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.	:	

MEMORANDUM OF APPELLEES PRETERM-CLEVELAND, ET AL. IN OPPOSITION TO JURISDICTION

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INTRODUCTION

The State asks this Court to review the First District Court of Appeals' ("First District") decision that it did not have jurisdiction over the trial court's order granting a preliminary injunction. The First District's decision was correct and does not warrant this Court's review.

Under well-settled Ohio law, preliminary injunction orders that maintain the status quo are not appealable. That is all the preliminary injunction at issue in this case does. It preserves the decades-old status quo related to abortion in Ohio until factual development in this litigation is complete and the trial court rules on Appellees' request for a permanent injunction. The only issue addressed by the First District—whether it had jurisdiction to review the trial court's entry of a preliminary injunction—is neither a substantial constitutional question nor a question of great public or general interest. Nonetheless, the State asks this Court to permit this appeal, in contravention of both longstanding Ohio precedent and rules of appellate jurisdiction.

Not content with this attempted end-run around Ohio's clear jurisdictional rules, the State is also trying to uproot standard procedure by asking this Court to address the merits of this dispute before the First District has had the opportunity to do so, and while significant factual and legal development remains to be done in the trial court. At bottom, the State's position is that the underlying subject matter of this case is of intense political interest, and therefore this Court should abandon settled procedural and jurisdictional rules and decide the merits now. The exact opposite is true. It is precisely in the most controversial cases that adherence to settled procedural rules is most important: only such adherence can ensure public confidence in the legitimacy of the judiciary's actions.

This Court will have a full opportunity to weigh in on the merits of this case once the factual record is complete and the lower courts have reached decisions on the merits. It would be highly premature for the Court to intervene now. Accordingly, Appellees respectfully request that this

Court dismiss the State's appeal for lack of jurisdiction and remand to the trial court consistent with the instructions of the First District.

STATEMENT OF THE CASE AND RELEVANT FACTS

1. Ohioans have enjoyed legal and safe abortion access for nearly five decades.

2. That would change under S.B. 23, which requires that if a pregnancy is located in the uterus, abortion providers must determine whether there is cardiac activity (typically detectable at approximately six weeks after the first day of a patient's last menstrual period ("LMP"), and sometimes even as early as five weeks LMP). If there is cardiac activity, S.B. 23 makes it a crime to "caus[e] or abet[] the termination of" the pregnancy. S.B. 23, Section 1, amending R.C. 2919.192(A), 2919.192(B), and 2919.195(A).

3. S.B. 23 has only two very limited exceptions: abortion after cardiac activity is detected is permitted only if the abortion is necessary (1) to prevent the woman's death, or (2) to prevent a "serious risk of the substantial and irreversible impairment of a major bodily function." S.B. 23, Section 1, amending R.C. 2919.195(B). The language of these exceptions offers no clarity as to which medical situations—other than those specifically enumerated in the statute—create a "serious risk of the substantial and irreversible impairment of a major bodily function." As a result, S.B. 23 puts clinicians in the position of having to turn away patients experiencing significant health issues due to uncertainty as to whether the statutory definition applies to their circumstances. *See* Amended Verified Complaint (Jan. 31, 2023) ¶ 43.

4. Violations of S.B. 23 are punishable by imprisonment of up to one year and a fine of $2,500, and also expose physicians to severe civil penalties, including license revocation and additional fines. *See id.* ¶¶ 45-48.

5. S.B. 23 thus effectively bans abortion starting at an extremely early point in

pregnancy and, if permitted to take effect, would all but eliminate access to abortion in Ohio.

6. Appellees—reproductive health care providers in Ohio—first challenged S.B. 23 in federal court in 2019, shortly after it was passed. *See Preterm-Cleveland v. Yost*, No. 1:19-cv-00360, Dkt. #1. On July 3, 2019, the federal district court preliminarily enjoined S.B. 23 before it went into effect, finding that the ban would "prohibit almost all abortion care in Ohio," violating Ohioans' rights under the Fourteenth Amendment of the United States Constitution. *Preterm-Cleveland v. Yost*, 394 F.Supp.3d 796, 800-801 (S.D. Ohio 2019). The injunction remained in place until it was vacated by the same court on June 24, 2022, just hours after the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*. *Preterm-Cleveland v. Yost*, No. 1:19-cv-00360, Dkt. #100.

