Supreme Court of Ohio Clerk of Court - Filed June 30, 2022 - Case No. 2022-0803

In the
Supreme Court of Ohio

State ex rel. Preterm-Cleveland, et al.	:	
	:	
Relators,	:	Case No. 2022-0803
	:	
v.	:	Original Action in Mandamus
	:	
David Yost, et al.	:	
	:	
Respondents	:	
	:	

RESPONSE TO RELATORS' MOTION FOR AN EMERGENCY STAY

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INTRODUCTION

The Court should deny the relators' emergency motion because their request for relief is both substantively and procedurally flawed.

Start with the substance. Last week, the Supreme Court of the United States overruled *Roe v. Wade*, 410 U.S. 113 (1973). It held that the United States Constitution confers no right to an abortion. *See Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. 5, 78–79 (June 24, 2022). With this holding, the Court extricated itself from having to repeatedly decide policy matters that the Constitution leaves to the States and the political branches. As Justice White explained long ago, *Roe* constituted "an exercise of raw judicial power." *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting). *Dobbs*, by overruling *Roe*, removed the federal judiciary from an area where it had "no right to be, and where" it did neither itself "nor the country any good by remaining." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

The Court waited too long. Because of *Roe*, judicial confirmation hearings "deteriorate[d] into question-and-answer sessions in which Senators [went] through a list of their constituents' most favored and most disfavored alleged constitutional rights," seeking "the nominee's commitment to support or oppose them." *Id*. at 1001. And because *Roe* prohibited the States from adopting abortion regulations best suited to their populations, the case transformed abortion into a national issue at the forefront of every

presidential campaign.

Consider the following questions, posed by Chief Judge Sutton of the Sixth Circuit. Did *Roe*'s "centralization of power" leave "the competing sides to the debate content or more fearful of what's next?" *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 536 (6th Cir. 2021) (Sutton, J., concurring). Was the assertion of "judicial authority over the issue … healthy for the federal courts?" *Id*. Did it work to "facilitate[] more compromise and thus more settled law?" *Id*. No, no, and no again. The constitutionalizing of abortion inflicted irreparable harm on this nation. The public's confidence in the courts will take decades to recover, if it ever does.

The relators ask this Court to travel *Roe*'s path. They say that the Ohio Constitution, despite never mentioning abortion, confers a right to obtain one up through about the first 20 weeks of pregnancy. (Truth be told, the logical endpoint of at least some of their arguments is that an Ohioan has a right to obtain an abortion up until the moment she gives birth.) That argument is meritless. So is any suggestion that such a ruling would settle the abortion issue. If this Court creates a right to abortion, the state judiciary will face a flood of cases challenging every minute detail of the many laws regulating abortion. Relatedly, every judicial election will focus on this issue; voters will be urged to choose judges based on the candidates' willingness to expand or contract constitutional protections for abortion—not on their fidelity to the principle that courts are to "interpret what the law says" instead of declaring what it "*should be*." *Clark v. Scarpelli*, 91 Ohio St.

3d 271, 291 (2001) (Cook, J., concurring in part and dissenting in part). "Abortion contests … are not going away." *Preterm*, 994 F.3d 512at 535. For some, abortion is the murder of a child and should be prohibited in all or nearly all circumstances. For others, it is a medical procedure key to preserving the liberty interests of women. For still others, it is something in between. In a constitutional democracy like ours, the issue must be resolved like most others—through the democratic process. And in Ohio, given the ease with which the People can seek to amend their laws and the Constitution directly, the issue *will* remain up for debate, no matter what this Court does. The Court should not entertain this futile attempt to cut short that debate through a ruling with no basis in the Constitution. (In any event, a ruling in the relators' favor will simply create more questions than it answers. If there is a right to abortion, how far does the right extend? Put differently, how are lower courts to know if a law violates the right? During the fifty-year lifespan of *Roe*, the Supreme Court never managed to identify any judicially administrable test.)

Make no mistake, any contention that Ohio's constitution confers such a right is indefensible, no matter the theory of constitutional interpretation one might embrace. Consider first the originalist approach to constitutional interpretation. Almost all of the constitutional language on which the relators rely was adopted by 1851. For most of Ohio's history—between 1834 and the 1973 decision in *Roe*—the State criminalized abortion. Put differently, the clauses on which the relators principally rely co-existed, for over a century after their ratifications, with laws prohibiting abortion. If Ohioans thought

these clauses prohibited such laws, one would expect to see some evidence. There is none. So if this Court takes an originalist approach—if it interprets the Constitution according to the "common understanding of the people who framed and adopted" it—that document contains no right to abortion. *See Pfeifer v. Graves*, 88 Ohio St. 473, 487 (1913). Creating such a right would be "inconsistent with the intent of the framers." *State v. Mole*, 149 Ohio St. 3d 215, 2016-Ohio-5124 ¶21 (plurality op.).

Even for those inclined to view the Constitution as a living document, however, the case for an abortion right is non-existent. *Roe* itself was almost universally pilloried when it issued. As one leading, pro-choice scholar put it: *Roe* "is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 947 (1973). The argument that the Constitution guarantees a right to abortion has not gotten any stronger. In the years since *Roe* compelled Ohio to allow abortions in some circumstances, Ohioans' elected representatives have repeatedly passed laws limiting the availability of abortion. Thus, even assuming the Constitution "evolve[s]" to reflect "the basic mores of society," *State v. Broom*, 146 Ohio St. 3d 60, 2016-Ohio-1028 ¶95 (2016) (O'Neill, J., dissenting) (quotation omitted), the evolution of Ohioans' mores cuts against recognizing a right to abortion.

In light of all this, to say that the Ohio Constitution confers a right to an abortion "would involve not a construction" of the Constitution, "but a rewriting of it." *State Bd.*

of Equalization of Cal. v. Young's Mkt. Co., 299 U.S. 59, 62 (1936). Nothing good will come of that. Justice Benjamin Curtis, in dissent from the abhorrent *Dred Scott* decision—the first Supreme Court decision to embrace the concept of substantive due process—explained why. When "a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Dred Scott v. Sandford*, 60 U.S. 393, 621 (1857) (Curtis, J., dissenting). "When such a method of interpretation of the Constitution obtains, in place of a republican Government … we have a Government which is merely an exponent of the will of … the members of this court." *Id*. The Court should treat abortion in exactly the same way as our Constitution: it should leave the matter to the People and the political branches.

