In the Supreme Court of Ohio

JOHN DOE 1, et al., Plaintiffs-Appellees, vs. CITY OF COLUMBUS, et al., Defendants-Appellants.	)	CASE NO: 2024-0056

MEMORANDUM IN RESPONSE TO JURISDICTION OF PLAINTIFFS-APPELLEES

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THIS CASE DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT A MATTER OF GREAT PUBLIC AND GENERAL INTEREST

The question of if and when the granting or denial of a preliminary injunction is a final appealable order under R.C 2505.02(B)(4) is an interesting and important one. However, it does not reach the threshold requirement of this court and, in any event, this case is not the best vehicle to decide that issue.

Appellants' argument that district courts "are implicitly holding that a preliminary injunction can never be appealed immediately," and that this "in practice make[s] it impossible to immediately appeal an injunction in all cases" is incorrect. *Id.* at 1. Another related case illustrates that. Columbus, obtained a preliminary injunction from the Franklin County Common Pleas Court. *Columbus v. State*, 10th Dist. Franklin No. 22AP-676, 2023-Ohio-195, ¶ 1. Despite the city also seeking a permanent injunction on a state statute, the Tenth District determined that the preliminary injunction obtained by the city violated the status quo. *Id.* at ¶ 11–19. As such, the Tenth District determined that the city's preliminary injunction *was* a final appealable order. *Id.* at ¶ 19. Appellants' other litigation belies its arguments that a preliminary injunction of duly enacted laws can never be a final appealable order.

The issue of whether plaintiffs may bring a case pseudonymously similarly does not reach the threshold for this court. First, the Fifth District Court of Appeals did not address it. Second, this court recently addressed this issue and the trial court applied the standards this court enunciated in *State ex rel. Cincinnati Enquirer v. Shanahan*, 166 Ohio St.3d 382, 2022-Ohio-448, 185 N.E.3d 1089, ¶ 36. The Delaware County Common Pleas Court was satisfied that it had jurisdiction based on the redacted—notarized—affidavits of each Appellee attached to Appellees' complaints—which were signed by four members of the Ohio bar. The court found that this sufficiently established the Plaintiffs' validity and the court's personal jurisdiction. Appellants

erroneously claimed that the common pleas court lacked subject matter jurisdiction. But this is a personal jurisdiction question, which Appellants waived because they never raised personal jurisdiction. The court should not accept jurisdiction over this issue.

Appellants also ask the court to address the merits of the case, which the court of appeals did not address. Appellees share Appellants desire to resolve the merits expeditiously. If the court does accept jurisdiction in this case, Appellees would welcome the court's confirmation that R.C. 9.68 is still constitutional and that the Columbus ordinances in question violate the Ohio Constitution, Article I, section 4.

STATEMENT OF THE CASE

Columbus' statement of the case omits certain key facts. First, as noted above, Appellees' complaint included redacted—notarized—affidavits of each Appellee. The trial court found these affidavits sufficient to exercise jurisdiction over Appellees. The court understood the need for anonymity and so did not require any further identification.

Second, while it is true that Appellees themselves did not appear for the preliminary injunction hearing, had they done so it would have destroyed their anonymity. Appellees were represented at the hearing by counsel, who submitted evidence to support their preliminary injunction motion, including the affidavits that were attached to Appellees' complaint. Appellees' counsel also cross-examined Columbus' witness and made other legal arguments to the court.

INTRODUCTION

The statute governing appealability of preliminary injunctions is well known and well used. Appellate courts deal with it all the time and Appellants have not moved to cerify a conflict under App,. R. 25 and S.Ct. Prac. R. 8.01(A). Appellants cite to inapplicable federal case law to urge this Court to accept jurisdiction and fall into line with federal courts on the appealability of preliminary injunction grants or denials. It is helpful at the start to note the different rules applying to each

court system.

Ohio Revised Code 2505.02(B)(4) provides:

(B) 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:

* * *

(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.

By contrast, federal law is much broader—giving courts of appeals jurisdiction over appeals from "[i]nterlocutory orders of the district courts * * * granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court * * *." 28 U.S.C § 1292. It would make appealablity issues simpler if the legal analysis under Ohio law were as uninvolved as under federal law, but it is not. Indeed, Appellants should seek their requested relief through an amendment to R.C. 2505.02 rather than through this court.