7. Appellees commenced the present action on September 2, 2022, seeking emergency relief (including a temporary restraining order and a preliminary injunction) from the Hamilton County Court of Common Pleas (the "trial court") due to the significant and irreparable harm caused by S.B. 23 during the two short months in which it had been in effect.[1] Appellees' initial Complaint asserted claims for violations of the fundamental right to abortion provided by the Ohio Constitution's broad protections for individual liberty under Article 1, Sections 1, 16, and 21, and the Ohio Constitution's equal protection and benefit guarantee under Article 1, Section 2.

[1] On June 29, 2022, Appellees filed a petition for a writ of mandamus with this Court, seeking an order declaring S.B. 23 unconstitutional. *See State ex rel. Preterm-Cleveland v. Yost*, Case No. 2022-0803. Appellees voluntarily dismissed their petition in September 2022, due to the ongoing irreparable harm caused by S.B. 23's enforcement and their clients' and clients' patients' need for immediate relief. Ohio S.Ct. Case Announcement 2022-Ohio-3174.

Appellees also brought a claim arising from S.B. 23's unconstitutional vagueness, in violation of Article 1, Section 16, but did not move for preliminary injunctive relief on that claim.[2]

8. On September 14, 2022, the trial court entered a 14-day temporary restraining order enjoining enforcement of S.B. 23. On September 27, 2022, the court extended this order by 14 days to enable the parties to conduct expedited discovery in advance of a scheduled hearing on Appellees' preliminary injunction motion. The parties had a little over two weeks to conduct this limited discovery before presenting evidence and live witness testimony at a single-day preliminary injunction hearing on October 7, 2022.

9. On October 12, 2022, the day that the temporary restraining order was set to expire, the trial court granted Appellees' request for a preliminary injunction, finding that they had demonstrated "a substantial likelihood of success on the merits" of their claims and "that they and their patients will suffer irreparable harm under S.B. 23." *See* Order Entering Preliminary Injunction (Oct. 12, 2022) ("PI Order") ¶¶ 81, 112, 124. The trial court expressly noted that its decision was based on "the limited record before the Court" and that "trial on the merits … was *not* consolidated" with the preliminary injunction hearing. (Emphasis added.) PI Order at 1, fn.1.

10. The State appealed the PI Order, and the First District, *sua sponte*, ordered briefing on whether it had jurisdiction to hear the appeal, separate and apart from any merits briefing. *See* Entry Ordering Jurisdictional Briefing (Oct. 28, 2022). Although the State submitted its merits

[2] On January 31, 2023, Appellees filed an Amended Complaint. In addition to their constitutional claims, Appellees have brought a claim that S.B. 23 is void *ab initio* as it violated federal law at the time of its enactment. Neither Appellees' vagueness claim nor their void *ab initio* claim has been litigated before the trial court.

brief while waiting for the First District's ruling on jurisdiction, s*ee* Appellants' Br. (Dec. 12, 2022), the First District issued its decision before Appellees' merits brief was due.

11. On December 16, 2022, the First District held that it lacked jurisdiction and dismissed the appeal. *See Preterm-Cleveland v. Yost*, 1st Dist. Hamilton No. C-220504, 2022-Ohio-4540 ("App."). The court's decision was limited solely to the question of appellate jurisdiction. *See* App. ¶ 8 ("[W]e do not weigh the merits of the case; rather, we must determine the threshold question of whether, under Ohio law, we may exercise jurisdiction over the state's appeal of the preliminary injunction order.").

12. In its decision, the First District held that the PI Order is not an appealable final order under R.C. 2505.02(B)(4), because it is merely a preliminary order "issued… on a limited record and on an expedited basis" that "maintains the precontroversy status quo." App. ¶¶ 19, 23. The court concluded that the result was compelled by Ohio law on appellate jurisdiction, observing "we cannot expand our jurisdiction simply because the case is a significant one." *Id.* ¶ 29.