In truth, however, the Court need not even reach these substantive issues because of the insurmountable procedural problems with this case. First, although the relators claim to seek mandamus relief, they are in fact seeking a prohibitory injunction—they want an order forbidding the respondents from enforcing the Heartbeat Act. This Court lacks original jurisdiction to entertain requests for prohibitory injunctions. *State ex rel. Chattams v. Pater*, 131 Ohio St. 3d 119, 2012-Ohio-55 ¶1; *State ex rel. Esarco v. Youngstown City Council*, 116 Ohio St. 3d 131, 2007-Ohio-5699 ¶11 (collecting cases); *State ex rel. Ohio*

Stands Up!, Inc. v. DeWine, 2021-Ohio-4382 ¶12 (Kennedy, J., concurring in the judgment). Second, even if the relators could cure this problem, they face another. To win mandamus relief, the relators would need to show that they "lack … an adequate remedy in the ordinary course of the law." *State ex rel. Gil-Llamas v. Hardin*, 164 Ohio St. 3d 364, 2021-Ohio-1508 ¶19 (2021). But the relators have an adequate remedy: they can pursue their constitutional challenges in lower courts, seeking declaratory and injunctive relief. Indeed, we know such a remedy is available, as many of the relators have already been pursuing similar challenges—and successfully getting preliminary relief—for months and years.

The Court should not reach the merits of this case. It should dismiss the case. And because the Court should dismiss, it should deny the request for an emergency injunction. If the Court grants emergency relief, it will contravene its own precedent, and invite a flood of original actions challenging the constitutionality of every law—abortions laws, but others too—that some Ohioans do not like.

BACKGROUND

The Ohio General Assembly passed the Heartbeat Act—Senate Bill 23, or "S.B.23"—in 2019. The Act, which only recently went into effect, makes it a criminal offense to "knowingly and purposefully perform or induce an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the unborn human individual the pregnant woman is carrying and whose fetal heartbeat has

been detected." R.C. 2919.195(A). The law does not apply to women on whom abortions are performed—it regulates only those who perform abortions on others. R.C. 2919.198.

The Act contains two exceptions that allow for a physician, in the physician's reasonable medical judgment, to perform abortions after cardiac activity is found. The first applies when abortion is necessary to prevent the patient's death. The second applies when there is "a serious risk of the substantial and irreversible impairment of a major bodily function." R.C. 2919.195(B). "'Serious risk of substantial and irreversible impairment of a major bodily function' means any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function." R.C. 2919.16(K); *see* R.C. 2919.19(A)(12). That "includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes, may include, but is not limited to, diabetes and multiple sclerosis, and does not include a condition related to the woman's mental health." R.C. 2919.16(K). Another provision specifically allows the performance of abortions in the case of an ectopic pregnancy. R.C. 2919.191.

A violation of the Act is a fifth-degree felony, punishable by up to one year in prison and a fine of $2,500. R.C. 2919.195(A); R.C. 2929.14(A)(5), R.C.2929.18(A)(3)(e). In addition, the state medical board may limit, revoke, or suspend a physician's medical license based on a violation of the Act, see R.C. 4731.22(B)(10), or assess a forfeiture of up to $20,000 for each violation, R.C. 2919.1912(A). Money from such forfeitures is deposited

in a foster-care and adoption-initiatives fund. R.C. 2919.1912(C). A patient also can initiate a civil action against a provider who violates the Act. R.C. 2919.199 (A)(1), (B)(1).

Before the Heartbeat Act took effect, parties challenged its constitutionality in federal court. They contended that the Act contradicted the Fourteenth Amendment to the United States Constitution as interpreted by *Roe v. Wade* and *Planned Parenthood v. Casey*. The District Court agreed, and preliminarily enjoined the Act's enforcement. *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796 (S.D. Ohio 2019). On March 3, 2021, the court issued an order staying the case pending the final disposition of all appeals and petitions for certiorari in *Preterm-Cleveland v. Himes*, No. 18-3329 (6th Cir.), and *Memphis Ctr, for Reproductive Health v. Slatery*, No. 20-5969 (6th Cir.). *See Preterm-Cleveland v. Yost*, No. 19-cv-00360 MRB (S.D. Ohio Mar. 3, 2021).

On June 24, 2022, the United States Supreme Court issued its opinion in *Dobbs*, holding that the United States Constitution confers no right to abortion. That same day, Ohio Attorney General Dave Yost filed an emergency motion to dissolve the preliminary injunction because the injunction rested entirely on the conclusion that the Heartbeat Act violated the right to an abortion recognized in *Roe* and *Casey*—the right that *Dobbs* abrogated. That court quickly vacated the injunction, and the Act went into effect.

Five days later, the relators filed this case.

ARGUMENT

The relators label their emergency motion a request for a *stay*, but that is not what

it is. The relators are not moving to stay anything, but rather to enjoin the Heartbeat Act pending further proceedings. After all, courts do not "stay" laws—they enjoin laws, and stay lower-court orders. Requests for emergency injunctions pending the resolution of writs of mandamus are thus procedurally improper. *State ex rel. Alkop, Inc. v. McQuade*, No. C.A. OT-83-4, 1983 WL 13837 (6th Dist., Feb. 11, 1983). (Indeed, courts assessing mandamus requests cannot issue prohibitory injunctions *at all*. *See below* 12–18.) The cases on which the relators rely, *see* Mot. 3, are not to the contrary. One stays a lower-court order, not a law. *Ohio High School Athletic Assn. v. Ruehlman*, 153 Ohio St. 3d 1465, 2018-Ohio-3407. The other prevents document destruction as an ancillary matter in a mandamus case that was already pending for a year—the Court did not preliminarily give a form of the ultimate relief sought. *State ex rel. Clough v. Franklin Cty. Children's Servs.*, 142 Ohio St. 3d 1435, 2015-Ohio-1566.

If the Court disagrees—if it concludes the relators can seek an emergency injunction—it must at least require the relators to meet the stay-pending-appeal standard. That standard requires the Court to consider: "(1) whether [the relator] has shown a strong or substantial likelihood or probability of success on the merits; (2) whether [the relator] has shown that it will suffer irreparable injury; (3) whether the issuance of a stay will cause harm to others; and (4) whether the public interest would be served by granting a stay." *Bob Krihwan Pontiac-GMC Truck, Inc. v. Gen. Motors Corp.*, 141 Ohio App. 3d 777, 783 (10th Dist., 2001); *accord Khemsara v. Ohio Veterinary Med. Licensing Bd.*, 2022-Ohio-833 ¶20 (8th

Dist.); *Ulliman v. Ohio High Sch. Athletic Assn.*, 184 Ohio App. 3d 52, 60 (2d Dist. 2009). While state courts have applied this test in determining whether *to stay* an injunction pending appeal, a materially identical test governs the question whether *to issue* an injunction pending appeal. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (*per curiam*).

In this case, everything turns on the relators' likelihood of success. As an initial matter, "[w]hen a party has no likelihood of success on the merits," courts "may not grant a stay" or an injunction pending appeal. *Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, 992 F.3d 518, 522 (6th Cir. 2021) (*per curiam*). And regardless, if the relators cannot show a likelihood of success on the merits, they cannot satisfy the other injunction-pending-appeal factors. Consider, for example, the second of the four factors, which requires a showing of irreparable harm. If the relators have no right to relief, they will sustain no legally cognizable injury from the non-issuance of relief. Now consider the third and fourth factors—harm to other parties and the public interest. States always suffer irreparable harm when their laws are enjoined. *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020) (*per curiam*). And "giving effect to the will of the people by enforcing the laws they and their representatives enact serves the public interest." *Id*. So, unless the relators can show that they will likely prevail in obtaining mandamus relief, they are not entitled to an emergency injunction.