Appellants have not pointed to a clear split in the district courts on the issue and have not explained why this case might be one to clear up any supposed confusion. The court should allow the rulings below to stand. However, if the court accepts jurisdiction over the case, it would be

useful to determine the underlying legal issues as to R.C. 9.68 and Article I, Section 4 of the Ohio Constitution, as discussed below.

LAW AND ARGUMENT

> **Response to Proposition of Law No. 1:** *Under R.C. 2505.02(B)(4), the government may immediately appeal orders preliminarily enjoining its laws only if the requirements of R.C. 2505.02(B)(4) are met. The status quo test carries out the legislative requirement that interlocutory appeals may be brought only if the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment.*

Under R.C. 2505.02, a preliminary injunction is only immediately appealable if "[t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment * * * ." R.C. 2505.02(B)(4)(b). "Needless to say, any party losing a preliminary injunction decision can muster some claim of immediate harm, but [R.C. 2505.02(B)(4)(b)] keeps our eyes on the 'meaningful or effective remedy' standard. And with respect to preliminary injunction orders that preserve the status quo, Ohio courts have spoken." *Preterm-Cleveland v. Yost*, 1st Dist. Hamilton No. C-220504, 2022-Ohio-4540, ¶ 22, *appeal dismissed*, 2023-Ohio-4570.

Ohio courts have determined that a preliminary injunction that maintains the status quo *generally* does not deny the appealing party the opportunity for a meaningful or effective remedy. But that may not always be the case. Where maintaining the status quo denies "the appealing party the opportuinity for meaningful or effective remedy," subsection (b)(4)(b) would be satisfied. So, this court has explained, "[i]n some instances, '[t]he proverbial bell cannot be unrung and an appeal after final judgment on the merits will not rectify the damage' suffered by the appealing party." *State v. Muncie*, 91 Ohio St. 3d 440, 451, 746 N.E.2d 1092 (2001), citing *Gibson–Myers & Assocs. v. Pearce*, 9th Dist. Summit, No. 19358, 1999 WL 980562, *2 (Oct. 27, 1999). See also *Preterm* at ¶ 24 (listing multiple cases where courts *have applied the exception and allowed interlocutory appeals* of preliminary injunctions where "absent an immediate appeal, the right cannot be

vindicated"). "Indeed, [Appellants'] argument is tantamount to a conclusion that *any* preliminary injunction of a [ ] statute warrants an immediate appeal." *Id*. at ¶ 26.

Appellants' claim that the status quo test employs circular reasoning ignores both the foregoing and the role of the courts of appeals. While the purpose of a preliminary injunction is to preserve the status quo, the courts of appeals may conclude that the injunction does not maintain the status quo when deciding if R.C. 2505.02(B)(4) has been met. *See Columbus v. State*, 10th Dist. Franklin No. 22AP-676, 2023-Ohio-195 (finding that trial court's preliminary injunction on state statute disrupted the status quo and thus was a final appealable order). Simply because a preliminary injunction is entered does not end the inquiry into its appealability one way or another. It is the appeals court's duty to determine if that preliminary injunction disrupts the status quo and meets the other requirements of R.C. 2505.02.

> **Response to Proposition of Law No. 2:** *An order enjoining enforcement of an ordinance does not cause irreparable harm to the governments interest, and thus, is not automatically immediately appealable. Where a complaint seeks a permanent injunction, this is strong evidence that the appealing party will have the opportunity for a meaningful and effective remedy.*

Appellants open their arguments supporting its Proposition of Law No. 2 with quotes and citations from inapplicable federal and Georgia courts; not Ohio courts. Appellants claim that enjoining the enforcement of a municipal ordinance causes irreparable harm, but the harm it claims is to third parties—not Appellants. "[D]uring the time of [the] injunction, all the societal harms the law was intended to address go unremedied." Jurisdictional Br. at 9.

