In the
Supreme Court of Ohio

ANTHONY McCLAIN,	:	Case No. 2021-0718
	:	
Appellant,	:	On Appeal from the
	:	Hamilton County
v.	:	Court of Appeals,
	:	First Appellate District
STATE OF OHIO,	:	
	:	Court of Appeals
Appellee.	:	Case No. C-200195
	:	

MERIT BRIEF OFAPPELLEE
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INTRODUCTION

This case asks whether the Ohio Constitution guarantees Anthony McClain a jury trial on his claim to be declared a wrongfully imprisoned person. It does not. The Ohio Constitution guarantees a "right of trial by jury." Ohio Const. art. I, §5. But that right consists of a right to trial "as it was recognized by the common law." *Dunn v. Kanmacher*, 26 Ohio St. 497, 503 (1875). And the common law would recognize no jury right here. McClain brings a statutory claim with no analog at common law, seeking relief he could not have obtained at common law, from a defendant who could not have been sued at common law. A bench trial suffices for claims like that.

STATEMENT

1. In 1986, the General Assembly enacted R.C. 2743.48, the "wrongful-imprisonment statute." The statute creates two, sequential causes of action for a person who claims to have been wrongfully imprisoned.

Through the first cause of action, a person seeks "to be declared a wrongfully imprisoned individual." R.C. 2743.48(B)(1); *see also* R.C. 2305.02. Someone seeking this declaration must "file a civil action" in the "court of common pleas" where "the underlying criminal action" began. R.C. 2743.48(B)(1). Among other requirements, a plaintiff must make either of two showings. First, he may show that the government failed to comply with its obligations to disclose evidence under *Brady*. Alternatively, he may show that he did not commit the "offense of which [he] was found guilty." R.C. 2743.48(A)(5); *State ex*

rel. O'Malley v. Russo, 156 Ohio St. 3d 548, 2019-Ohio-1698 ¶6. The plaintiff carries the burden of proof. *See Walden v. State*, 47 Ohio St. 3d 47, 53 (1989). And the statute calls upon the court, rather than a jury, to "determine[]" whether the plaintiff has done so. R.C. 2743.48(A)(5). If the plaintiff carries that burden, the court can declare the plaintiff a wrongfully imprisoned person.

Once a person has been "declared a wrongfully imprisoned person," he or she may "commence" a second "civil action," this time in the Court of Claims. R.C. 2743.48(B)(1), (C)(2). The second cause of action aims to "recover a sum of money"—specifically, the money lost as a result of "the individual's wrongful imprisonment." R.C. 2743.48(D). As with other actions against the State in the Court of Claims, the statute does not guarantee a jury trial for this second cause of action. *Id.*; R.C. 2743.11.

2. In 1995, a grand jury indicted Anthony McClain for murder, with an attached firearm specification. *McClain v. State*, 1st Dist. C-200195, 2021-Ohio-1423 ¶2 ("App.Op."). A jury then convicted him of those offenses. *Id.* He failed to overturn that conviction on direct appeal. *Id.* But the First District later granted him a new trial on the basis of newly discovered evidence. App.Op. ¶3. And on retrial, the jury acquitted him. *Id.*

McClain then filed the first type of lawsuit mentioned above. App.Op. ¶4. He sued the State, asking the court of common pleas to declare him a wrongfully imprisoned

person. *Id.* Because McClain failed to allege a *Brady* violation, he had to prove that he did not commit the murder. *Id.*

Over McClain's objection, the court of common pleas resolved the case through a bench trial rather than by assigning the case to a jury. *Id.* And the court, in the end, declined to declare McClain a wrongfully imprisoned person. It concluded that McClain failed to prove his actual innocence of the murder offense. *Id.*

On appeal, McClain argued that he had a right, under the Ohio Constitution, to have a jury hear his case. App.Op. ¶5. The First District rejected that argument and affirmed the court of common pleas. App.Op. ¶¶30–31. "Article I, Section 5 of the Ohio Constitution," it reasoned, "does not preserve a right to a jury trial in a wrongful-imprisonment action because the [wrongful-imprisonment] action did not exist at common law," App.Op. ¶30, and because the action differed in significant ways from actions that did exist at common law, App.Op. ¶¶23–29. Judge Bergeron dissented, arguing that "wrongful imprisonment functions as a modern counterpart or extension" of the "intentional tort of false imprisonment," which "carried a jury trial right" at common law. App.Op. ¶61.