13. While the State's appeal to the First District was pending, the trial court held a case management conference on December 14, 2022. *See* Dec. 14, 2022 Case Management Conference Transcript ("Tr."). In advance of the conference, the parties submitted proposed case schedules. *See* Joint Scheduling Report (Dec. 8, 2022). During the conference, the trial court decided to delay issuing a scheduling order until the resolution of the State's First District appeal, and the State did not object. Tr. at 4:12-20. As noted above, the First District's opinion came out on December 16 and, on January 3, 2023, the State then noticed an appeal to this Court. As a result, proceedings in the trial court have not yet moved forward, solely due to the State's continuing appeals.

I. THIS APPEAL INVOLVES A PURELY JURISDICTIONAL ISSUE THAT DOES NOT RAISE A MATTER OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

To demonstrate that this Court has jurisdiction over this appeal, the State must show that this appeal raises a "substantial constitutional question" or "a question of public or great general interest." S.Ct.Prac.R. 5.02(A). They do not—and cannot—show either.

First, there is no constitutional question at issue in this appeal. This Court has found that it has jurisdiction where an appeal "presents a properly debatable constitutional issue … ." *Smith v. Leis*, 2005-Ohio-5125, 106 Ohio St. 3d 309, 835 N.E.2d 5, ¶ 15. The issue decided by the First District was whether the PI Order constituted a final appealable order under R.C. 2505.02(B)(4).[3] As noted by the First District, this is an issue that "obligates [the court] to consider the language of the governing statute … ." App. ¶ 10. In other words, this issue boils down to "whether [the] order constitutes a final appealable order under R.C. 2505.02(B)(4)," *id.* ¶ 11—which is a limited question of statutory interpretation, not a constitutional question.

Second, the statutory question is routine, narrow, and uncontroversial and presents no question of public or great general interest. This Court has cautioned that questions of public or great general interest must be distinguished "from questions of interest primarily to the parties." *Williamson v. Rubich*, 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960). This standard may be met, for instance, by a "novel question[] of law or procedure … ." *Noble v. Colwell*, 44 Ohio St. 3d 92, 94, 540 N.E.2d 1381 (1989).[4] The procedural question of whether a particular preliminary

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[3] As the First District recognized, "[t]he parties agree that the only subsection of R.C. 2505.02 at issue here is R.C. 2505.02(B)(4) … ." App. ¶ 10.

[4] The merits of this case—namely, the question of whether S.B. 23 violates rights protected by the Ohio Constitution—certainly concern significant constitutional questions of great general interest. But the merits are not currently on appeal or ripe for decision by this Court, and are thus irrelevant

injunction order is appealable does not meet this high threshold. The First District's holding that the PI Order is not an appealable final order under R.C. 2505.02(B)(4), but merely a preliminary order that "maintains the precontroversy status quo," App. ¶ 23, accords with well-established law, *see id.* ¶ 21 (collecting cases). Ohio courts routinely consider whether preliminary injunctions constitute final and appealable orders. *See infra* Section II. As a result, they have developed a well-tested set of standards to guide this inquiry, which the First District applied in concluding that the PI Order did not constitute a final, appealable order. *See* App. ¶¶ 10-15, 17-28.

In short, as the First District recognized, there is extensive Ohio precedent concerning the interpretation of R.C. 2505.02, and the State's challenge is anything but "novel." *See Noble*, 44 Ohio St. 3d at 94, 540 N.E.2d 1381. The State has done nothing to demonstrate that there is any dispute regarding the application of R.C. 2505.02(B)(4): either in its jurisdictional memorandum, which does not cite a single Ohio state case in support of its first Proposition of Law, *see* State's Br. at 9-11; or in its briefing before the First District, which prompted that court to note that "the state's defense of appellate jurisdiction is notably sparse on Ohio caselaw, and the cases it does cite are distinguishable from the controversy at hand." App. ¶ 27.