Appellants' arguments for irreparable injury thus hinges on "harm to third-parties rather than on harm to itself, which colors its jurisdictional analysis." *Preterm-Cleveland,* 1st Dist. Hamilton No. C-220504, 2022-Ohio-4540, at ¶ 25, citing *Mentor Way Real Estate Partnership v. Hertanu*, 8th Dist. Cuyahoga No. 103267, 2016-Ohio-4692, ¶ 11 (dismissing the appeal for want

of a final appealable order upon concluding that harm to a third party would not deny appellant a meaningful and effective remedy). Similar to *Preterm-Cleveland*, Appellants cannot hinge their arguments on possible injury to third parties. *See* Memo. in Support Exhibit B at 28 (finding that the public interest weighs in favor of Appellees here and noting that "the city has opted to forgo until July 1, 2023 its enforcement of the ban on large-capacity magazines"). This case provides a perfect example of why trying to hinge an appeal of a preliminary order on potential harm to third parties is inappropriate. *See id.* (noting that the court had "no evidence before [it] that might support or refute" the view that the challenged ordinances would make Columbus safer). The simple fact is, the record is not yet complete. *See Taxiputinbay, LLC v. Put-in-Bay*, 6th Dist. Ottawa No. OT-20-021, 2021-Ohio-191, ¶ 14 (finding alleged harm to third parties too speculative due to incomplete record).

"[T]his court has found that an appeal after the conclusion of a case would not afford a meaningful remedy in only a few situations—all of which involve orders affecting a right that, once lost, can never be regained." *State v. Jordan*, 2023-Ohio-2666, ¶ 25 (DeWine, J., dissenting). 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 v. McHenry*, 5th Dist. Stark No. 2013CA00001, 2013-Ohio-3693, ¶ 16. The key feature of cases allowing interlocutory appeals of preliminary injunctions is that the proverbial bell from the preliminary order cannot be unrung. See *State v. Muncie*, 91 Ohio St.3d 440, 451, 746 N.E.2d 1092 (2001).

A preliminary injunction preventing enforcement of an ordinance is *not* an order that cannot be unrung. *See Preterm-Cleveland*, 1st Dist. Hamilton No. C-220504, 2022-Ohio-4540, at ¶ 16

(finding federal case law holding that enjoining a valid state law inflicts "serious[ ] and irreparabl[e] harm" on a state as irrelevant to Ohio's appellate scheme). First, Appellants may prevail at trial, which would cause the preliminary injunction to be rescinded, and allow Appellants to enforce the city of Columbus' challenged laws. Further, if it was determined that R.C. 9.68 can not prevent Appellants from enacting firearms laws, then Appellants would be free to exercise the city's home rule authority to pass more ordinances. Thus, the preliminary injunction does not prevent Appellants from having a meaningful remedy after a trail on the merits.

Even if Appellants were correct that "a preliminary injunction of a duly-enacted law or ordinance is such a rare circumstance," Memo. in Support at 8, this is not the case to address such question. As this court's precedent holds, the city of Columbus' ordinances were not "duly-enacted" ordinances; they were unconstitutionally enacted. *See Cleveland*, 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370. There is no irreparable injury when the government acts unconstitutionally. Further, the record is incomplete as to any possible harms to third parties.

Appellants' argument that it is injured is particularly flawed given that this court has twice upheld R.C. 9.68, the ordinance which they contend is invalid. It is a stretch for them to assert irreparable harm when the injunction simply requires them to honor a statute that this court has twice confirmed is constitutional. See *Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967, ¶ 41; *Cleveland* at ¶ 25.

A. Where a complaint seeks a permanent injunction, this is strong evidence that the appealing party will have the opportunity for a meaningful and effective remedy.

While it may be that most cases that seek a preliminary injunction also seek a permanent injunction, this does not make R.C. 2505.02(B)(4) a dead letter as Appellants claim. First, a party may seek a preliminary injunction of a law without seeking a permanent injunction. For example, a party may seek a preliminary injunction to maintain the status quo while the parties seek to

resolve their legal differences, either through a declaratory judgment or otherwise.

Second, the requiest for a permanent injunction is not dispositive as Appellants' own litigation illustrates. In *Columbus v. State*, 10th Dist. Franklin No. 22AP-676, 2023-Ohio-195, at ¶ 12, the city of Columbus sought and obtained a preliminary injunction on R.C. 9.68. The Tenth District noted that "[b]ecause the provisional remedy at issue in this matter is a preliminary injunction and the City ultimately seeks a permanent injunction, there is some support for finding that the second prong of R.C. 2505.02(B)(4) is not met in this case." *Id.* Nonetheless, the court ultimately concluded that the preliminary injunction was a final appealable order under R.C. 2505.02(B)(4). *Id.* at ¶ 19. Even though courts consider the ultimate relief sought in making a determination under R.C. 2505.02(B)(4)(b), this does not mean that preliminary injunctions of laws can never be reviewed.

