right to abortion for all Ohioans. *See* Ohio Const. art. I, §22.

ARGUMENT

While the Ohio Constitution *already* provided for a fundamental right to abortion through its substantive due process, health care freedom, and sex equality protections, *see* PI Order at ¶ 84, the Amendment's addition makes it all the more clear that the State "shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against" that right. Ohio Const. art. I, §22(B). It is beyond question that S.B. 23 does precisely what the Amendment forbids, and accordingly it cannot survive the Amendment's passage. The Attorney General has publicly conceded that the Amendment would have such an impact. Because the Amendment will resolve the underlying litigation and because it presents a significant change in the law governing the dispute between the parties on which the current appeal rests, there is no need for this Court to decide the questions currently before it. In addition, the Amendment underscores that the State suffers no harm from the inability to immediately appeal the preliminary injunction.

I. THE AMENDMENT RESOLVES THE UNDERLYING LITIGATION.

As of December 7, 2023, the Ohio Constitution expressly forbids the State from prohibiting abortion prior to viability. *See* Ohio Const. art. I, §22(B). There is no question that S.B. 23 bans abortion prior to viability. *Compare* PI Order at ¶ 2 *with* Ohio Const. art. I, §22(C)(1) (defining "[f]etal viability" as "the point in a pregnancy when, in the professional judgment of the pregnant patient's treating physician, the fetus has a significant likelihood of survival outside the uterus with reasonable measures"). Because of the clear, facial constitutional violation, the trial court will be able to resolve this case on the merits without

requiring further discovery. Appellees intend to file an amended complaint in the trial court which will assert an additional cause of action under Article I, Section 22. Additionally, Appellees intend to file a dispositive motion that would allow the trial court to swiftly resolve the case, given the plain text of the Amendment and Appellant Yost's public concession. *See* Ohio Att'y Gen., *Issue 1 on the November 2023 Ballot: A legal analysis by the Ohio Attorney General* ("[S.B. 23] would not exist if Issue 1 passes."). A dispositive ruling by the trial court granting permanent relief would eliminate the need for this Court to address the appealability of the trial court's prior order granting preliminary relief.

Swift resolution of the case by the trial court would moot the State's appeal before this Court. "A matter becomes moot when the issues are no longer live." *Jacobson v. Akron Children's Hosp.*, 2023-Ohio-2225, 220 N.E.3d 953, ¶ 54 (9th Dist.) (internal quotation marks and citation omitted). As soon as the trial court grants final relief—which is plainly appealable—the appealability of any preliminary relief would no longer be an issue. And there can be no doubt that such final relief will come soon, given the Amendment's plain text and the Attorney General's unequivocal public concession that the "[p]assage of Issue 1 would invalidate the Heartbeat Act." Ohio Att'y Gen., *Issue 1 on the November 2023 Ballot: A legal analysis by the Ohio Attorney General.*

Were this Court to issue a ruling on the appealability of preliminary relief, it would be giving an opinion "on abstract propositions." *Fortner v. Thomas*, 22 Ohio St. 2d 13, 14, 257 N.E.2d 371 (1970). Such opinions are improper. *Id.* The State may *want* a ruling on whether it may appeal preliminary orders that enjoin state laws—but this appeal is not the proper vehicle for such a ruling because the unconstitutionality of the enjoined law is no longer in doubt.[1] It is

[1] Moreover, the standing issue currently before the Court is no longer relevant because standing is claim-specific and, as noted above, Appellees intend to promptly move to amend

this Court's "settled judicial responsibility," *id.*, to refrain from giving opinions in circumstances like these, where there are no questions of law that "affect the matters *in issue in the case before*" it, *State v. Bistricky*, 66 Ohio App. 3d 395, 397, 584 N.E.2d 75 (8th Dist. 1990) (emphasis added).[2]

In sum, in light of the new Article I, Section 22, the merits of the underlying case have fundamentally changed in such a way that the final outcome below is now foretold. As a result, there exists no "actual controvers[y] between parties legitimately affected by specific facts," *Fortner*, 22 Ohio St. 2d at 14 (emphasis added), and, accordingly, this appeal should be dismissed as moot.

II. SHOULD THIS COURT DECIDE THE APPEAL, THE PASSAGE OF ISSUE 1 ONLY STRENGTHENS PLAINTIFFS' POSITION.

Should the Court address appealability, it must find that the order preliminarily enjoining S.B. 23 is not a final appealable order. The State primarily argues that the order preliminarily enjoining S.B. 23 is immediately appealable because the State suffers harm by not being able to enforce its law. *See* State Br. 16. This argument effectively urges the Court to afford it a "benefit of presumption" that S.B. 23 is constitutional, such that it could suffer harm by being preliminary enjoined from enforcing a constitutional law. State Br. at 18-19.

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their complaint to add a cause of action under Article I, Section 22 that will dispose of this lawsuit in its entirety.

[2] In *State v. Bistricky*, the Court of Appeal for the Eighth District declined to entertain the State's appeal of a trial court's motion for acquittal in part because legislation passed after the acquittal "substantially amend[ed] the pertinent criminal statute," noting that an "advisory opinion on the statute as it was at the time of trial and prior to amendment would serve no purpose and would constitute a waste of judicial time." 66 Ohio App. 3d at 397. The same principles apply here.

As Appellees have already explained, the State's position would upend well-established Ohio law that preliminary injunctions are only appealable in the narrow circumstances set forth in R.C. 2505.02(B)(4). *See* Appellee Br. at 13-20. Those specific and narrow circumstances manifestly do not include an exception permitting immediate appeal of all injunctions against the enforcement of state law. This bars the State's appeal. Additionally, in light of the Amendment, the State's position is particularly untenable. It can claim *no* harm related to its inability to enforce S.B. 23 because S.B. 23 is emphatically unconstitutional. *See Newburgh Heights v. State*, 2021-Ohio-61, 166 N.E.3d 632, ¶ 76 (8th Dist.), *rev'd on other grounds*, 168 Ohio St. 3d 513, 2022-Ohio-1642, 200 N.E.3d 189 ("[T]he state cannot be harmed when an unconstitutional law does not go into effect."). There can be no "presumption" of constitutionality here—the Ohio Constitution precluded such a presumption *prior* to the Amendment, *see* Appellee Br., and it is now indisputable. The State alleges harm that simply does not exist. As such, the State will have an adequate and effective remedy when final judgment is entered below.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court dismiss the instant appeal as improvidently accepted in light of the passage of Issue 1.

Date: December 7, 2023

Respectfully submitted,

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