Moreover, the State is incorrect to assert that the First District's decision "prevent[s] the State from *ever* appealing a preliminary injunction … ." State's Br. at 6. The decision merely addresses the appealability of the PI Order in *this* case. *See* App. ¶ 28 ("*In the case at hand* … we hold that *the trial court's order* granting plaintiffs' motion for a preliminary injunction does not satisfy the requirements of a final appealable order" (Emphases added.)). Indeed, a recent decision

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to this Court's jurisdictional analysis under S.Ct.Prac.R. 5.02(A). *See infra* Section III. Were the existence of such issues in a case enough to invoke this Court's jurisdiction, the rules of Ohio appellate procedure imposing specific limits would become irrelevant any time a constitutional claim is involved in any case.

by the Tenth District Court of Appeals proves precisely this point. *See City of Columbus v. Ohio*, 10th Dist. Franklin No. 22AP-676, 2023-Ohio-195. There, the court held that a recently-granted preliminary injunction against the State was appealable as it altered the status quo by enjoining a long-standing statute that had been in effect for over eight years before the City of Columbus filed suit. *See id*. ¶ 15.[5] The decision in this case does not preclude the State's ability to establish jurisdiction in any other appeal, and it will not do so in the future.

This Court has repeatedly refused to exercise its jurisdiction where a party has sought to appeal a lower court's application of R.C.2505.02(B)(4) to a preliminary injunction. *See, e.g.*, *Wells Fargo Ins. Servs. USA, Inc. v. Gingrich*, 132 Ohio St. 3d 1462, 2012-Ohio-3054, 969 N.E.2d 1230; *Davis v. CNG Fin. Corp.*, 119 Ohio St. 3d 1445, 2008-Ohio-4487, 893 N.E.2d 516; *DPL, Inc. v. Forester*, 109 Ohio St. 3d 1425, 2006-Ohio-1967, 846 N.E.2d 535; *Wellman Seeds, Inc. v. Delphos*, 82 Ohio St. 3d 1412, 694 N.E.2d 75 (1998). As this Court has found, whether one particular preliminary injunction is an appealable final order does not raise a substantial constitutional question or one of great public interest. In short, "with respect to preliminary injunction orders that preserve the status quo, Ohio courts have spoken." App. ¶ 22. This Court should accordingly find that this issue does not fall within its jurisdiction.

II. RESPONSE TO PROPOSITION OF LAW NO. 1: THE PI ORDER IS NOT FINAL AND APPEALABLE

"[A]n order granting or denying a preliminary injunction is a final, appealable order *only* if it satisfies the two-prong test in R.C. 2505.02(B)(4)." (Emphasis added.) *Swan Creek Twp. Bd. Of*

[5] The court distinguished the First District's decision in this case, as the PI Order did not deprive the State of a meaningful or effective remedy in part because S.B. 23 had been enjoined for nearly three years prior to this litigation. *See* 10th Dist. Franklin No. 22AP-676, 2023-Ohio-195, ¶ 18.

Trustees v. Wylie & Sons Landscaping, 6th Dist. Fulton No. F-06-026, 2007-Ohio-2839, ¶ 2. Under that test, a preliminary injunction is final for purposes of appeal where: (1) "[t]he 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," and (2) "[t]he 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). Both prongs must be satisfied to establish appellate jurisdiction. *Hootman v. Zock*, 11th Dist. Ashtabula No. 2007-A-0063, 2007-Ohio-5619, ¶¶ 2, 13.

As the First District held, the PI Order does not meet the second prong for three reasons. App. ¶ 28. *First*, the PI Order is not final and appealable because it maintains the status quo. The "status quo" is the "last, actual, peaceable, uncontested status which preceded the pending controversy." *Clean Energy Future, LLC v. Clean Energy Future-Lordstown*, 11th Dist. Trumbull No. 2017-T-0110, 2017-Ohio-9350, ¶ 5 (quoting *Aquasea Group, LLC v. Singletary*, 11th Dist. Trumbull No. 2013–T–0120, 2014-Ohio-1780, ¶ 11); *see also Quinlivan v. H.E.A.T. Total Facility Solutions, Inc.*, 6th Dist. Lucas No. L-10-1058, 2010-Ohio-1603, ¶ 5 (collecting cases). As the Ohio courts of appeals have repeatedly held, "a preliminary injunction which acts to maintain the status quo pending a ruling on the merits is not a final appealable order under R.C. 2505.02." *Taxiputinbay, LLC v. Put-in-Bay*, 6th Dist. Ottawa No. OT-20-021, 2021-Ohio-191, ¶ 17 (collecting cases); *accord In re Est. of Reinhard*, 12th Dist. Madison, No. CA2019-11-028, 2020-Ohio-3409, ¶ 17; *RKI, Inc. v. Tucker*, 11th Dist. Lake No. 2017–L–004, 2017-Ohio-1516, ¶ 11.

