IN THE FIFTH DISTRICT COURT OF APPEALS
DELAWARE COUNTY, OHIO

JOHN DOE 1, et al.,	)	CASE NO: 23 CAE 04 0028
	)	
Plaintiffs-Appellees,	)	
	)	On Appeal from the Delaware
vs.	)	County Court of Common Pleas
	)	CASE NO: 23-cv-H-02-0089
CITY OF COLUMBUS, et al.,	)	
	)	
Defendants-Appellants.	)	
	)	

PLAINTIFFS-APPELLEES' MOTION TO DISMISS

Plaintiffs-Appellees respectfully move to dismiss this interlocutory appeal because the trial court's decision granting a preliminary injunction and denying the Appellants' Motions to Dismiss is not a final appealable order qualifying under R.C. 2505.02 and this Court therefore lacks subject matter jurisdiction to hear the appeal. The reasons for dismissing this appeal are stated more fully in the attached Memorandum in Support.

Respectfully submitted,

/s/ David C. Tryon
David C. Tryon (0028954)
Robert D. Alt (0091753)
Jay R. Carson (0068526)
Alex M. Certo (0102790)
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 224-4422
Email: d.tryon@buckeyeinstitute.org

Attorneys for Plaintiffs-Appellees

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MEMORANDUM IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION TO DISMISS

I. Introduction

Appellate courts are courts of limited jurisdiction. *Preterm-Cleveland* v. *Yost*, 1st Dist. Hamilton No. C-220504, 2022-Ohio-4540, ¶ 9; *Assn. of Cleveland Firefighters, #93* v. *Campbell*, 8th Dist. Cuyahoga No. 84148, 2005-Ohio-1841, ¶6. "If a lower court's order is not final, then an appellate court does not have jurisdiction to review the matter, and the matter must be dismissed." *Riscatti* v. *Prime Properties Ltd. Partnership*, 137 Ohio St.3d 123, 2013-Ohio-4530, 998 N.E.2d 437, ¶ 18, quoting *Supportive Solutions, L.L.C.* v. *Electronic Classroom of Tomorrow*, 137 Ohio St.3d 23, 2013-Ohio-2410, 997 N.E.2d 490, ¶ 10. An order granting a preliminary injunction is final and appealable only if it satisfies both prongs of R.C. 2505.02. Specifically, to be final and appealable, the order granting a preliminary injunction must "effectively determine the action with respect to the provisional remedy and prevent[] a judgment in favor of the appealing party" and prevent the appealing party from obtaining any "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)(a)–(b). Here, the trial court's order granting the preliminary injunction does not "effectively determine the action," because it does not bar Defendants-Appellants ("Appellants") from eventually prevailing at trial. Neither does it prevent the Appellants from obtaining an

effective appellate remedy following a final judgment on the merits. Further, the portion of the trial court's order denying the City's Motion to Dismiss or Transfer Venue—like nearly all denials of motions to dismiss—does not "affect a right that in effect determines the action." R.C. 2505.02 (B)(1). The order from which Appellants appeal is thus not a final appealable order. As such, this Court lacks subject matter jurisdiction and must dismiss the appeal.

II. Summary of Facts.

In December 2022, the City of Columbus passed Ordinance 3176-2022 (the "Ordinance"). The Ordinance bans firearm magazines that hold 30 or more rounds of ammunition. The Ordinance, which bans these so-called "large-capacity magazines," runs afoul of R.C. 9.68, which expressly preempts local governments' authority to enact firearms regulations that exceed existing state or federal regulations, and criminalizes mere possession of these objects, even if never used for any unlawful purpose. The Ordinance also regulates the storage of firearms, which is another area of regulations preempted by R.C. 9.68.