Appellants' erroneous claim that seeking a permanent injunction is a death sentence for all interlocutory appeals of preliminary injunctions of laws does not warrant this court's review.

> **Response to Proposition of Law No. 3:** *A common pleas court has jurisdiction to hear a complaint brought by Doe plaintiffs who properly invoke the jurisdiction of the court. The courts personal jurisdiction over a plaintiff is invoked when an individual files a complaint. The courts subject matter jurisdiction is unaffected by the plaintiff's identity.*

It would appear that this issue is not properly before the court given that the court of appeals did not address it. It certainly does not reach the level of a matter of great public concern. But Appellees respond briefly.

"A defense of lack of jurisdiction over the person," is waived if it is not included in a motion to dismiss or an answer. Civ.R. 12(H). Appellants did not raise this defense in either their motion to dismiss or their answer. Accordingly, their arguments under this proposition of law are barred.

Appellants' motion to dismiss the amended complaint did assert the lack of subject matter

jurisdiction, Civ.R. 12(B)(1), but that is inapplicable here. Defs.' Mot. Dismiss Am. Compl. at 1 ("This Court lacks subject-matter jurisdiction to hear this case because (1) Plaintiffs have failed to meet the requirements to proceed pseudonymously * * * ."); *id.* at 6 Heading II, A ("This Court lacks subject matter jurisdiction * * * .").

A claim that the court lacks jurisdiction over the parties is based on personal jurisdiction, not a lack of subject matter jurisdiction. *See Doe v. Cedarville University*, 2nd Dist. Montgomery No. 29875, 2024-Ohio-100, ¶ 9–11 (rejecting the argument that "Doe's failure to comply with Civ.R. 10" was a subject matter jurisdiction question and concluding that "the trial court had subject-matter jurisdiction to consider both Doe's complaint and the motion to proceed under a pseudonym").

Indeed, suggesting that the court lacks subject matter jurisdiction to proced pseudonyously makes no sense because subject matter jurisdiction cannot be waived or created. Yet Ohio courts have allowed cases to proceed with anonymous plaintiffs. "The practice of proceeding under a pseudonym is well established in Ohio * * *." *Doe v. Bruner*, 12th Dist. Clinton No. CA2011–07–013, 2012-Ohio-761, ¶ 4, citing *Doe v. Shaffer*, 90 Ohio St.3d 388, 738 N.E.2d 1243 (2000). Very recently, this court again recognized that a court may excuse a plaintiff from identifying him or herself in certain situations. *State ex rel. Cincinnati Enquirer*, 166 Ohio St.3d 382, 2022-Ohio-448, 185 N.E.3d 1089, at ¶ 36. Accordingly, courts have subject matter jurisdiction over cases where plainitiffs are proceeding pseudonymously.

This court has spoken definitively that plaintiffs may proceed pseudonymously with leave of the trial court based on certain criterion so there is no reason for this court to revisit the issue only two years later. Nevertheless, a few of Appellants' assertions merit some comment.

First, *Yocom*—a federal court case—explained the issue as one of personal jurisdiction—

but only where permission to proceed has not been granted. *W.N.J. v. Yocom*, 257 F.3d 1171, 1172 (10th Cir.2001). "Where no permission is granted, 'the federal courts lack jurisdiction over the unnamed parties [i.e., personal jurisdiction], as a case has not been commenced with respect to them.'" *Id.*, quoting *Natl. Commodity & Barter Ass'n, Natl. Commodity Exchange v. Gibbs*, 886 F.2d 1240, 1245 (10th Cir.1989). The trial court, of course, has personal jurisdiction over Appellees because they "submitted to the court's jurisdiction by filing the complaint." *Moore v. Mt. Carmel Health Sys.*, 162 Ohio St.3d 106, 2020-Ohio-4113, 164 N.E.3d 376, ¶ 34. *See also Doe v. Mitchell*, S.D.Ohio No. 2:20-CV-00459, 2020 WL 6882601, *4 ("There is no jurisdictional bar unless and until the Court denies plaintiff leave to proceed under a pseudonym * * * ."), *report and recommendation adopted*, S.D.Ohio No. 2:20-CV-459, 2021 WL 2313436.

