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	:	Court of Appeals
OF OHIO, ET AL.,	:	Case No. C-220504
	:	
Appellants.	:	

SUPPLEMENTAL BRIEF OF APPELLANTS ON EFFECT OF CONSTITUTIONAL AMENDMENT

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INTRODUCTION

"All political power is inherent in the people," the Ohio Constitution says, and the People "have the right to alter, reform, or abolish" our State government and its laws. Ohio Const. art. I, § 2. On the issue of abortion, the People of Ohio did just that.

The Court has now asked the parties to address whether and how that recent development affects this case, in which the underlying substantive claim challenges an abortion restriction. The State Defendants acknowledge that the People have dramatically "alter[ed]" the legal landscape, and that the core prohibition of the Heartbeat Act—the prohibition on performing an abortion after a fetal heartbeat is detected—is overridden by the new Amendment.

But this dramatic legal change does not affect *this appeal*, which does not deal with the underlying Heartbeat Act, but rather critical *procedural* issues that do not turn on the substantive regulation of abortion at all. Indeed, the abortion-specific merits of the Heartbeat Act are not even before the Court. And the Court need not take the State's word for it. The ACLU, which sponsored both this case and the Amendment, said so just after the election. It noted that this pending case involved only "two narrow questions," but that "the direct question of whether the Ohio Constitution protects the right to abortion *is not yet before the court*." *Statement on Ohio Six-Week Ban Abortion Litigation Following Passage of Issue 1*, ACLU (Nov. 8, 2023, 2:00 PM), https://perma.cc/393Q-FMWT (emphasis added). The ACLU further explained that it would "continue fighting in Ohio courts" against the

Heartbeat Act, including in this Court, only "if and when our case comes back before the Supreme Court." *Id.* On this point, the ACLU is right.

As detailed below, this appeal is not the time or place to resolve the Heartbeat Act's now-conflict with the Ohio Constitution, for several reasons. Among them: the Court chose not to accept the merits for review, and until a court with proper jurisdiction reviews those merits, the case is *not* moot. Meanwhile, because the Heartbeat Act remains enjoined while the Court proceeds, no one is harmed by ensuring proper resolution.

Equally important, the Court can and should answer the pending issue of whether the preliminary injunction below was immediately appealable. As the State explained (Jur. Mem. at 4–7; State. Br. at 14–25; *see* below at 8–12), that question continues to vex parties and lower courts in other areas than abortion, and everyone needs an answer. Moreover, that issue inherently evades review, so the Court should use this rare opportunity to provide much-needed guidance. And while the third-party standing issue is comparatively less pressing after the Amendment, the Court should nevertheless resolve it to guide non-abortion cases.

The Court must of course honor the will of the People of Ohio in the extraordinary moments when they amend the Ohio Constitution. But that popular will is ordinarily expressed in State laws adopted by the People's representatives—laws that can be frozen statewide by the order of a single trial judge. This Court should hold that such orders are appealable.

ARGUMENT

This case is before the Court on just two issues: the appealability of a preliminary injunction against enforcement of a State law, and Plaintiffs' potential third-party standing to raise others' rights. The State's merits briefs explained why this injunction *is* appealable, State Br. at 14–25, and why third-party standing *is not* available here, *id.* at 25–35. Those procedural points arose in the context of an underlying claim that Ohio's Constitution, before last month's amendment, granted a right to abortion. In the light of Ohio's new Amendment, this Court's disposition of this case turns on three points.

First, the ultimate question of abortion in Ohio is not before the Court, however obvious it might seem that the core prohibition of the Heartbeat Act cannot survive the new Amendment. Second, the appealability issue not only can be resolved, but also desperately requires resolution—it goes literally to the foundation of a representative democracy, by providing a single county judge the ability to negate the acts of the peoples' representatives without any review, for a very long period of time. Third, while the third-party standing issue is not as crucial, the Court ought to resolve it to provide guidance to lower courts.

A. The constitutionality of the Heartbeat Act is not before the Court.

It would be improper for the Court to address the merits of Plaintiff's challenge to the Heartbeat Act now. The State recognizes that at first blush, it might seem that Ohio's new Amendment changes this case. The Amendment says that Ohioans have a

constitutional right to abortion, and the Heartbeat Act seeks to restrict abortions after a heartbeat is detected. Yet, despite this obvious conflict between the Amendment and the Heartbeat Act, the issue is *not* before this Court—for three reasons.