The relators will not succeed on the merits of their mandamus petition. "To be

entitled to a writ of mandamus, relators must establish (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of respondents to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law." *Gil-Llamas*, 164 Ohio St. 3d 364 ¶19. The relators cannot make any of these showings.

I. This Court lacks jurisdiction to entertain the relators' mandamus petition, which is procedurally improper regardless.

The relators ask this Court to break the usual litigation rules and give them special treatment. As far as respondents are aware, this Court has never, in a mandamus proceeding, granted the kind of relief relators seek here—an injunction ordering state officials to stop enforcing the law without ordering any *affirmative* action at all. The relators are suing to prevent conduct, not to compel it. They are, therefore, seeking a prohibitory injunction. Trial courts issue such injunctions, and the relators have won such injunctions in Hamilton County against other abortion laws. But appellate courts like this one are not the starting gate for such requests—they are the finish line.

Unless the Court is prepared to give the relators special and unprecedented treatment, it should hold that their request for mandamus relief is procedurally improper. This follows for two reasons. *First*, the relators are improperly using a writ of mandamus to try to win a prohibitory injunction and declaratory judgment. *Second*, the relators have adequate remedies at law. For either of these two reasons, they will lose. Thus, they are not entitled to emergency relief.

A. This Court lacks jurisdiction to entertain the relators' request for a prohibitory injunction.

The Court lacks subject-matter jurisdiction over the relators' mandamus action. "Subject-matter jurisdiction refers to the constitutional or statutory power of a court to adjudicate a particular class or type of case." *Corder v. Ohio Edison Co.*, 162 Ohio St. 3d 639, 2020-Ohio-5220 ¶14. "'A court's subject-matter jurisdiction is determined without regard to the rights of the individual parties involved in a particular case.'" *Id.* (quoting *Bank of Am., N.A. v. Kuchta*, 141 Ohio St. 3d 75, 2014-Ohio-4275 ¶19). "Instead, 'the focus is on whether the forum itself is competent to hear the controversy.'" *Id.* at ¶14 (quoting *State v. Harper*, 160 Ohio St. 3d 480, 2020-Ohio-2913 ¶23). In "the absence of subject-matter jurisdiction, a court lacks the authority to do anything but announce its lack of jurisdiction and dismiss." *Pratts v. Hurley*, 102 Ohio St. 3d 81, 2004-Ohio-1980 ¶21.

This Court lacks subject-matter jurisdiction over the relators' mandamus action because what the relators actually seek is a declaratory judgment and a prohibitory injunction. The relators request: (1) "an immediate stay of enforcement of S.B. 23"; (2) an order, judgment, and/or writ from this Court "declaring S.B. 23 unconstitutional"; (3) a peremptory writ of mandamus "directing Respondents to … not enforce S.B. 23"; and (4) if the Court does not issue a peremptory writ, an alternative writ "directing Respondents to . . . not enforce S.B. 23." Compl. ¶18; *see also id.* at 42 ("Prayer for Relief"). The first two requests for relief ask this Court to enjoin the Heartbeat Act and to declare it unconstitutional. In other words, the relators seek a prohibitory injunction and a declaratory

judgment. The same goes for the relators' third and fourth requests for a "peremptory writ" or an "alternative writ." The relators make clear they seek an order from this Court directing the respondents to "not enforce S.B. 23." Compl. ¶18. Thus, the relators' third and fourth requests for relief also seek a prohibitory injunction.

Accordingly, this Court lacks subject-matter jurisdiction over the relators' purported mandamus action. This Court's original jurisdiction extends only to "quo warranto, mandamus, habeas corpus, prohibition, procedendo, any cause on review as may be necessary to its complete determination, and all matters relating to the practice of law, including the admission of persons to the practice of law and the discipline of persons so admitted." *ProgressOhio.org, Inc. v. Kasich*, 129 Ohio St. 3d 449, 2011-Ohio-4101 ¶2. This Court and the courts of appeal lack original jurisdiction over cases seeking prohibitory injunctions. *Chattams*, 131 Ohio St. 3d 119 at ¶1; *Esarco*, 116 Ohio St. 3d 131 at ¶11 (collecting cases); *Ohio Stands Up!*, 2021-Ohio-4382 at ¶12 (Kennedy, J., concurring in the judgment). And "'if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus.'" *State ex rel. Ohio Civil Serv. Emps. Assn, Local 11 v. State Emp. Rels. Bd.*, 104 Ohio St. 3d 122, 2004-Ohio-6363 ¶11 (quoting *State ex rel. Grendell v. Davidson*, 86 Ohio St. 3d 629, 1999-Ohio-130).

The relators cannot evade these jurisdictional limits by claiming to seek a *mandatory* injunction rather than a prohibitory injunction. In contrast to prohibitory injunctions

(over which this Court lacks jurisdiction), this Court has jurisdiction to entertain requests for mandatory injunctions. *State ex rel. Gadell-Newton v. Husted*, 153 Ohio St. 3d 225, 2018-Ohio-1854 ¶13. "The difference between the two forms of relief is simple: 'a prohibitory injunction is used to prevent a future injury, but a mandatory injunction is used to remedy past injuries.'" *Id.* at ¶10 (quoting *State ex rel. GMC v. Indus. Comm'n*, 117 Ohio St. 3d 480, 2008-Ohio-1593 ¶12). The relators seek a prohibitory injunction, because they are suing to "prevent a future injury," not to "remedy past injuries." *Id.* Their briefing makes this abundantly clear. The relators have filed an emergency motion requesting an immediate injunction of the Heartbeat Act, along with a purported mandamus action directing the respondents to "not enforce S.B. 23." Compl. ¶18. These requests are aimed at preventing alleged *future* injuries. Thus, the relators seek a prohibitory injunction, not a mandatory injunction.

The relators' few cited cases do not say otherwise. They rely principally on *State ex rel. Ethics First-You Decide Ohio PAC v. DeWine*, 147 Ohio St. 3d 373, 2016-Ohio-3144. *See, e.g.*, Br. in Supp. 9. But *Ethics First* merely reaffirms that, "if a complaint seeks to *prevent* action, then it is injunctive in nature, and the court has no jurisdiction; if it seeks to *compel* action, then the court does have jurisdiction to provide relief in mandamus." *Ethics First*, 147 Ohio St. 3d 373 ¶10. To determine the true goals of a mandamus action, the Court "must examine [the relators'] complaint 'to see whether it actually seeks to prevent, rather than to compel, official action.'" *State ex rel. Satow v. Gausse-Milliken*, 98

Ohio St. 3d 479, 2003-Ohio-2074 ¶13 (quotation omitted). In *Ethics First*, the relators sought to *compel* the respondent to process their initiative petition under an old law, not simply to bar the respondent from processing that petition under a new law. In sharp contrast, the relators here seek solely to *prevent* the Heartbeat Act's enforcement. They do not seek to compel anything. Therefore, their purported mandamus action improperly seeks a prohibitory injunction.