Second, contrary to Appellants' assertions, federal law does not dictate that permission to use a pseudonym must come before a plaintiff files a case. "*Ordinarily*, a plaintiff wishing to proceed anonymously files a protective order that allows him or her to *proceed* under a pseudonym." (Emphasis added.) *Citizens for a Strong Ohio v. Marsh*, 123 Fed.Appx. 630, 636 (6th Cir.2005), citing *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir.2004). Federal courts have allowed plaintiffs to file their cases anonymously, and then later seek leave to *proceed* in such manner. *Publius v. Boyer-Vine*, 237 F.Supp.3d 997, 1003 n.1 (E.D.Cal.2017) (granting preliminary injunction motion and noting that the plaintiff brought his case anonymously and that his first amended complaint notes "that he intends to file a motion to pursue this case anonymously"). Indeed, the Rules of Civil Procedure do not provide a mechanism to file a motion for leave to file a complaint anonymously without first filing the complaint and obtaining a case number under which to file motions. And in contrast to Appellants' cited case *Allison Publications LLC v. Doe*, 654 S.W.3d 210 (Tex. App. 2022), Appellees' counsel here knows Appellees' identities. *See also*

Bruner, 12th Dist. Clinton No. CA2011-07-013, 2012-Ohio-761, at ¶ 2 (allowing plaintiff to explain why pseudonymity should be granted *after* the filing of a complaint).

Ohio allows pseudonymous filings, and there is no requirement of a pre-filing motion and approval. This proposition of law does not warrant the court's review.

> **Response to Proposition of Law No. 4:** *R.C. 9.68 is constitutional. All state statutes that conflict with municipal laws will limit municipal power. However, where a state statute—considering the entire enactment and not the challenged statute in a vaccum—sets forth police, sanitary, or similar regulations, the state statute does not violate the Home Rule Amendment even if it limits municipal power.*

Appellants ask this court to reach the merits of this case on the basis of judicial economy, even though the court of appeals did not address the issue. Appellees expect that sooner or later this court will be asked to address the merits of this case and Appellees would prefer sooner. But Appellees note that if Appellants had not appealed the case on April 28, 2023, the trial court would likely have reached a final judgment by now. Indeed, upon remand from the court of appeals, the common pleas court issued a case management plan on December 28, 2023, that would have resolved the case within ten months. See Scheduling Entry at 4, *Doe v. City of Columbus*, Delaware C.P. No. 23 CV H 02 0089 (Dec. 28, 2023). Based on the amount of time in that schedule, had the case proceeded without Appellants' appeal, the common pleas court would have held a trial in February 2023. Unfortunately, Appellants have unnecessarily prolonged this case and significantly increased the legal fees Appellees are expending (which are recoverable under R.C. 9.68).

But if the court does reach the merits, as presumably it will at some point, it should simply reaffirm its prior holding that 9.68 is constitutional and reign in Appellants and the other cities that are trying to circumvent this court's prior holdings. Almost 15 years ago this court held that R.C. 9.68 is a constitutional enactment. *Cleveland*, 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370, at ¶ 35. In doing so, the court built off its home rule precedent. *Id.* at ¶ 25. Along the way, the

court admonished the lower court for reviewing the challenged provision in isolation. *Id.* at ¶ 15, 17, 22–23 (finding that the lower court "erred in analyzing R.C. 9.68 in a vaccum" under the first *Canton* prong); *see id.* at ¶ 27 and 28 (noting that gaps in Ohio law does not mean that R.C. 9.68 does not set forth a police regulation under the third *Canton* prong). The current posture of this case—a common pleas court applying this binding precedent—does not warrant review by this court.

If the court does decide to review this proposition of law, *Dayton v. State*, 151 Ohio St.3d 168, 2017-Ohio-6909, 87 N.E.3d 176, does not warrant overruling *Cleveland*. The lead opinion in *Dayton v. State* is not binding precedent. Where "four justices declined to join [a] portion of the opinion, * * * [there] is not a holding of th[e] court." *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 29. The lead opinion in *Dayton*, which garnered only three justices' support, "focuses exclusively on the third [Canton] prong * * * ." *Dayton* at ¶ 40 (French, J., concurring in the judgment only). Justice French, on the other hand, would have resolved the case under the fourth Canton prong. *Id.* (French, J., concurring in the judgment only). Nothing in Justice French's concurrence supported the lead opinion's determination that the contested provisions should be viewed in isolation. *See id.* at ¶ 44–45 (French, J., concurring in the judgment only) ("[v]iewing the contested provisions in relation to the rest of S.B. 342").