First, the Court expressly chose not to review the merits of the abortion claim here. The State, when it brought this appeal, asked the Court to address the merits along with the procedural issue. *See* Jur. Mem. at 7–9, 12–15. The Plaintiffs, for their part, opposed all review, but especially opposed reaching the merits. *See* Opp. Jur. at 12–15. They insisted not only that the Court *should* not address the merits, but that it *could* not, saying that "the only question conceivably before this Court is the narrow one of" appealability, *id.* at 12, and that the merits "are not properly before this Court," *id.* at 15. The Court granted review of both the appealability and standing issues, but expressly rejected the merits issue. *See 03/15/2023 Case Announcements*, 2023-Ohio-758.

Second, this case is here only on a preliminary injunction, so there is no final order for the Court to affirm to end the case. That would be so even if the Court had initially granted review of the merits issue, which was the propriety of granting a *preliminary* injunction, based on a *likelihood* of success. "Normally," an appellate court "limit[s] [its] review of a [trial] court's decision to grant or deny a preliminary injunction to a consideration of whether the [trial] court abused its discretion, leave[s] it at that, and remand[s] to the [trial] court for further proceedings." *Doe v. Sundquist*, 106 F.3d 702, 707 (6th Cir. 1997). A reviewing court "generally decline[s] comment on the merits of the case to the

extent possible," recognizing that "legal issues are more fully argued once litigation passes the preliminary stage" and respecting "the axiom that [a reviewing court] do[es] not consider issues not passed upon by the [trial] court." *Id.* Further trial-court action will be needed regardless of what this Court does.

Third, this case does not contain *any* conclusions of law for this Court to review regarding the relationship between the Heartbeat Act and the new Amendment. The preliminary injunction below was premised upon Ohio's *previous* constitutional language, so it did not assess the Heartbeat Act's language against the new Amendment. While the conflict between the new Amendment and the Heartbeat Act's core prohibition seems obvious, both the Amendment and the Act involve more than that core prohibition.

Indeed, a reviewing court with proper jurisdiction will be required to separate the unconstitutional portions of State law from the parts that remain perfectly valid. For example, the trial court's preliminary injunction here blocked nearly all of the Act, but it expressly allowed the State to enforce the Act's provisions relating to "adoption and foster care (R.C. 2919.1910 and R.C. 5103.11)"; "section 2919.193 naming the Act"; and "R.C. 2317.56(C)(2) regarding the internal Ohio Department of Health process for producing informed consent materials for the Department of Health." Preliminary Injunction Order at ¶134. Surely no one objects to support for adoption and foster care. And whatever objections Plaintiffs might lodge in the future about informed consent, the State will

remain free to produce materials of some kind for the Department of Health. All those issues need to be carefully sorted out and may require additional fact development. A full resolution of what statutory provisions conform to, or conflict with, the new Amendment will require careful review and briefing before a trial court. This appeal in this Court is not the time nor the place for such analysis to occur in the first instance.

Meanwhile, proceeding to resolve this appeal will not affect the existing preliminary injunction, so there will be no harm to Plaintiffs in the interim. That preliminary injunction ensures that no one's newly minted rights will be affected while the ordinary careful process of judicial review continues. And if the Court has any doubts on that score, it can add additional days to the effective date of its mandate, ensuring orderly further trial-court action while these issues are resolved permanently. *See, e.g.*, *Zurz v. Meyhew*, 2010-Ohio-5273, ¶79 (2d Dist.) (ordering that mandate reversing preliminary injunctions take effect 30 days after opinion), *vacated on other grounds sub nom. Goodman v. Hanseman,* 132 Ohio St. 3d 23, 2012-Ohio-1587, ¶1.

The State recognizes that the outcome of such judicial review is predictable for the core prohibition in the Heartbeat Act. Its position here is not meant to delay or deny that conclusion. Thus, as detailed below, the State asks the Court not only to avoid those merits issues, but to continue to resolve this case on the independently important appealability issue before it.

B. The Court should resolve the appealability issue, which is a recurring problem that needs an answer and systematically evades review.