To the extent the relators are attempting to style their mandamus action as a request for an order that the respondents comply with pre-existing law, that attempt also fails. *See* Br. in Supp. 9. The relators claim they want an order requiring compliance with R.C. 2919.201. But there is nothing in that statute with which the respondents must "comply." While that statute prohibits abortion starting at 20 weeks post-fertilization, the Heartbeat Act goes further. An order requiring the respondents to "comply" with R.C. 2919.201 is consistent with the respondents' simultaneously abiding by the Heartbeat Act. (And what would it even mean for *the respondents* to "comply" with a statute prohibiting conduct carried out by *the relators*?) So an order requiring compliance with R.C. 2919.201 does not get relators anything. What the relators want is an order *preventing* enforcement of the Heartbeat Act, not an order *requiring* enforcement of R.C. 2919.201. Verbal gymnastics cannot change that fact.

In addition to vastly overstating the holding of *Ethics First*, the relators lean heavily on *State ex rel. Zupancic v. Limbach*, 58 Ohio St. 3d 130, 133 (1991). *See* Br. in Supp. at 9, 11-

13. But *Zupancic* does not help them. In that case, "the essence of [the relators'] request [was] for respondent to abide by a former statute." *Id*. Specifically, in *Zupancic*, the respondent *had to act* to take a certain action, and the mandamus sought would order her to act affirmatively under an old law rather than a new law. *Id.* at 133–34. As discussed above, that is not the case here—the relators want an order barring the respondents from enforcing the Heartbeat Act, not an order requiring compliance with a prior law. Moreover, as discussed below, the relators have adequate remedies at law by way of declaratory-judgment actions or actions seeking injunctive relief in state trial court. In contrast, *Zupancic* determined that "all alternative remedies at law" were "wholly inadequate" for redressing the movant's injuries. *Id.* at 134.

In any event, *Zupancic* does not reflect the current state of this Court's jurisprudence. "[S]ince *Zupancic* was decided, the Supreme Court of Ohio has taken a significantly more narrow view of when an appellate court's mandamus jurisdiction may be invoked." *State ex rel. Ohio Apartment Ass'n v. Wilkins*, 2006-Ohio-6783 ¶10 (10th Dist.); *see, e.g.*, *State ex rel. United Auto., Aerospace & Agric. Implement Workers of Am. v. Ohio Bureau of Workers' Comp.*, 108 Ohio St. 3d 432, 2006-Ohio-1327 ¶43 (collecting cases). "This more narrow view of original jurisdiction has been emphasized particularly where the relator's allegations indicate that the real goals of the mandamus action are declaratory judgment and a prohibitory injunction." *Wilkins*, 2006-Ohio-6783 at ¶10; *see also State ex rel. Int'l Heat & Frost Insulators & Asbestos Workers Local # 3 v. Court of Common Pleas*, 2006-Ohio-

274 ¶9 (8th Dist.) (stating that "more recent decisions of the Supreme Court of Ohio suggest that the Supreme Court has reexamined the holding[] of … *Zupancic*").

Finally, *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp.*, 97 Ohio St. 3d 504, 2002-Ohio-6717, is wholly inapplicable. The majority in that case did not even address subject-matter jurisdiction related to prohibitory injunctions, and instead began its legal analysis by considering whether the relators had standing. *See id.* at ¶10. Moreover, the relators' citations to *Ohio Bureau of Workers' Compensation* come from that case's discussion of public-rights standing—not any discussion of original jurisdiction or the requirements for mandamus, which are the issues presented here. *See* Br. in Supp. 9-10.

Contrary to the relators' suggestion, purported mandamus actions do not become proper simply because a party wishes to challenge the constitutionality of a statute. "'Constitutional challenges to legislation are generally resolved in an action in a common pleas court rather than in an extraordinary writ action.'" *State ex rel. Beane v. City of Dayton*, 112 Ohio St. 3d 553, 2007-Ohio-811 ¶32 (quoting *State ex rel. Satow v. Gausse-Milliken*, 98 Ohio St. 3d 479, 2003-Ohio-2074 ¶18); *see also State ex rel. Satow v. Gausse-Milliken*, 98 Ohio St. 3d 479, 2003-Ohio-2074 (refusing to issue a writ of mandamus despite the fact that relators were challenging the constitutionality of 2002 Sub.H.B. No. 329). This Court has repeatedly made clear the "general rule" that this Court "lack[s] jurisdiction to consider the merits of mandamus actions challenging the constitutionality of new legislative enactments because they constitute disguised actions for declaratory judgment and

prohibitory injunction." *State ex rel. United Auto., Aerospace & Agric. Implement Workers of Am. v. Ohio Bureau of Workers' Comp.*, 2006-Ohio-1327 ¶43, 108 Ohio St. 3d 432, 439; *see, e.g.*, *Grendell*, 86 Ohio St. 3d 629, 1999-Ohio-130 (dismissing mandamus action seeking declaratory judgment that 1999 Am.Sub.H.B. No. 283 was unconstitutional and a prohibitory injunction preventing respondents from acting pursuant to it); *State ex rel. Governor v. Taft*, 71 Ohio St. 3d 1 (1994) (no jurisdiction over mandamus action seeking declaration that 1994 Am.Sub.H.B. No. 20 was unconstitutional and prohibitory injunction to prevent respondent from filing the act); *State ex rel. Ohio Stands Up!, Inc. v. DeWine*, 2021-Ohio-4382 ¶19 (Kennedy, J., concurring in the judgment) (reasoning that the Court lacked original jurisdiction where "the gravamen of the complaint here is to *prohibit* Governor DeWine's and Director Murnieks's actions").

In sum, mandamus is not the proper vehicle for this challenge, and this Court does not have jurisdiction to consider the relator's claims.

B. The relators have adequate remedies at law.

The relators' mandamus action also fails because the relators have an adequate remedy at law: they can seek a declaratory judgment or an injunction in state trial court. "It is well settled that mandamus will not issue when an individual has a plain and adequate remedy in the ordinary course of law." *State ex rel. Hodge v. Ryan*, 131 Ohio St. 3d 357, 2012-Ohio-999 ¶6; *see also State ex rel. Steele v. McClelland*, 154 Ohio St. 3d 574, 2018-Ohio-4011 ¶9; R.C. 2731.05. The relators claim that "there are no other practicable means

of protecting the rights of all Ohioans affected by S.B. 23." Br. in Supp. at 12-13. That is wrong, as the relators' ongoing litigation in lower courts shows.

First, the relators could seek a declaratory judgment. Indeed, as discussed above, the relators are improperly seeking a declaratory judgment from this Court—disguised as a mandamus claim. The relators request "an Order, Judgment, and/or Writ from this Court declaring S.B. 23 unconstitutional." Compl. ¶18; *see also id.* at p. 42 ("Prayer for Relief"). This Court has no authority to entertain requests for declaratory judgments, *State ex rel. Governor v. Taft*, 71 Ohio St. 3d 1, 2 (1994), but lower courts do. Thus, the relators have an adequate remedy at law by way of a declaratory-judgment action in state trial court. (The relators cite *Zupancic* for the proposition that, "where declaratory judgment would not be a complete remedy unless coupled with ancillary relief in the nature of mandatory injunction, the availability of declaratory injunction is not an appropriate basis to deny a writ to which the relator is otherwise entitled." Br. in Supp. at 13 (citing *Zupancic*, 58 Ohio St. 3d at 133). But that proposition is irrelevant, as the relators seek a prohibitory injunction, not a mandatory injunction.)