On February 16, 2023, Plaintiffs-Appellees John Doe 1–4 and Jane Doe filed suit against the Appellants, alleging that the regulations enacted by the Ordinance are unlawful and invalid because they violate R.C. 9.68's preemption requirement, a requirement which the Ohio Supreme Court has twice upheld. Second, Appellees pled that the Ordinance violates Article I, Section 4 of the Ohio Constitution, which secures Ohioans' fundamental right to "bear arms for their defense and security." Third, Appellees argued that the Ordinance's definition and alternative definition for "large capacity magazines" was void for vagueness under the Ohio Constitution.

On February 16, 2023, Appellees' filed a Motion for a Temporary Restraining Order and a Preliminary Injunction. The trial court held a hearing on the preliminary injunction on February 21, 2023. Because all parties had notice of and were represented at the hearing, the court did not rule on the motion for a temporary restraining order but treated the matter as a preliminary

injunction. That same day, Appellants filed a Motion to Dismiss the Complaint or, in the Alternative, to Transfer Venue. On February 24, 2023, Appellees filed their Motion Seeking Leave to Proceed Pseudonymously.

On February 27, 2023, the City of Columbus amended the Ordinance by enacting Ordinance 0680-2023 (the "New Ordinance"). The New Ordinance cured the vague language Appellees challenged and, ostensibly, temporarily delayed the enforcement of the "large capacity magazine" ban until July 1, 2023, and added new provisions.

On March 10, 2023, Appellees' filed an Amended Complaint, adding a new plaintiff, John Doe 5, and challenging the additional provisions in the New Ordinance. On March 17, 2023, Appellees renewed their motion for a preliminary injunction. On March 24, 2023, Appellants filed their Motion to Dismiss the Amended Complaint or, in the Alternative, to Transfer Venue.

On April 25, 2023, after all allowable briefing, the Delaware County Court of Common Pleas (1) granted Appellees' 2/24/23 Motion Seeking Leave to Proceed Pseudonymously, (2) denied Appellants' 2/21/23 and 3/24/23 motions to dismiss the case or transfer venue, and (3) granted Appellees' 2/16/23 and 3/17/23 motions for a preliminary injunction. Appellants have now appealed the Court's Judgment Entry.

III. Law and Argument: The Delaware County Court of Common Pleas' order is not a final appealable order under R.C. 2505.02.

An order is only considered a final appealable order if it comports with R.C. 2505.02. That statute, in relevant part, provides:

> An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> (1) An order that affects a substantial right in an action that in effect determines the

action and prevents a judgment;

* * *

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(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).

While the court's order did dispose of several motions, none of the decisions are final appealable orders under these subsections. As such, this Court lacks subject matter jurisdiction, and the Court should dismiss the appeal.

A. The order granting Appellees' motion for a preliminary injunction.

The common pleas court's order granted a preliminary injunction, which is a provisional remedy that does not meet the requirements for a final appealable order. "A preliminary injunction is a provisional remedy, which is defined as a 'remedy other than a claim for relief.'" *McHenry* v. *McHenry*, 5th Dist. Stark No. 2013CA00001, 2013-Ohio-3693, ¶ 11, quoting R.C. 2505.02(A)(3). *See State* v. *Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 145, quoting *State* v. *Muncie*, 91 Ohio St.3d 440, 448 (2001) (describing list of ancillary proceedings in R.C. 2505.02(A)(3) as "a nonexhaustive list of examples"); *Youngstown City School Dist. Bd. of Edn.* v. *State*, 10th Dist. Franklin No. 15AP-941, 2017-Ohio-555, ¶ 6 (stating that a "preliminary injunction is a provisional

remedy, considered interlocutory, tentative, and impermanent in nature"); *Dimension Serv. Corp.* v. *First Colonial Ins. Co.*, 10th Dist. Franklin No. 14AP-368, 2014-Ohio-5108, 118 ("The purpose of a preliminary injunction is to preserve the status quo pending a resolution of the case on the merits.").

An order that grants a provisional remedy is considered a final appealable order only when it both:

> (a) * * * 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]
>
> (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.