The Court granted review in this case for a good reason having nothing to do with abortion in particular: Ohio law on the appealability of preliminary injunctions is unclear, and only this Court can provide the guidance that parties and lower courts need. The Amendment's passage does not undercut that need for guidance, and indeed, if anything, this case is now a *better* vehicle for addressing that critical procedural issue without the distracting effect of abortion law.

First, the need for certainty has grown while this case has been pending. The State need not rehash here the uncertainty of appealability law, which was well-established in our Jurisdictional Memorandum, or why our view is correct, which was covered in the merits briefing and at argument. But new cases decided after briefing continue to show uncertainty, month after month. *See, e.g.*, *England v. 116 West Main LLC*, 2023-Ohio-3086 (2d Dist., Aug. 17); *Madison Township Board of Trustees v. Hambden Sportsman Inc.*, 2023-Ohio-3694 (11th Dist., Oct. 10); *GigSmart, Inc. v. AxleHire, Inc.*, 2023-Ohio-3807 (1st Dist., Oct. 20). Those three recent cases diverge on the importance of the "status quo," a notion that the First District below relied on in this *Preterm* case, and which, the State has explained, is not part of Ohio's statute governing final appealable orders. *See* State Br. at 23–24, citing *Preterm-Cleveland v. Yost*, 2022-Ohio-4540, ¶21 (1st Dist.) ("App.Op."). In *Madison Township*, the Eleventh District said, as if it were a bright-line rule, that a "preliminary injunction that maintains the status quo pending a ruling on the merits of the

case is not a final appealable order." *Madison* at ¶12. But the First District, in *GigSmart,* found that an order it described as a status-quo injunction was nevertheless appealable on the facts there. *GigSmart* at ¶¶56–57. And in *England,* the Second District noted that "[a]though the trial court has denominated its order as a 'status [quo] order,' this language is not dispositive," and it assessed an order that, in requiring a party to "preserve" a status quo of keeping a crumbling building standing, actually required the party to take affirmative costly steps to "shore up" the building. *Id.* at ¶¶17, 21-27. All these cases show the continuing need for review of the question before this Court.

Indeed, that need for review remains especially acute in cases involving preliminary injunctions of state law, as shown just recently in a case pitting a local gun-control ordinance against State laws governing firearms. *See Cincinnati v. State,* Hamilton Cty. Com. Pl. Case No. A-2300389, Order of Sept. 28, 2023. In that case, a trial court enjoined enforcement of a State law, and when the State sought a stay pending appeal from the trial court under Rule 62, the trial court denied that stay on the express ground that the State would not be able to appeal, for lack of finality. *Id.* at 2. Yet the State appealed anyway, and the First District allowed that appeal to continue, denying the City's motion to dismiss for lack of finality. *See Cincinnati v. State,* First Dist. C-230492, Order of Oct. 25, 2023. That one-line denial order contained no analysis, so no one knows why the same district that took a bright-line approach against appealability in this case but went another direction in allowing an appeal in that one. That court needs guidance, as do the

State and the parties challenging State laws.

Second, this case is *not* moot. For all the reasons explained in Part A above, this case remains a live controversy at a minimum regarding the scope of which precise provisions are invalid, as well as because of its preliminary posture. *See* above at 6–7. Until a court issues a permanent injunction that is not appealed (or is affirmed on appeal), this case remains a live controversy, and that gives the Court at least the option to continue. For the above reasons, it should. And it does not matter if the State is no longer suffering harm from being unable to appeal this particular injunction, because the issue here is whether the injunction *was* appealable when the State tried, and the Court needs to resolve this issue for future cases.

Third, this appealability issue systematically evades review, so even if it were moot—whether in the formal sense, or in the practical sense of being on a fast glide path to mootness—it would qualify as one that is capable of repetition, yet evading review as formal matter, and one that is still jur-worthy as a practical matter.

This issue evades review systemically for this reason: A party whose appeal is dismissed for lack of finality faces a serious timing dilemma. The reason such a party tries an immediate appeal, as the State did here, is that it believes it suffers an ongoing harm, and that it will not receive an "effective remedy" by plowing on in the trial court. After all, that could take a year or more—sometimes, depending on the judge and the docket, much, much more—as was shown here by the Plaintiffs' requested trial schedule.