3. McClain appeals the First District's constitutional ruling. McClain Br.2. (McClain also argued below that he had a statutory right to a jury trial, App.Op. ¶5, but he no longer pursues that theory, *see generally* McClain Br.). This appeal thus asks whether the Ohio Constitution guarantees a right to a jury trial when a plaintiff sues for

an order declaring him a wrongfully imprisoned person. That is an open question under this Court's precedent, *Walden*, 47 Ohio St. 3d at 53 n.2, and the Court agreed to decide it, *see 10/12/2021 Case Announcements*, 2021-Ohio-3594.

ARGUMENT

State's Proposition of Law:

> *The Ohio Constitution does not guarantee a right to a jury trial in a proceeding against the State to be declared a wrongfully imprisoned person.*

1. The Ohio Constitution says that "[t]he right of trial by jury shall be inviolate." Ohio Const. art. I, §5. In civil cases, the jury right does not extend to "all controversies." *Belding v. State ex rel. Heifner*, 121 Ohio St. 393, 396 (1929); *see also Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257 ¶25. Instead, the right applies only to cases for which "the principles of the common law," as "it existed previously to the adoption of the Constitution," guaranteed a jury trial. *Belding*, 121 Ohio St. at 396; *see also Dunn*, 26 Ohio St. at 502–03; *Mason v. State*, 58 Ohio St. 30, 55 (1898); *Keller v. Stark Elec. Ry. Co.*, 102 Ohio St. 114, 116 (1921); *Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552, 556 (1994); *Arrington*, 109 Ohio St.3d 539, ¶25. This being so, the constitutional right carries at least three limits, reflecting the limits of the historical jury right.

First, the right generally does not apply to statutory claims that lack a common-law analog. Since the days of territorial government, Ohio's legislatures have enacted statutory "special proceedings," *Armstrong v. Marathon Oil Co.*, 32 Ohio St. 3d 397, 419 (1987)—causes of action "specially created by statute" that were not "denoted as an action

at law or a suit in equity," R.C. 2505.02. Because the common-law jury right did not extend to these special proceedings, this Court has long held that the Ohio Constitution does not require empaneling a jury in these proceedings. *Willyard v. Hamilton*, 7 Ohio 111, 115–17 (1836); *Belding*, 121 Ohio St. at 396–97; *Armstrong*, 32 Ohio St. 3d at 419. For example, the jury right does not apply to claims under the workers-compensation statute because workers-compensation claims are not "sufficiently similar" to any cause of action "recognized at common law." *Arrington*, 109 Ohio St. 3d 539 ¶¶24–25. Likewise, the right does not apply to claims under the age-discrimination statute, because the statute created a "new civil right," for which no common-law action provided relief. *Hoops v. United Tel. Co. of Ohio*, 50 Ohio St. 3d 97, 100 (1990).

Second, the right applies only when the plaintiff seeks a form of relief for which the common law guaranteed a jury trial. The historical right to a jury attached only in courts of law. *Mason*, 58 Ohio St. at 55. Thus, the constitutional right to a jury trial extends only to cases in which a plaintiff seeks relief that a court of law could grant—namely, "the recovery of money." *Dunn*, 26 Ohio St. at 503. It does not extend to relief obtainable only from probate courts or courts of equity. *Brown v. Reed*, 56 Ohio St. 264, 270 (1897). Thus, it does not extend to actions that seek an appointment of a guardian, *Hagany v. Cohnen*, 29 Ohio St. 82, 84 (1876), an injunction, *Converse v. Hawkins*, 31 Ohio St. 209, 210 (1877), or other "equitable relief," *Rowland v. Entrekin*, 27 Ohio St. 47, 47, 49–50 (1875); *Hoops*, 50 Ohio St. 3d at 101. Similarly, the constitutional right does not apply to an action seeking

relief that "did not exist" at common law, *Renee v. Sanders*, 160 Ohio St. 279, 282 (1953), because a court of law could not award that relief. All told, the right extends to relief available in common-law courts when those courts would use a jury to perform factfinding.