In addition, the relators have another adequate remedy at law by way of an injunction in state trial court. In fact, some of the relators have already successfully obtained, in trial courts, statewide preliminary injunctions of other Ohio laws related to abortion. *See Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A 2101148, at 8 (Apr. 19, 2021) (preliminarily enjoining Ohio's law requiring in-person

performance of the first stage of a medication abortion); *Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A 2100870 (Jan. 31, 2022) (preliminarily enjoining Ohio's law providing for the disposition of fetal remains after surgical abortions). Notably, the relators cite these same statewide injunctions in their briefing. *See* Br. in Supp. at 17.

The relators' contrary contentions are unavailing. For example, they argue that "a writ of mandamus is an appropriate remedy where the challenged statute affects 'fundamental' or 'core' rights of Ohio citizens and the circumstances 'demand early resolution.'" Br. in Supp. at 9–10 (quoting *Ohio Bur. of Workers' Comp.*, 97 Ohio St. 3d 504 ¶12). This brief explains below that the challenged law does not violate anyone's constitutional rights. The more important point, for present purposes, is that the mandamus standard *requires* a relator to prove the absence of an adequate remedy. *Ryan*, 131 Ohio St. 3d 357 ¶6. This Court has never recognized an exception for cases presenting constitutional issues. And it would be passing strange to do so: the significance of constitutional issues justifies greater scrutiny by more courts, rather than immediate and final review by one court.

The relators also assert that "[t]his Court has consistently used mandamus actions to determine the constitutionality of statutes that have a widespread effect." Br. in Supp. at 10. Tellingly, the relators cite only one case for this proposition. *See id.*, (citing *Ohio Bur. of Workers' Comp.*, 97 Ohio St. 3d 504 ¶12). But that case does not say that relators

lack an adequate remedy at law simply because the challenged statute has a "widespread effect." In claiming otherwise, the relators are lifting dicta out of context. While *Ohio Bureau of Workers' Compensation* observed that the challenged statute "affect[ed] virtually everyone who works in Ohio," it made that observation in reference to public-rights standing—it did not claim that the widespread effect had any bearing on the presence or absence of an adequate remedy in the ordinary course of law. *See Ohio Bur. of Workers' Comp.*, 97 Ohio St. 3d 504 ¶12 (determining that "[s]ince H.B. 122 therefore implicates a public right, we find that relators meet the standing requirements of *Sheward*").

The relators contend that "[t]he uniquely uniform and wide-reaching relief that only this Court can provide is necessary," Br. in Support at 10, but they do not explain how a writ of mandamus is "uniquely" uniform. They cannot deny that both a declaratory judgment against all the respondents or a statewide injunction in trial court would constitute statewide relief. And in any event, they do not *need* statewide relief—the relators can individually sue in separate trial courts and obtain injunctions (if they are entitled to injunctive relief) barring enforcement of the Heartbeat Act. That is the normal way to litigate constitutional challenges, and so hardly inadequate to vindicate constitutional rights. If this Court holds otherwise, it should expect to be flooded with requests for mandamus relief every time the General Assembly enacts a statute with widespread effects that different entities from around the State would prefer not to follow. And it can expect to receive many more petitions relating to abortion over the next several months,

as the relators challenge each abortion law—laws regulating waiting periods, parental consent, time limits, and more—one by one, directly in this Court.

At bottom, the relators are contending that no other relief would be as *advantageous* to them. But that is irrelevant. The relators assert that, without mandamus relief, "women and healthcare providers in counties throughout Ohio—including providers who are not relators in this action—may seek injunctive relief from trial courts in different counties, and those cases may result in different outcomes." Br. in Supp. at 13. But the relators cite no case for the proposition that otherwise-improper mandamus relief suddenly becomes proper because of a hypothetical risk of "piecemeal and duplicative litigation." *Id.* Moreover, the relators confuse desirability with availability. Just because the relators would prefer to pursue a mandamus action in this Court does not mean that they lack an adequate remedy at law. *See, e.g.*, *State ex rel. Peoples v. Johnson*, 152 Ohio St. 3d 418, 2017-Ohio-9140 ¶11 (quoting *State ex rel. Luoma v. Russo*, 141 Ohio St. 3d 53, 2014-Ohio-4532 ¶8 ("[T]he *availability* of an appeal is an adequate remedy sufficient to preclude a writ." (emphasis added)).

In sum, the relators have not "establish[ed], by clear and convincing evidence … the lack of an adequate remedy in the ordinary course of the law." *State ex rel. Luonuansuu v. King*, 161 Ohio St. 3d 178, 2020-Ohio-4286 ¶15. For this additional reason, their mandamus action fails.

II. Because there is no state constitutional right to abortion, the relators have no clear right to the relief they seek, and the respondents have no clear duty to do whatever the relators are requesting.

Even if the Court can hear this case, the relators are not entitled to mandamus relief. The reason is simple: there is no constitutional right to abortion. Thus, the relators will not be able to show "a clear legal right to the requested relief" or "a clear legal duty on the part of respondents to provide it." *Gil-Llamas*, 164 Ohio St. 3d 364 at ¶19.

The remarkable thing about the supposed right to abortion—the fact that led to the nearly universal condemnation of *Roe v. Wade* at the time it was decided—is that there is no theory of constitutional jurisprudence that justifies recognizing a right to abortion. Indeed, even the dissenters in *Dobbs* made no serious effort to defend the right to abortion on first principles—they instead relied on the doctrine of *stare decisis* and on other precedents from the Supreme Court of the United States. None of that is relevant here because *this Court* has never recognized any right to abortion.

This Court will likely hold that the Ohio Constitution confers no right to abortion. The State explains why in two steps. First, the State shows that the Ohio Constitution cannot reasonably be interpreted as conferring a right to abortion, regardless of whether one embraces an originalist or living-constitutionalist approach to constitutional interpretation. Second, the State explains that no precedent from this Court can plausibly be extended to recognize any abortion right.

A. The Ohio Constitution does not recognize a right to abortion.

The question of how to interpret a constitution is the subject of significant debate. On the one hand there are originalists, who "argue that the meaning of the constitutional text is fixed and that it should bind constitutional actors." Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 Nw. U. L. Rev. 1243, 1244 (2019). "Living constitutionalists," on the other hand, "contend that constitutional law can and should evolve in response to changing circumstances and values." *Id*. In many cases, the choice between these competing philosophies proves dispositive. Not here. Regardless of whether one interprets the Ohio Constitution through an originalist or living-constitutionalist lens, the Constitution does not confer any right to abortion.