But even appealing to *this* Court may also take well over a year. So even if a party persuades this Court that it *was* denied an effective remedy in the trial court, *and* this Court rules in favor of appealability, the party will have irreparably lost the year to be vindicated. Worse yet, this Court would likely return the case to the appeals court to then resolve the propriety of the preliminary injunction, taking up even *more* time. A party facing that problem will most likely take the easier path of accepting its fate and returning to the trial court, *even if an appellate dismissal for lack of finality was incorrect.*

On the other hand, if a party succeeds in going forward in the appeals court, it is unlikely that the issue of finality will later be challenged in this Court. But more important, the party—especially the State, when its laws are enjoined—cannot control that eventuality. It is at the mercy of both the appellate court's decision *and* the opposing party's decision of whether to appeal the finality issue along with other issues.

This was the rare case in which the State managed to get the issue of appealability before this Court, so it should not throw away this elusive opportunity to give the guidance that courts need. Another such opportunity might not arise again soon.

Finally, the functional disappearance of the merits here benefits the Court's review of the question of appealability. The proper resolution of this procedural issue will not ultimately affect abortion availability in Ohio either way. The outcome will thus be absolved of any potential public misperception that a politically charged issue distorted this Court's proper application of appealability doctrine. Here, the Court can and should

address the appealability issue without worrying that its outcome will make any difference as to the merits of abortion regulation. If the court finds appealability—as it should for the reasons articulated, *see* State Br. at 14–25—it would be proper to leave the injunction in place when it remands. For all these reasons, the Court can and should resolve the appealability issue.

C. The Court should decide the third-party standing issue.

Ohio's law of third-party standing will continue to control non-abortion cases involving doctors or other assertions of third-party standing. True enough, the new Amendment expressly protects the rights of a "person or entity that assists an individual exercising" rights under the Amendment, such as a doctor or clinic performing an abortion. So doctors and clinics will now have their own rights in the Ohio Constitution, and will likely be able to articulate reasons for their own standing rather than rely on third-party standing.

Nevertheless, this Court may proceed to address the claims to third-party standing here. The Plaintiffs in this controversy did in fact assert third-party standing based on women's rights, not on their own rights, as no such direct rights existed then. Of course, "standing is determined as of the filing of the complaint," and "[p]ost-filing events that supply standing that did not exist on filing may be disregarded." *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 2012-Ohio-5017, ¶¶26–27; *see also Victoria Plaza Liab. Co. v. Cuyahoga Cty. Bd. of Revision*, 86 Ohio St. 3d 181, 183 (1999) (assessing standing

"at the time the complaint is filed"). Analysis of that third-party standing assertion in this case will affect future cases that might be brought by doctors in other fields unrelated to abortion or other reproductive issues, or by any other third parties asserting standing based on the rights of others. After all, despite the frequency of abortion cases in third-party-standing jurisprudence, the lead Ohio Supreme Court case on the issue involves a city and its citizens. *See City of E. Liverpool v. Columbiana Cnty. Budget Comm'n*, 114 Ohio St. 3d 133, 2007-Ohio-3759, ¶25. And the lead U.S. Supreme Court case involves lawyers and potential clients. *Kowalski v. Tesmer*, 543 U.S. 125, 130–31 (2004). Given all that, the Court can resolve the standing question, if it wishes, and it will provide guidance for future cases.

But because the Court needs to resolve the appealability issue, and the third-party standing issue has been briefed and argued, nothing impedes the Court's resolution of the proper application of third-party standing here. The State encourages the Court to do so.

* * *

As to abortion in Ohio, the People have made their decision. The Ohio Constitution has been amended to protect a right to abortion. The State recognizes that significant portions of the Heartbeat Act will not survive future scrutiny in an appropriate venue. But such scrutiny should occur in the first instance in such a venue—an appropriate trial court—and not in this Court in the first instance. The Court's guidance on the important

live issue of appealability is both proper and critical. It should not hesitate to resolve the questions over which it has accepted jurisdiction, and thus hasten the day for a proper resolution of the other issues created by the Amendment.

CONCLUSION

The Court should resolve appealability and standing, the only two questions now before the Court.

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