(Emphasis added.) R.C. 2505.02(B)(4).

The first requirement is not satisfied here because "a preliminary injunction only serves to maintain the status quo pending litigation of the []issues in this matter. Ohio courts have found that '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.'" *McHenry* at ¶ 17–18[1], quoting *Hootman* v. *Zock*, 11th Dist. Ashtabula No.2007–A–0063, 2007-Ohio-5619, ¶ 16; *E. Cleveland Firefighters, IAFF Local 500* v. *E. Cleveland,* 8th Dist. Cuyahoga No. 88273, 2007-Ohio-1447, ¶ 5; *Deyerle* v. *Perrysburg*, 6th Dist. Wood No. WD–03–063, 2004-Ohio-4273, ¶ 15. In cases involving injunctions enjoining the enforcement of statutes, Ohio courts of appeal have defined the "status

[1] While *McHenry* used R.C. 2525.02(B)(4)(a) in determining that "a preliminary injunction which acts to maintain the status quo pending a ruling on the merits is not a final appealable order," other courts used subsection (4)(b) to reach that conclusion.

quo" as the "last, actual, peaceable, uncontested status which preceded the pending controversy." *Preterm-Cleveland*, 2022-Ohio-4540, at ¶ 21. In *Preterm-Cleveland*, a case challenging changes to Ohio's abortion laws, the court explained that the appropriate "status quo" point was the statutory status quo immediately before enactment of the challenged statute. *Id.* at ¶23. Here, the status quo that the preliminary injunction serves is the state of the law immediately before the challenged Ordinance's enactment. Moreover, nothing in the trial court's order prevents Appellants from prevailing following a full hearing or trial on the merits.

Nor does the preliminary injunction satisfy subsection (b). The burden is on the appealing party to "demonstrate that it 'would have no adequate remedy from the effects of that [interlocutory] order on appeal from final judgment.'" *McHenry* 2013-Ohio-3693, at ¶ 16, quoting *Empower Aviation L.L.C.* v. *Butler Cty. Bd. of Commrs.*, 185 Ohio App.3d 477, 2009–Ohio–6331, 924 N.E.2d 862, ¶ 18 (1st Dist.). "'[I]t is well established that the granting of a temporary or preliminary injunction, in a suit in which the ultimate relief sought is a permanent injunction, is generally not a final appealable order.'" *RKI, Inc.* v. *Tucker*, 11th Dist. Lake No. 2017–L–004, 2017-Ohio-1516, ¶ 10, quoting *Hootman*, 2007-Ohio-5619, at ¶ 15.

In this case the Plaintiffs-Appellees prayed for not only a preliminary injunction, but also for "a permanent injunction," Am. Compl. at 22, and for declaratory judgment, Am. Compl. at 21. The trial court has not ruled on either of the latter two prayers for relief. The Judgment Entry below is replete with references to further action to be taken in the case—making it clear that this is not a final judgment and that Appellants will have further opportunities to prove up their case. For example, the court explained "I well understand that the procedural posture of this case is such that the city has not presented here a full-throated home-rule argument * * *." J.E. at 19. And "this preliminary injunction will remain in effect until it is dissolved or modified by me or until this case

is resolved on the merits." *Id.* at 30.

Defendants-Appellants will have a meaningful and effective remedy by an appeal following final judgment. Once a full record is developed and presented and the trial court issues its final decision, Defendants—if they lose at that stage of the case—will be able to appeal to this Court and seek a reversal of the lower court without any loss of monies or other irreparable harm to Defendants themselves. By contrast, where the courts have found the "absence of an adequate remedy after final judgment," the cases 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, at ¶16. The key feature of these cases is that the bell from the preliminary order cannot be unrung. That simply does not apply here.