1. Any argument that the Ohio Constitution as originally understood confers a right to abortion is frivolous.

"The natural reading of a legal document, constitution or not, presupposes a fixed meaning of the words in the document at the time they were communicated." *Preterm-Cleveland*, 994 F.3d at 541 (Bush, J., concurring) (citation omitted). "Laws communicate unchanging directives so that people can rely on them and order their lives accordingly." *Id*. "Originalism applies that understanding to the Constitution." *Id*. It calls on courts to decide constitutional cases based on constitutional text—and to interpret that text in accordance with the text's "original public meaning." *State v. Weber*, 163 Ohio St. 3d 125, 155 (2020) (DeWine, J., concurring in the judgment). Thus, an originalist approach to the

question presented requires asking whether reading the Ohio Constitution as conferring a right to an abortion accords with the "common understanding of the people who framed and adopted" it. *Pfeifer*, 88 Ohio St. at 487. The Court should not recognize any such right if doing so would be "inconsistent with the intent of the framers." *Mole*, 149 Ohio St. 3d 215 at ¶21 (plurality op.).

Here, there is no plausible argument that any of the provisions on which the relators rely confer such a right.

Consider first Sections 1, 2, and 16 of Article I. The text of these clauses does not speak to the issue at all. And there is no evidence that anyone alive at the time of the clauses' ratifications believed they conferred a right to abort an unborn child. Every one of these clauses was ratified by 1851. That is significant because, starting in 1834, Ohio prohibited *all* abortions. *See* Act of Feb. 27, 1834, §§1, 2, 1834 Ohio Laws 20–21; Ohio Gen. Stat. §§111, 112 (1841); R.C. §2901.16 (1972); *see also Steinberg v. Brown*, 26 Ohio Misc. 77 (N.D. Ohio 1970); *State v. Tippie*, 89 Ohio St. 35, 39–40 (1913). And indeed, almost immediately after Ohioans ratified the 1851 Constitution, this Court upheld a conviction pursuant to one of these laws. *See Wilson v. State*, 2 Ohio St. 319, 320 (1853). If Ohioans understood the charter of their liberties to confer a right to abortion, someone would have suggested as much. But there is no such evidence anyone did—certainly there is no evidence that the clauses on which the relators rely were *commonly* understood to confer a right to abortion. And when "a Government practice [was] open, widespread, and

unchallenged" for years after the ratification of a constitutional provision, that is proof positive that the provision was not understood to bar the practice in question. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019) (quotation omitted). The "unambiguous and unbroken history" of laws prohibiting abortion proves that the Constitution, as originally understood, confers no right to an abortion. *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (quotation omitted).

Now consider the Healthcare Freedom Amendment, ratified in 2011. *See* Ohio Const., art. I, §21. It provides, in relevant part:

> (A) No federal, state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system.
>
> (B) No federal, state, or local law or rule shall prohibit the purchase or sale of health care or health insurance.
>
> (C) No federal, state, or local law or rule shall impose a penalty or fine for the sale or purchase of health care or health insurance.
>
> (D) This section does not affect laws or rules in effect as of March 19, 2010; affect which services a health care provider or hospital is required to perform or provide; affect terms and conditions of government employment; or affect any laws calculated to deter fraud or punish wrongdoing in the health care industry.

This amendment, which the People of Ohio passed in response to fears that the Affordable Care Act would force people to buy health insurance and usher in an era of single-payer healthcare, does not speak to abortion. Subsection (A) forbids laws compelling participation in healthcare markets. Subsection (B) guarantees a right to purchase healthcare; it bars the State from adopting a single-payer system under which citizens

would be prohibited from buying healthcare themselves and required to obtain healthcare through a government-approved provider. Subsection (C) forbids the government from punishing the sale or purchase of healthcare. And Subsection (D) expressly preserves the legislature's ability to regulate healthcare—in particular, its power to deter fraud and punish "wrongdoing."

None of this can plausibly be read as guaranteeing a right to a particular healthcare procedure. To the contrary, Subsection (D) expressly *preserves* the legislature's power to "punish wrongdoing in the health care industry," which presupposes a power to determine what qualifies as "wrongdoing." This preserves the General Assembly's power to prohibit or regulate the circumstances in which procedures can be offered at all. That is why, even after the Amendment's passage, Ohio continues prohibiting the unlicensed practice of medicine; the Amendment gives citizens no right to purchase medical care from someone with no license to practice. *See, e.g.*, R.C. 4731.41. Similarly, Ohio has continued forbidding physicians from using steroids to enhance athletic performance, or from using cocaine hydrochloride except in narrowly defined circumstances. O.A.C. 4731-11-03. And Ohio has continued banning electroshock therapy for minors, female genital mutilation for minors, and assisted suicide. *See, e.g.*, O.A.C. 5122-3-03(D)(2); R.C. 2903.32; R.C. 3795.02. Similarly, the Ohio Department of Health did not violate the Constitution when, early in the COVID-19 pandemic, it temporarily barred the performance of elective surgeries. *See, e.g.*, Director's Order for the Management of Non-essential

Surgeries and Procedures throughout Ohio (Mar. 17, 2020), https://perma.cc/2HWG-AJAK. If Subsection (B) were understood as guaranteeing a right to purchase any medical procedure, rather than a right to purchase for oneself whatever healthcare procedures the State permits, none of these regulations, most of which are uncontroversial, would be legal. And indeed, if Subsection (B) guaranteed a right to purchase any medical procedure, including abortion, it would guarantee a right to obtain an abortion *during all nine months* of a pregnancy. Even the relators are not willing to go that far—at least not yet.

The plain understanding of the text accords with the understanding of those who ratified the Amendment. Consider the political realities. Ohioans overwhelmingly voted in favor of the Amendment; it won 65.63 percent of the vote. *See* Ohio Healthcare Amendment, Issue 3 (2011), Ballotpedia (accessed June 29, 2022), https://perma.cc/XG9T-FRCE. No provision understood as conferring a right to abortion would have garnered so many votes. Certainly no provision guaranteeing a right to abortion at all phases of a pregnancy—which is what the Amendment would guarantee if it guaranteed a right to abortion—could have won 2/3 of the vote. After all, most people think abortion should be illegal in the second trimester of a pregnancy, and overwhelming majorities (almost 90 percent of Americans) believe abortion should be illegal in the third trimester. *See* Lydia Saad, *Trimesters Still Key to U.S. Abortion Views*, Gallup (June 13, 2018), https://perma.cc/E4QZ-VBHZ.

Consider, too, the public discussion of the issue. The State has not found evidence

that even one person at the time of the Amendment's ratification suggesting it guaranteed a right to abortion. But Ohio Right to Life—a group whose mission includes opposing abortion—*endorsed* the Amendment. Steven Ertelt, *Ohio Pro-Life Group Endorses Issue 3 to Oppose Obamacare*, LifeNews (Sept. 6, 2011), https://perma.cc/Q97D-H2E3.

In the end, there is no sound argument that the many Ohioans who voted in favor of the Healthcare Freedom Amendment were duped into constitutionalizing the right to abortion.