As the trial court recognized, and Appellants do not contest, the last, actual, peaceable, uncontested status was the "nearly five decades" of "legal and safe abortion access . . . in Ohio" that preceded S.B. 23. PI Order ¶ 131; *see also* App. ¶ 23. The PI Order that the State is attempting

to appeal merely preserves that status quo.

Second, the PI Order is not final and appealable because it is not a final remedy. As numerous Ohio courts have observed, the second prong is not met where "the provisional remedy is a preliminary injunction and the ultimate relief sought in the lawsuit is a permanent injunction." *Clean Energy Future, LLC*, 2017-Ohio-9350, ¶ 7 (collecting cases). Such is the case here. Appellees seek a permanent injunction and declaratory relief based upon their equal protection and due process claims, as well as their vagueness and void *ab initio* claims. To date, the parties have conducted only limited, expedited discovery related to Appellees' due process and equal protection claims in advance of the preliminary injunction hearing. Appellees' other claims have yet to be litigated or fully briefed before the trial court. The trial court has made clear that it intends to move the case forward to a trial on the merits and a final decision. *See supra* pp. 4-5. It is thus clear that the PI Order is not a final remedy. The State again fails to present any contrary authority, nor does it contest the status of the case pending before the trial court.

Third, the State will not suffer any harm during the pendency of the litigation. A party seeking to appeal an interlocutory order may do so only if "an appeal after final judgment will not rectify the damage." *AIDS Taskforce of Greater Cleveland v. Ohio Dep't of Health*, 2018-Ohio-2727, 116 N.E.3 874, ¶ 14 (8th Dist.) (quoting *State v. Muncie*, 2001-Ohio-93, 91 Ohio St. 3d 440, 451, 746 N.E.2d 1092). As the First District observed, "it is difficult to square the alarmist claims [of purported harm] in the state's jurisdictional brief with the fact that S.B. 23 had already been enjoined for nearly three years by the federal court." App. ¶ 26.

The State reiterates two theories of harm—both of which the First District thoroughly considered and rejected. The State first argues that states "*always*" suffer irreparable harm when constitutionally permissible laws are enjoined. (Emphasis sic.) State's Br. at 10. In support, the

State relies on three federal cases, none of which addresses the question of whether a preliminary injunction order is appealable in Ohio state courts under Ohio law. *See Maryland v. King*, 567 U.S. 1301, 1303, 133 S.Ct. 1, 183 L.Ed.2d 667 (2012); *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020); *Abbott v. Perez*, 138 S.Ct. 2305, 2324, 201 L.Ed.2d 714 (2018). This distinction is critical because, in contrast to Ohio's limited approach to appealability of non-final orders, federal law always permits appeal of orders granting a preliminary injunction. *See* 28 U.S.C. 1292(a)(1).

Moreover, as the First District recognized, the State's argument taken to its logical conclusion would mean that any preliminary injunction blocking enforcement of a state statute could be immediately appealed, on the theory that the State would be harmed by its inability to enforce the statute during the pendency of the trial court proceedings. This would completely undermine Ohio's appellate framework. Indeed, Ohio courts have rejected arguments that the State is necessarily irreparably harmed when "its duly enacted laws do not go into effect." *Newburgh Heights v. State*, 2021-Ohio-61, 166 N.E.3d 632, ¶¶ 75-76 (8th Dist.) (quotation omitted), *rev'd on other grounds*, 168 Ohio St.3d 513, 2022-Ohio-16425, 200 N.E.3d 189; App. ¶ 26.[6]

The First District also rejected the State's argument that the PI Order causes irreparable harm to third parties because abortions are irreversible. *See* State's Br. at 10-11; App. ¶ 27. And for good reason. R.C. 2505.02(B)(4)'s limited exception applies only to harm "suffered by the appealing party"—not purported harm to others. *Othman v. Heritage Mut. Ins. Co.*, 2004-Ohio-4361, 158 Ohio App.3d 283, 814 N.E.2d 1261, ¶ 11 (5th Dist.); *see also* App. ¶ 27

[6] In *City of Columbus*, the Tenth District acknowledged that the state "can claim some harm whenever a trial court enjoins a statute," but emphasized that only a "unique set of circumstances" constitute irreparable harm for purposes of R.C. 2505.02, like the "displace[ment] of a longstanding statute" that had been in effect for years before the preliminary injunction. 2023-Ohio-195, ¶ 18. Those circumstances do not exist here.