While the Tenth District has recently found that a grant of a preliminary injunction in favor of the City of Columbus in its suit against the State was a final appealable order, that decision exemplifies why the grant of a preliminary injunction here is not. In *City of Columbus* v. *State*, the Tenth District determined that the Franklin County Court of Common Pleas' preliminary injunction on R.C. 9.68 is a final appealable order. Decision, *City of Columbus* v. *State*, 10th Dist. No. 22AP-676, at 11 (Jan. 24, 2023). Importantly though, the Tenth District only did so because the preliminary injunction upset—rather than maintained—the status quo. According to the Tenth District,

> The trial court's order does not merely disrupt the status quo in an abstract sense, but it displaces a longstanding statute, which had the stated purpose of promoting clarity and uniformity of regulation of firearms throughout the state, and replaces it with uncertainty and a patchwork of laws. Thus, there is an immediate impact and

> harm, both to the state's interest and also to individuals in jeopardy of criminal prosecution under the newly enacted city code provisions. The state is further harmed by the enjoining of the original version of R.C. 9.68 on grounds rejected by the Supreme Court over a decade ago. Delaying the resolution of this issue until the conclusion of the proceedings denies the state a meaningful or effective remedy because it removes the protections of stare decisis inherent in our legal system, thereby inviting repetitive challenges to laws deemed constitutional and forcing the state to expend resources in their defense.

(Internal citations omitted.) *Id.* at 10.

The preliminary injunction here presents the opposite scenario. The Delaware Common Pleas Court enjoined Appellants from enforcing the City of Columbus' ordinances. Those ordinances conflict with R.C. 9.68 and disrupt the status quo by violating "a longstanding statute, which had the stated purpose of promoting clarity and uniformity of regulation of firearms throughout the state, and replaces it with uncertainty and a patchwork of laws." *Id.* Because the preliminary injunction here maintains the status quo, it is not a final appealable order. *McHenry*, 2013-Ohio-3693, at ¶ 18.

Finally, Appellants are not denied any meaningful or effective remedy by waiting to appeal until after a final decision on the merits of the claims. Nothing in the record shows that Appellants would suffer any injury if they were not allowed to appeal this interlocutory order. Besides passing remarks to the City's home rule authority, Appellants have not argued that this lawsuit, or the granting of the preliminary injunction, would injure Appellants.

The Delaware County Court of Common Pleas order granting a preliminary injunction is

not a final appealable order under Ohio law.

B. Order denying Appellants' motion to dismiss.

"[T]he denial of [a] motion to dismiss for lack of subject matter jurisdiction, is not a final order over which this court has appellate jurisdiction." *State of Ohio* v. *Thorpe*, 5th Dist. Stark No. 6404, 1985 WL 9196, *2. In *Vizzo* v. *Morris*, the court further explained that an "order affirming the magistrate's denial of Morris' motion to dismiss for lack of subject matter jurisdiction * * * does not determine the action and prevent a judgment, nor is it an order that affects a substantial right made in a special proceeding." *Vizzo v. Morris*, 5th Dist. Fairfield No. 2011–CA–52, 2012-Ohio-2141, ¶ 41, citing *Bell* v. *Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63, 616 N.E.2d 181(1993). As this Court noted, if the appellant does not ultimately prevail on the merits, the appellant can assert "the overruling of her motion to dismiss for lack of jurisdiction by an appeal of the final judgment entered in the case." *Id.* at ¶ 42.

Certainly in this case the denial of Appellants' motion to dismiss does not affect any substantial right of any of the Appellants. Appellants filed the appeal challenging the common pleas court's order during the preliminary stages of the case. Appellants have not yet filed an answer to Appellees' Amended Complaint. The common pleas court's order does not prevent Appellants from putting on evidence challenging Appellees' claims. If the trial court ultimately rules against Appellants on the merits and a final order is issued against them, they can raise the lack of subject matter jurisdiction on appeal at that time.

As such, the denial of Appellants' motion to dismiss for lack of subject matter jurisdiction is not a final appealable order.