Thus, *Dayton* is not binding precedent, lower courts should not rely on it, and it does not warrant overruling *Cleveland*. *See City of Toledo v. State*, 152 Ohio St.3d 496, 2017-Ohio-8955, 98 N.E.3d 222 (DeWine, J., dissenting) ("[T]here is no guidance to be gleaned from *Dayton* * * * .").

Response to Proposition of Law No. 5: *The Ohio Constitution has separate force and effect. However, in areas of personal liberty, where the U.S. Supreme Court has incorporated the Federal Constitution to the states, the Federal Constitution provides a floor below which state court decisions cannot fall. Because the Second Amendment has been incorporated to the states since this court's* Arnold *decision, and* Arnold's *reasonableness test falls below the U.S. Supreme Court's text, history, and tradition test,* Arnold *no longer applies.*

Appellants are correct that the Ohio Constitution is a document of independent force. In *Arnold*, this court determined that the Ohio Constitution, Article I, Section 4, guaranteed greater protections than the Second Amendment. *Arnold v. Cleveland*, 67 Ohio St.3d 35, 43, 616 N.E.2d 163 (1993). The court did so, in part, because the text of Article I, Section 4 specifically guaranteed an individual right to keep and bear arms, whereas, at the time, the Supreme Court had not yet determined that it guaranteed an individual right or that it applied to the states. *Arnold* ultimately held that Article I, Section 4 guaranteed a fundamental individual right, but nonetheless was subject to a reasonableness standard—which was also a typical standard of review federal courts used when evaluating laws infringing on the Second Amendment. However, *Arnold* included an important caveat to its determination of the standard of review, explaining that

> [i]n the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

(Emphasis added.) *Id.* at 42. Because the U.S. Supreme Court has since incorporated the Second Amendment to the states, *Arnold* itself requires that Ohio give as much protection under Article I, Section 4 as the Supreme Court provides "in its interpretation of the [Second Amendment]" under

New York State Rifle & Pistol Assn., Inc. v. Bruen, 597 U.S. 1, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022). This must include the stronger standard of review, i.e. the Court's text, history, and tradition test. *Bruen* at 17. This is the "floor below which state court decisions may not fall." *Arnold* at 42. So, as the common pleas court recognized, a simple reasonableness test is inadequate and *Arnold* now *requires*—at a minimum—application of the Supreme Court's text, history, and tradition test. *See Bruen* at 17.

At a minimum, if the court does not adopt the *Buren* text, history, and tradition test, it should adopt the strict scruitiny test it has applied to laws infringing on other fundamental rights. In a series of post-*Arnold* cases, the court has recognized that "[w]hen legislation infringes upon *a fundamental constitutional right* or the rights of a suspect class, strict scrutiny applies." (Emphasis added.) *State v. O'Malley*, 169 Ohio St.3d 479, 2022-Ohio-3207, 206 N.E.3d 662, ¶ 22, citing *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 64. See also *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, ¶ 20 (O'Connor J. dissenting) (rights that affect the fundamental right to bear arms "should be subjected to intermediate scrutiny"). Only when "neither a fundamental right nor a suspect class is implicated, [does the court] apply a rational-basis test." *O'Malley* at ¶ 22. While these cases do not explicitly overrule the reasonableness test, they certainly abrogate it in favor of heightened scrutiny. And while *O'Malley* was an equal protection claim, it applied strict scrutiny to "legislation infring[ing] upon a fundamental constitutional right." *Id.*

Thus, whether the court reviews this proposition of law now or in the future, it should reject a reasonableness test for reviewing the constitutionality of laws infringing on the fundamental right contained in Article I, Section 4.

CONCLUSION

Based on the foregoing, the court should not exercise jurisdiction over this case at this time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a true and accurate copy of the foregoing Memorandum in Response to Jurisdiction of Plaintiffs-Appellees has been served by e-mail to counsel of record for Defendants-Appellants this 12th day of February 2024.

/s/ *David C. Tryon*
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