Third, the right does not extend to lawsuits against entities, like the State, that are immune from suit without waiver. This follows for two reasons. The first is that a different provision of the Constitution permits "[s]uits [to] be brought against the state," only "in such manner, as may be provided by law." Ohio Const. art. I, §16; *Raudabaugh v. State*, 96 Ohio St. 513, 514 (1917). This provision reflects the "fundamental principle of law," sometimes called sovereign immunity, "that the state, as a sovereign, is not liable to be sued in its own courts without its express consent." *Raudabaugh*, 96 Ohio St. at 514. Under that principle, where the State (by statute) limits its consent to a bench trial, sovereign immunity forecloses proceeding in a different "manner"—such as by jury trial. The second reason is this: determining whether an action falls among the "classes of cases" for which a "common law court[]" would recognize a jury right, *Mason*, 58 Ohio St. at 55, requires asking whether a particular defendant could be sued in those courts without waiver, *see Butler v. Jordan*, 92 Ohio St. 3d 354, 372 (2001) (plurality op.); *Gladon v. Greater Cleveland Reg'l Transit Auth.*, 75 Ohio St. 3d 312, 321 (1996) (Wright, J., concurring). For example, in considering whether the jury right attached to a negligence claim against a county department, this Court considered not only whether the historical right

attached to negligence claims generally, but also whether the historical right extended to negligence claims "against a *political subdivision*" that had not consented to suit. *Butler*, 92 Ohio St. 3d at 372 (plurality op.) (emphasis original). Because common-law courts could not entertain suits against parties immune from suit, there is no right to a jury trial in such cases.

2. Under these principles, the Ohio Constitution does not guarantee McClain a right to a jury trial on his claim to be declared a wrongfully imprisoned person.

First, McClain brings a statutory claim with no common-law analog. As the Court has explained when resolving other issues surrounding the wrongful-imprisonment statute, that statute creates two causes of action that have "no parallel in the ancient dual system of law and equity." *Walden*, 47 Ohio St. 3d at 53; *see also O'Malley*, 156 Ohio St. 3d 548 ¶21. Thus, "a wrongful-imprisonment action" qualifies as "a special proceeding," *O'Malley*, 156 Ohio St. 3d 548 ¶21, to which no jury-trial right attaches, *see, e.g.*, *Armstrong*, 32 Ohio St. 3d at 419–20.

Second, McClain seeks only relief unavailable in common-law courts. He asks for a "declar[ation]" that he qualifies as a wrongfully imprisoned person. R.C. 2743.48(B)(1); *accord* Compl. at ¶2. That falls far from a claim for the "recovery of money only." *Dunn*, 26 Ohio St. at 503. It is essentially a request for a declaratory judgment. *Collier-Hammond v. State*, 8th Dist. No. 108368, 2020-Ohio-2716 ¶15. Because the remedy of "declaratory

judgment … did not exist" at common law, the jury right does not apply to claims seeking this remedy. *Renee*, 160 Ohio St. at 282.

Third, McClain seeks to sue a defendant who cannot be sued without its consent. As the caption indicates, the defendant in this wrongful-imprisonment suit is the State of Ohio itself. Because the wrongful-imprisonment statute provides only for a bench trial, *see* R.C. 2743.48(A)(5), (D), the State has not consented to a trial by jury. And, whether framed as a matter of sovereign immunity or as a matter of the historical jury right, the point remains: the constitutional jury right does not extend to this suit. *See Butler*, 92 Ohio St. 3d at 358, 372 (plurality op.). Ruling otherwise would call into question the constitutionality of R.C. 2743.11, which generally allows for no jury trial in actions against the State in the Court of Claims.

The bottom line is that the General Assembly gets to call the shots when it comes to when and how a private person may sue the State. And just as the Assembly has limited its waiver by circumscribing relief compared to what a private party may enjoy, the Assembly limited the cause of action for wrongful imprisonment by not adorning it with a jury right. *See, e.g.*, R.C. 2743.16(A) (special statute of limitations); R.C. 2743.02(D) (special set-off for collateral recovery); R.C. 2743.16(B) (pre-suit offer to compromise requirement).

This outcome accords with the jury right's focus on common-law analogies to statutory claims. That focus imposes a key check on the General Assembly, ensuring that the

jury right will always "be inviolate"—it prevents the "Legislature" from "tak[ing] away the trial by jury" through "new" procedural mechanisms. 2 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio 1850–51, 326 (S. Medary 1851). In other words, it prevents the General Assembly from redefining a cause of action to eliminate a jury right that would otherwise attach to it. To see why, suppose the General Assembly created a generally applicable, statutory breach-of-contract claim with substantive rules identical to the common-law cause of action. If the General Assembly assigned a court or other body the role of factfinder in those disputes, this would effectively nullify a defendant's right to a jury in breach-of-contract cases, and would in no way keep the right "inviolate." The rule that the jury right extends to the statutory claims "sufficiently similar" to the type of claims for which it existed under the common law, *see Arrington*, 109 Ohio St. 3d 539 ¶25, thus stops the General Assembly from enacting juryless doppelgangers of common-law actions that can be wielded against the citizens of this State.