("[C]onspicuously absent [from the state's briefing] are any cases where a third-party's rights are factored into the calculus."). The State claims it should be exempted from this rule but presents no authority in support of that proposition—only baseless assertions about state sovereignty that flout the legislature's framework for appellate jurisdiction of preliminary injunction orders. The State cannot seek an end-run around the clear limits for appellate jurisdiction established by Ohio's legislature by claiming that, as the State, it is exempt from rules of appellate procedure.

III. THIS COURT'S REVIEW IS LIMITED TO THE JURISDICTIONAL ISSUE

Even if this Court were to accept this appeal, the lone issue before the Court would be whether the First District correctly determined that it did not have jurisdiction to hear the State's desired appeal of the trial court's PI Order. The State's suggestion otherwise defies both this Court's practices and black-letter appellate procedure.

The State spends much of its "jurisdictional" memorandum re-litigating the merits of the PI Order. *See* State's Br. at 7-9, 11-15. But the only question conceivably before this Court is the narrow one of whether the First District's determination of its jurisdiction was correct under Ohio law. The First District expressly declined to reach the underlying merits of the PI Order. *See* App. ¶ 29 ("[W]e cannot expand our jurisdiction simply because the case is a significant one."). Indeed, the merits were not fully briefed before the First District, which issued its decision before the deadline for Appellees' merits brief. This appeal is therefore limited to the jurisdictional question.

The State has not identified a single Ohio case in which this Court has reviewed a merits issue that was not first addressed by the intermediate appellate court. The State cites a federal case to support its assertion that "[t]he Court's 'authority to address the merits' in this appeal of a preliminary injunction 'is clear.'" State's Br. at 7 (quoting *Munaf v. Geren*, 553 U.S. 674, 692, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008)). But as explained above, Ohio's standard is different from its

federal counterpart: unlike in federal court, where preliminary injunction orders are immediately appealable, under Ohio law, preliminary injunctions are appealable only in limited circumstances. *See supra* Section II. This distinction is made clear in *Munaf*, in which the U.S. Supreme Court explained that its "authority to address the merits of the habeas petitioners' claims" was based on longstanding *federal* precedent permitting the adjudication of the merits on appeal of a preliminary injunction. 553 U.S. at 691-92.[7] The State's reliance on federal authority thus does not have any import for this Court's jurisdiction. The only *Ohio* cases on which the State relies involve appeals to this Court following a decision on the merits from an appellate court. *See State v. Moore*, 154 Ohio St. 3d 94, 2018-Ohio-3237, 111 N.E.3d 1146; *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 2013-Ohio-3019, 136 Ohio St. 3d 231, 994 N.E.2d 408; *Apel v. Katz*, 83 Ohio St.3d 11, 697 N.E.2d 600 (1998).

The State otherwise offers only that addressing the merits would further "judicial economy." State's Br. at 7. But following this logic, *any* case involving a constitutional issue could be heard directly by this Court regardless of the status of the issues in the courts below. Such an outcome runs directly counter to the rules and principles of appellate procedure and should be rejected. Once again, in support of this argument, the State relies entirely on cases where the intermediate appellate courts made a determination on the merits before the matter was appealed to this Court. *See, e.g.*, *Moore*, 154 Ohio St. 3d 94, 2018-Ohio-3237, 111 N.E.3d 1146, ¶¶ 5, 17 (addressing a constitutional issue that had been ruled upon by the intermediate appellate court *sua sponte*). The State also cites