C. Order granting Appellees' motion to proceed pseudonymously.

Related to the common pleas court's denial of Appellants' motion to dismiss is the court's granting of Appellees' motion to proceed pseudonymously. Appellants first argued that the court

was required to dismiss Appellees' Complaint and Amended Complaint because Appellees brought their claim pseudonymously. Appellants then made the same arguments in challenging Appellees' motion to proceed pseudonymously.

Neither the granting of Appellees' motion to proceed pseudonymously nor the denial of Appellants' motion to dismiss for lack of subject matter jurisdiction on the same grounds is a final appealable order. Like a motion to dismiss for lack of subject matter jurisdiction, granting the motion to proceed pseudonymously does not plausibly fit into any of the R.C. 2505.02 categories. If, after a final judgment, this Court determined that the common pleas court proceeded improperly by allowing Appellees to proceed pseudonymously, Appellants have the appropriate remedy of having any final judgment reversed and requiring Appellees to refile their case with their identities disclosed—if they were willing to do so to their legal detriment. Thus, the order has violated no substantial right of Appellants, and R.C. 2505.02(B)(1) is inapplicable.

Similarly, proceeding pseudonymously against the government to challenge an unlawful ordinance "does not involve the same degree of risk of irreparable harm to a[n appealing] party as the decisions made in the types of actions listed under R.C. 2505.02(A)(3)." *Gen. Elec. Capital Corp.* v. *Golf Club of Dublin, L.L.C.*, 187 Ohio App.3d 420, 2010-Ohio-2143, 932 N.E.2d 401, ¶ 42 (5th Dist.). Thus, granting a motion to proceed pseudonymously is not a final appealable order.

D. Order denying Appellants' motion to transfer venue.

The common pleas court's denial of Appellants' motion to transfer venue is not a final appealable order. In *General Electric Capital Corporation*, this Court held that a denial of a motion to transfer venue did not fall into any of the categories listed in R.C. 2505.02(B) and so is not a final appealable order. *Gen. Elec. Capital Corp.* at ¶ 39–41. Specifically regarding the provisional remedies category, the court found that "[t]he basic purpose of R.C. 2505.02(A)(3) in categorizing certain types of preliminary decisions of a trial court as final, appealable orders is the protection

of one party against irreparable harm by another party during the pendency of the litigation." *Id.* at ¶ 40. As this Court correctly noted, "a decision by a trial court denying a motion for transfer of venue does not involve the same degree of risk of irreparable harm to a party as the decisions made in the types of actions listed under R.C. 2505.02(A)(3)." *Id.* at ¶ 41. Consequently, this Court "held that the denial of a request to change venue is not a final, appealable order." *Id.* at ¶ 42. See also *Mansfield Fam. Rest.* v. *CGS Worldwide, Inc.*, 5th Dist. Richland No. 00-CA-3, 2000 WL 1886226, at *2 (Dec. 28, 2000) (same).

As such, the common pleas court's order denying Appellants' motion to transfer venue is not a final appealable order, and the motion to dismiss should be granted.

IV. Conclusion

Appellees respectfully request that this Court dismiss the appeal for lack of a final appealable order.

Respectfully submitted,

/s/ David C. Tryon
David C. Tryon (0028954)
Robert D. Alt (0091753)
Jay R. Carson (0068526)
Alex M. Certo (0102790)
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 224-4422
Email: d.tryon@buckeyeinstitute.org

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

This will certify that a true and accurate copy of the foregoing Plaintiffs-Appellees' Motion to Dismiss has been served via e-mail this 22nd day of May 2023 upon the following counsel:

Richard N. Coglianese
rncoglianese@columbus.gov
Matthew D. Sturtz
mdsturtz@columbus.gov
Aaron D. Epstein
adepstein@columbus.gov
Assistant City Attorneys
City of Columbus
Department of Law
77 N. Front Street, 4th Floor
Columbus, Ohio 43215

/s/ David C. Tryon
David C. Tryon (0028954)