Nothing here implicates those concerns. The General Assembly created a new cause of action available solely against the State, providing new remedies to guard interests unprotected by the common law. It did not have to do so. And having done so, it need not go the extra mile of giving McClain a jury trial. Its decision to entrust his claim to the Court of Common Pleas does not devalue, let alone "take away," McClain's right to a jury trial as it existed at common law.

3. McClain raises several counterarguments. Each fails.

Foremost, McClain argues that the statutory claim for wrongful imprisonment finds a common-law analog in the tort of false imprisonment, which carried a jury right at common law. In other words, he argues that the two causes of action prove "sufficiently similar … to bestow on him a constitutional right to a jury." *Arrington*, 109 Ohio St. 3d 539; *accord* McClain Br.5–7. That argument fails for three independent reasons.

First, it runs headlong into caselaw recognizing that the wrongful-imprisonment statute creates a remedy unlike anything that existed previously. Start with *Walden*. There the Court rejected the State's argument that a plaintiff proceeding under the first step of the wrongful-imprisonment statute needed to prove his case by "clear and convincing evidence," the standard that historically applied to equitable causes of action. The Court reasoned that a declaration under the first phase of the wrongful-imprisonment statute "has no parallel in the ancient dual system of law and equity." *Walden*, 47 Ohio St. 3d at 53. *Walden's* specific description of wrongful-imprisonment claims accords with this Court's general description of declaratory judgment actions as "sui generis," being "neither one strictly in equity nor one strictly at law." *Sessions v. Skelton*, 163 Ohio St. 409, 409 (1955) (syllabus ¶3).

O'Malley bolsters the point. There, the Court ruled that an order granting summary judgment to a plaintiff under the first phase of a wrongful-imprisonment statute qualifies as an appealable final order. In reaching this conclusion, it relied in part on the

claim's status as a "special proceeding"—a proceeding that "prior to 1853 was not denoted as an action at law or a suit in equity." *O'Malley*, 156 Ohio St. 3d 548 ¶21 (quotation omitted).

Neither *Walden* nor *O'Malley* confronted the jury-right question head on, but each supports the idea that the wrongful-imprisonment statute qualifies as the sort of special proceeding that requires no jury trial. *See Armstrong*, 32 Ohio St. 3d at 419. In other words, both found that the wrongful-imprisonment statute creates a right *without* any common-law analog.

McClain clings to a stray remark in *Bennett v. Ohio Dep't of Rehab. & Corr.*, 60 Ohio St. 3d 107 (1991), but it offers no lifeline. *Contra* McClain Br.7–8. The Court in *Bennett* held that a person can maintain a false-imprisonment tort against the State when the State holds a person in prison past his lawful sentence. Along the way, the Court rejected the State's argument that this holding would expand liability beyond that authorized in the wrongful-imprisonment statute. The Court remarked that the wrongful-imprisonment statute "supplements" the false-imprisonment tort "to allow a recovery in some cases when recovery was not available before." *Bennett*, 60 Ohio St. 3d at 111. That remark hardly implies that the two actions are "sufficiently similar" for right-to-jury-trial purposes. *See Arrington*, 109 Ohio St. 3d 539 ¶25. Quite the opposite. The remark supports *Bennett*'s holding that the wrongful-imprisonment statute represents a separate, non-exclusive cause of action that does not displace the false-imprisonment tort and that follows

different rules of liability. *Bennett*'s "supplements" remark, along with its holding, fully accords with *Walden* and *O'Malley*. Each decision supports the conclusion that the wrongful-imprisonment statute amounts to a special proceeding that requires no jury trial.