[7] The Supreme Court also acknowledged that reaching the merits was "the wisest course" given the habeas petitions implicated "sensitive foreign policy issues in the context of ongoing military operations." *Munaf*, 553 U.S. at 692. The State has not and cannot credibly contend that similar issues are implicated here.

to *Stammco*, 2013-Ohio-3019, 136 Ohio St. 3d 231, 994 N.E.2d 408, ¶ 52, to suggest that remanding this case "merely to reach an inevitable result" would lead to unnecessary delay. State's Br. at 7. But in *Stammco*, this Court addressed an issue that had been *twice* appealed to both the intermediate appellate court and this Court. Here, where the State urges this Court to decide issues that have neither been decided by nor fully briefed to the First District—and where two claims have not even been litigated before the trial court—there is no such "inevitable result."

Moreover, it is not in the interest of judicial economy to address the merits of a preliminary injunction before a full record has been developed and all of Appellees' claims have been ruled upon by the trial court. The PI Order was based on a limited record built through expedited and narrow discovery conducted over the course of just over two weeks. The State's unfair impugnment of the trial court—that it will "drag out" its proceedings—is wholly unfounded and provides no reason to circumvent the appellate process. *See* State's Br. at 1. To the contrary, the trial court made clear that it intends to move this case forward to final judgment, *see* PI Order at 1 fn.1, and has attempted to do just that, *see supra* p. 5. Indeed, at the most recent case management conference, the court indicated that it would set a discovery schedule following the resolution of the appellate proceedings. Tr. at 3:21-4:15. It is only the State's procedurally inappropriate appeals that are preventing the trial court proceedings from moving forward.

When Appellees previously brought a mandamus claim before this Court to prohibit enforcement of S.B. 23, the State sought to have that claim dismissed by arguing that Appellees were required to resolve their claims "in an action in a common pleas court" first. *See State ex rel. Preterm-Cleveland*, No. 2022-0803, Respondents' Motion to Dismiss at 11. Now that Appellees have done as the State urged and obtained a preliminary ruling while matters proceed in the trial court, the State seeks to leapfrog over the very process it requested. The State cannot simply

cherry-pick which processes it wishes to follow because it does not agree with a particular ruling.

IV. RESPONSE TO PROPOSITIONS OF LAW NOS. 2 AND 3: THE ISSUES OF STANDING AND THE SCOPE OF THE OHIO CONSTITUTION'S PROTECTIONS ARE NOT RIPE FOR APPEAL

As discussed *supra*, this appeal is limited to the review of the First District's determination of its jurisdiction. The State's Propositions of Law Nos. 2 and 3 are not properly before this Court. Specifically, the First District has not considered the issue of standing, nor have Appellees had an opportunity to brief this issue.[8] Similarly, this Court should not consider the merits of Appellees' constitutional claims until the trial court has issued a final order and that final order is appealed to and heard by the First District. *See supra* Section III. Process matters.[9]

CONCLUSION

The sole issue raised by this appeal—the First District's determination of its own jurisdiction—is routine, narrow and noncontroversial. It raises no substantial constitutional question or question of great public interest. This Court should accordingly find that this issue does not fall within its jurisdiction under S.Ct.Prac.R. 5.02(A) and refuse to accept this appeal.

Moreover, should this Court find that it has jurisdiction to consider whether the PI Order at issue is a final, appealable order, the law on this issue is clear: it is not. *See supra* Section II. The State has provided no authority or basis for this Court to deviate from well-settled Ohio precedent and rules of appellate procedure, and this Court should not do so.

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[8] Moreover, third-party standing is a prudential question, not a constitutional one. *See Kowalski v. Tesmer*, 543 U.S. 125, 130, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004).

[9] If this Court ultimately determines that the First District has jurisdiction to consider the merits of the PI Order, then remand will be the appropriate remedy. *See* 5 Ohio Jur. 3d Appellate Review § 615 ("[W]hen the record in the Ohio Supreme Court affirmatively shows that some of the assignments of error were not passed on by the lower appellate court, the case will be remanded for the consideration of such assignments.").

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Respectfully submitted,

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I hereby certify that on February 2, 2023, the foregoing was electronically filed via the Court's e-filing system. I further certify that a copy of the foregoing was served via electronic mail upon counsel for the following parties:

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