2. A principled living-constitutionalist approach does not permit recognizing a constitutional right to abortion.

On another view of the judicial role, courts must interpret the Constitution to "evolve[]" in a manner that reflects "the basic mores of societ[al] change." *Broom*, 146 Ohio St. 3d 60 ¶95 (O'Neill, J., dissenting) (quotation omitted). On this approach, the Constitution draws "its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality).

The danger of living constitutionalism is plain. It invites courts to make value judgments, which presents a temptation for courts to "declare" that "the Constitution" means whatever a majority of judges think "it ought to mean." *Dred Scott*, 60 U.S. at 621 (Curtis, J., dissenting). That "is a formula for an end run around popular government." William H. Rehnquist, *The Notion of A Living Constitution*, 54 Tex. L. Rev. 693, 706 (1976). To guard against that—to ensure some objectivity in the analysis—living constitutionalists decide cases with reference to *society's* values instead of their own. *See, e.g.*, *Obergefell*

v. Hodges, 576 U.S. 644, 662–71 (2015); *Graham v. Florida*, 560 U.S. 48, 58–59 (2010); *Roper v. Simmons*, 543 U.S. 551, 560–61, 564–68 (2005); *Lawrence v. Texas*, 539 U.S. 558, 568–72 (2003); *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002); *Casey*, 505 U.S. at 850 (quoting *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting)); *Mapp v. Ohio*, 367 U.S. 643, 651–53 (1961). In this way, living constitutionalism requires *interpreting* law, not making it. *See* Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 97–98 (2022).

Ohioans' values require leaving abortion to the democratic process. For one thing, Ohioans ratified a constitution that can be easily amended through popular initiative. *See* Ohio Const., art. II, §1a; R.C. 3519.01(A). Ohioans often place issues on the ballot, and they often ratify those initiatives. *See, e.g.*, Ohio Const., art. I, §§10a, 21. This process and practice suggests that Ohio's values include the value of resolving contentious issues through the democratic process—not through judge-made law. That, alone, cuts against recognizing any right to abortion. Precisely because state constitutions are easier to amend when that is what the People want, courts should be *less willing* to read rights into state constitutions than the federal one. *Cf.* Sutton, *Who Decides*? at 134.

Ohio's history of abortion legislation cuts the same way. Again, Ohio forbade abortion at all times between 1834 and *Roe*. And in the nearly half-century since *Roe*, Ohio's elected representatives have repeatedly enacted laws *restricting* the availability of abortion. *See, e.g.*, R.C. 2919.123(A); R.C. 2919.121(B)(1); R.C. 2919.192; R.C. 2317.56; R.C. 2919.10; R.C. 3727.60. Over time, the trend has been toward greater restrictions. *Compare,*

e.g., R.C. 1919.195 with R.C. 2919.201 and R.C. 2919.17. This trend shows that a right to abortion would contradict, not accord with, evolving societal values. *See Atkins*, 536 U.S. at 315–16. So does the fact that, notwithstanding this flurry of action, and notwithstanding the ease with which Ohioans can put forward constitutional initiatives, an initiative aimed at expanding or preserving the right to abortion has never even qualified for the ballot.

In addition to looking at the values codified by law, living constitutionalists on occasion look to foreign practices and evolving knowledge. But neither source supports recognizing a right to abortion.

Begin with the international community. At least "117 countries … either ban abortion outright or sharply limit its availability to narrow instances." *Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409, 449 (6th Cir. 2021) (Thapar, J., concurring in the judgment in part and dissenting in part), *vacated for reh'g en banc* 18 F.4th 550. "By contrast, only seven countries" follow *Roe* in "permitting abortions after twenty weeks." *Id*. And those seven countries include China and North Korea—hardly models of evolving standards of decency. *Id*. Now consider other American States. While the dust is still settling after *Dobbs*, numerous States have enacted laws that will forbid abortion in many or most circumstances now that *Roe* was overturned. *See, e.g.*, Ark. Code Ann. §5-61-304; Human Life Protection Act, 2019 Arkansas Laws Act 180, §2 (S.B. 149); Idaho Code Ann. §18-622; Ky. Rev. Stat. §311.772; La. Stat. Ann. §40:1061; Miss. Code. Ann. §41-41-45; 2007

Miss. Laws Ch. 441, §6 (S.B. 2391); Mo. Ann. Stat. §188.017; N.D. Cent. Code Ann. §12.1-31-12; 27; 2007 North Dakota Laws Ch. 132, §2 (H.B. 1466); Okla. Stat. Ann. tit. 63, §1-731.4; 2022 Okla. Sess. Law Serv. Ch. 133 (S.B. 1555); S.D. Codified Laws §22-17-5.1; Tenn. Code Ann. §39-15-213; Tex. Health & Safety Code Ann. §170A.001; 2021 Tex. Sess. Law Serv. Ch. 800 (H.B. 1280); Utah Code Ann. §76-7a-201; Abortion Prohibition Amendments, 2020 Utah Laws Ch. 279 (S.B. 174); Wyo. Stat. Ann. §35-6-102. Others never repealed laws prohibiting or greatly restricting abortion. *See, e.g.*, Ala. Code §13A-13-7; Ariz. Rev. Stat. §13-3603; Mich. Comp. Laws §750.14; Wis. Stat. Ann. §940.04; W. Va. Code Ann. §61-2-8. Unless this Court is prepared to say that the governments of at least *eighteen* sister States stand against fundamental justice, this list ought to carry a great deal of weight.

Evolving knowledge also undermines any argument for a constitutional right to abortion. "As to the question 'when life begins,' the *Roe* majority maintained that 'at that point in the development of man's knowledge,' it was 'not in a position to speculate.'" *Memphis*, 14 F.4th at 450 (Thapar, J., concurring in the judgment in part and dissenting in part) (quoting *Roe*, 410 U.S. at 159) (alteration accepted). "Whether or not the scientific answer to that question was clear then, it is now. From fertilization, an embryo (and later, fetus) is alive and possesses its unique DNA." *Id*. (citing Enrica Bianchi, et al., *Juno Is the Egg Izumo Receptor and Is Essential for Mammalian Fertilization*, 508 Nature 483, 483 (2014)). And "from conception on, the human embryo is 'fully programmed and has the active

disposition to use that information to develop himself or herself to the mature stage of a human being.'" *Id*. (quoting Robert P. George & Christopher Tollefsen, *Embryo: A Defense of Human Life* 50 (2008)). "Of course, that new life is not yet mature—growth and development are necessary before that life can survive independently—but it is nonetheless human life." *Hamilton v. Scott*, 97 So. 3d 728, 746–47 (Ala. 2012) (Parker, J., concurring).

What is more, advances in "medical and scientific technology have greatly expanded our knowledge of prenatal life." *Id*. "The development of ultrasound technology has enhanced … *public* understanding, allowing us to watch the growth and development of the unborn child in a way previous generations could never have imagined." *Id*. "These images reveal how an unborn child visibly takes on 'the human form' in all relevant aspects by 12 weeks' gestation." *Memphis*, 14 F.4th at 450 (Thapar, J., concurring in the judgment in part and dissenting in part). And "neonatal and medical science … now graphically portrays … how a baby develops sensitivity to external stimuli and to pain much earlier than was [previously] believed." *McCorvey v. Hill*, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring).