Second, the analogy to false imprisonment fails on its own terms. False imprisonment and wrongful imprisonment differ from each other in several ways; they are not "sufficiently similar." *Arrington*, 109 Ohio St. 3d 539 ¶25. For starters, a false-imprisonment tort cannot succeed when the imprisonment arose from valid legal process, such as a court sentence. *Mundt v. United States*, 611 F.2d 1257, 1259 (9th Cir. 1980); *Stephens v. State*, 186 Wash. App. 553, 560 (2015); *see* Restatement (Second) of Torts §35 (1965); *Towse v. State*, 64 Haw. 624, 635 (1982); *Herzog v. Graham*, 77 Tenn. 152, 155 (1882). By stark contrast, a wrongful-imprisonment action can succeed *only* when the imprisonment arose from a court-imposed sentence. R.C. 2743.48(A)(3). Second, even for the closest category of false-imprisonment claims—those based on asserted (but invalid) legal process—the tort does not turn on whether the person is innocent. *Brinkman v. Drolesbaugh*, 97 Ohio St. 171, 174 (1918); *see also id.* at syllabus ¶3. But, at least in cases like McClain's, wrongful imprisonment turns on just that. R.C. 2743.48(A)(5). What is more, while the common law sometimes allowed plaintiffs to bring false-imprisonment claims against state officials, *see, e.g.*, *Brinkman*, 97 Ohio St. at 172, it did not permit suits against the State itself, *Bennett*, 60 Ohio St. 3d at 110–11. (That is why plaintiffs before 1975 could not bring false-

imprisonment claims against the State at all, *see id.* at 110; R.C. 2743.02, and why plaintiffs today must bring those claims in the Court of Claims, *Johnson v. Madison Cty. Ct. of Common Pleas*, 149 Ohio St. 3d 730, 2017-Ohio-2805 ¶¶6–8.) Wrongful-imprisonment claims take the exact opposite approach—they are available *only* against the State itself. R.C. 2743.48(B)(2).

This feature—that the statute in this case creates a new cause of action available solely against the State without displacing former remedies—separates this case from the out-of-state cases cited by the dissent below, which purported to find a common-law analog. *See, e.g.*, *Vill. Food & Liquor Mart v. H & S Petroleum, Inc.*, 254 Wis. 2d 478, 491–94 (2002); *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip*., LLC, 813 N.W.2d 49, 54 (Minn. 2012); *Allstate New Jersey Ins. Co. v. Lajara*, 222 N.J. 129, 135 (2015). None involved a claim available against the State alone. Where a legislature has created a new cause of action, its creation of that cause of action does not constitute impermissible "legislative meddling" with an existing cause of action. *Contra* App. Op. ¶39 (Bergeron, J., dissenting).

Third, even if false imprisonment qualifies as sufficiently similar to wrongful imprisonment, McClain still has no right to a jury trial, because he seeks something other than monetary damages. *See above* 7–8. The dissent below suggested that McClain's lawsuit sought "to recover a sum of money." App. Op. ¶67 (quotation omitted). Not so. He seeks only a declaration. True enough, Ohio law provides that, after a person has

"file[d]" a declaratory action and obtained a declaration, R.C. 2347.48(B), he may "commence" a new action for money damages in a different court, R.C. 2347.48(C). In other words, the statute envisions two separate proceedings: one in which the plaintiff seeks a declaration, and a second, separate proceeding in which the successful plaintiff seeks monetary relief. Case law points the same way. In *O'Malley*, the Court held that a grant of a declaration qualifies as an appealable final order because the order "completely resolve[s]" that case. 156 Ohio St. 3d 548 ¶18. But the order *does not* completely resolve the plaintiff's entitlement to damages—the plaintiff must file a second suit to obtain monetary relief. *O'Malley* thus recognized that the wrongful-imprisonment statute envisioned two different suits: one for a declaration and a later action for monetary relief. McClain's own complaint grasps the point. It states that McClain sought "the determination that he was a wrongfully imprisoned individual under Section 2305.02 so that he has the option to file for compensation, if he should so elect, with the Ohio Court of Claims at a later date." Compl. ¶3. Because he is not entitled to monetary relief in this suit for a declaration, the jury-trial right does not extend to this suit.

4. Perhaps because he cannot succeed under the historical approach, McClain criticizes it. Without actually asking this Court to overrule the test (thus forfeiting any argument that it should do so), he argues that it "is not a creature of our Constitution, but instead emerged from this [C]ourt's case law." McClain Br.5 (quoting *Arrington*, 109 Ohio St.3d 539 ¶85 (Pfiefer, J., dissenting)).

That is wrong. The historical approach to the jury trial right is implicit in this Court's power of judicial review. The Ohio Constitution does not expressly give courts the power to "protect[]" the jury right from legislative "infraction or violation." *Rutherford v. McFaddon*, (1807) (unpublished), published at 2001-Ohio-56, at 14 (Tod, J., concurring). That power instead flows implicitly from two features of our government, each supporting the historical approach. First, the people of Ohio established their government through a "written constitution," which serves as the "supreme law of the land" and which provides a benchmark for measuring legislative acts. *Id.* at 3 (majority op.). That written law would prove "destitute of force" if "succeeding legislatures and courts" could "var[y]" the rights within it as they "may think proper." *Id.* at 8. Second, our Constitution vests the courts with "judicial power," Ohio Const. art. IV, §1, to explain the meaning of a law, *Rutherford*, 2001-Ohio-56 at 4. If this Court were to alter the jury right as it "think[s] proper," *id.* at 8, it would exceed "the judicial power" to "declare what the law was and is," and would take the power, reserved to the people and the legislature, to declare "what it shall be." *Id.* at 22 (Tod, J., concurring) (quotation omitted); *see also id.* at 2–3 (majority op.). That is why, from the very beginning—indeed from this Court's first case establishing judicial review—this Court has recognized that the phrase "right of trial by jury" refers to the right as it was understood "at the time of the framing [of] the constitution." *Id.* at 8–9. *Belding* did not cut that test from "whole cloth." *Contra* App. Op. ¶46 (Bergeron, J., dissenting).

What is more, the historical test offers more flexibility than McClain suggests. In the same way that courts apply the principles of free speech to new contexts like the Internet, they can apply the "principles of the common law" to new contexts in two ways. First, the jury right can apply to modern common-law causes of action, like negligence, even though they arose after the founding. *Sorrell v. Thevenir*, 69 Ohio St. 3d 415, 422 (1994), *superseded on other grounds due to legislative action.* Second, it can apply to new statutory claims that have a common-law analog. *Arrington*, 109 Ohio St. 3d 539 ¶ 25. That flexibility just does not stretch far enough to help McClain, because it remains grounded in the principles of the common law.

Indeed, another State's explanation of why the right *does* apply to late-arriving common-law claims helps to show why the right *does not* apply to special statutory claims. When a court adjudicates a common-law claim that arose after the founding (like a negligence claim), it still "enforc[es]" the common law. *Jersey Cent. Power & Light Co. v. Melcar Util. Co.*, 212 N.J. 576, 591, 594-96 (2013) (*per curiam*) (quotation omitted). Thus, it still sits as a common-law court—a court in which the jury right has attached since Magna Carta. *Willyard*, 7 Ohio at 116. When a court adjudicates a special statutory claim, in contrast, it sits not as a common-law court but "as a special statutory tribunal only, and not by reason of any constitutional or inherited common-law jurisdiction." *New Jersey Sports & Exposition Auth. v. Del Tufo*, 210 N.J. Super. 664, 668 (Law. Div. 1986) (quotation omitted) (cited with approval in *Jersey Cent. Power*, 212 N.J. at 590). Because the historical

jury right applied only in common-law courts, *Mason*, 58 Ohio St. at 55, *Willyard*, 7 Ohio at 116, the constitutional jury right does not extend to courts sitting as special statutory tribunals.

The framers' use of "be inviolate" rather than "remain inviolate" does not call into question the historical test. *Contra* McClain Br.3–4. The choice of verb tells us nothing about the content of the right. It tells us only that we should not assume that the right was indeed inviolate every time the people ratified or amended the provision. In particular, in declining to insert "as heretofore used" into the clause, the framers of the 1851 Constitution seemed concerned about blessing court decisions that had upheld legislation altering the number of jurors on certain juries. 2 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio 1850–51, 326–27. Thus, the verb "be" prevents this Court from declaring that the Constitution codifies its previous caselaw whenever the jury language is ratified or amended. This accords with the idea, which has been with us from the start, that the right to trial by jury refers to "a right then existing," *Rutherford*, 2001-Ohio-56 at 8, rather than one that "admit[s] ... addition, diminution, modification or qualification," *id.* at 18 (Tod, J., concurring), "as succeeding … courts may think proper," *id.* at 8 (majority op.).

Divorcing the right from its history would also make it difficult to set limiting principles. If the right applies to a statutory proceeding for a declaratory judgment against the State, where else would it apply? To a lawsuit for an injunction only? To

adoption proceedings? Every time facts need finding? A jury right unbound would clog the courts, delaying justice for all.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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I certify that a copy of the foregoing Merit Brief of Appellee State of Ohio was served by e-mail this 10th day of February, 2022 upon the following:

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