In light of these scientific and technological advances, it is no surprise that many Americans oppose permissive abortion laws. Americans today have more compassion for living organisms—human and non-human alike—than ever before. Consider the countless state and federal laws barring *animal* cruelty. *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r of Indiana State Dep't of Health*, 917 F.3d 532, 537 (7th Cir. 2018)

(Easterbrook, J., dissenting from denial of rehearing *en banc*), *vacated and remanded sub nom. Box v. Planned Parenthood of Ind. and Ky.*, 139 S. Ct. 1780 (2019) (*per curiam*). Legislatures enact these laws "not simply because all mammals can feel pain and may well have emotions, but also because animal welfare affects human welfare. Many people feel disgust, humiliation, or shame when animals or their remains are poorly treated." *Id*. It is hardly a surprise that a society evolved enough to feel compassion for animals also feels compassion for unborn human beings, whom they can now see through images clearer than anything available at the time of *Roe*.

In the end, abortion is a contentious issue. There are many Americans—and many Ohioans—on both sides of that issue. *See, e.g.*, Rick Exner, *Ohio sharply divided on bill to ban abortion as early as 6 weeks, poll shows*, Cleveland.com (Mar. 26, 2019), https://perma.cc/G2HH-37BU. That is precisely why living constitutionalism cannot justify taking the issue from the political process. Again, a principled approach to living constitutionalism requires reference to the way in which "our society views" the issue in question, *Atkins*, 536 U.S. at 316, not on the way it appears to those who happen to serve as judges. In this contentious field, there is no plausible argument that *society's* "ideas of the Constitution have evolved" so "substantially," *Broom*, 146 Ohio St. 3d 60 at ¶95 (O'Neill, J., dissenting) (quotation omitted), that the question of abortion's legality is now removed from the democratic process.

B. This Court's precedent does not permit recognizing an abortion right.

The discussion above shows that the Constitution cannot be interpreted to confer a right to abortion. But there remains the question whether this Court's precedent *requires* recognizing such a right. The answer is no. In fact, this Court's precedent is best read to *preclude* the Court from recognizing any right to abortion.

Equal protection. The United States Constitution forbids the States from "deny[ing] to any person … the equal protection of the laws." U.S. Const., amend. XIV, §1. In *Dobbs*, the U.S. Supreme Court held that this clause *does not* confer any right to abortion. *Dobbs*, slip op. 10–11. Undeterred, the relators argue that Ohio's analogous provision does. In particular, they point to Article I, Section 2, which states:

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly

The first problem with this argument is that, for almost a century, this Court has held that "the federal and Ohio Equal Protection Clauses are to be construed and analyzed identically." *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St. 3d 55, 60 (1999); *accord State v. Moore*, 154 Ohio St. 3d 94, 2018-Ohio-3237 ¶22; *State v. Aalim*, 150 Ohio St. 3d 489, 2017-Ohio-2956 ¶29; *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St. 3d 307, 2016-Ohio-8118 ¶46 (lead op.); *Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 2010-Ohio-4908 ¶17; *Eppley v.*

Tri-Valley Loc. Sch. Dist. Bd. of Educ., 122 Ohio St. 3d 56, 2009-Ohio-1970 ¶11; *McCrone v. Bank One Corp.*, 107 Ohio St. 3d 272, 2005-Ohio-6905 ¶7; *State v. Thompson*, 95 Ohio St. 3d 264, 2002-Ohio-2124 ¶11; *Desenco, Inc. v. Akron*, 84 Ohio St. 3d 535, 544 (1999); *Beatty v. Akron City Hosp.*, 67 Ohio St. 2d 483, 491–94 (1981); *Keaton v. Ribbeck*, 58 Ohio St. 2d 443, 445 (1979) (*per curiam*); *State ex rel. Struble v. Davis*, 132 Ohio St. 555, 560 (1937). It is now blackletter law that the federal Equal Protection Clause confers no right to abortion. *See Dobbs*, slip op. 10–11 This means, in light of all these precedents, that Article I, Section 2 of the Ohio Constitution confers no such right either.

One quick aside. While some of this Court's non-majority opinions suggest that Ohio's Equal Protection Clause affords greater rights than the federal analogue, those opinions also recognize an important limitation on recognizing heightened protections. Specifically, "such an interpretation" is permissible only when it is "both prudent and not inconsistent with the intent of the framers." *Mole,* 149 Ohio St. 3d 215, at ¶21 (plurality op.). Here, as explained above, reading the Equal Protection Clause to confer a right to abortion would be quite "inconsistent with the intent of the framers." *Id*. In addition to the fact that no one alive in 1851 understood the Clause to guarantee any such right, Ohioans drafted and ratified the 1851 Constitution while Josiah Wilson was being criminally charged for supplying abortifacients in violation of Ohio law. *Wilson,* 2 Ohio. St. at 320. Soon thereafter, in 1853, this Court upheld his conviction, specifically holding that Ohio law barred abortions performed "at any time during the period of gestation." *Id*.

So there is little doubt what the ratifying generation thought the Clause said about abortion—nothing at all, meaning the matter remained subject to regulation by the political branches.

Return to the question at bar: Does any precedent support housing a right to abortion in Ohio's Equal Protection Clause? No. To the contrary, this Court's holdings regarding the Clause's meaning forbid recognizing any such right. The Court has said that, as "a general matter, this provision requires that the government treat all similarly situated persons alike." *Sherman v. Ohio Pub. Employees Retirement Sys.*, 163 Ohio St. 3d 258, 2020-Ohio-490 ¶14. The Heartbeat Act does that—it applies equally to everyone who might seek or perform an abortion. And the challenged laws are also "rationally related to a legitimate government interest." *Id*. (quotation omitted). Namely, the interest in protecting life. *See Dobbs*, slip op. 78.

Of course, this "rational basis" test does not apply to equal-protection claims involving discriminatory treatment of "a suspect class." *Sherman*, 163 Ohio St. 3d 258 at ¶14. Relevant here, when "a discriminatory classification based on sex … is at issue, [courts] employ heightened or intermediate scrutiny and require that the classification be substantially related to an important governmental objective." *Thompson*, 95 Ohio St. 3d 264 at ¶13. But for two reasons, the rule requiring heightened scrutiny of laws that discriminate on the basis of sex does not permit striking down the Heartbeat Act.

First, the Heartbeat Act satisfies intermediate scrutiny because it is substantially

related to the government's important interest in protecting unborn life. Even the relators concede the Heartbeat Act will have the effect of protecting unborn life, and there are few state interests more important than protecting innocent life.

Second, neither intermediate scrutiny or any other form of heighted scrutiny even applies, because the Act does not discriminate on the basis of sex. The Heartbeat Act regulates anyone, regardless of sex, who performs an abortion. True, "men do not menstruate" or become pregnant, while "women do." *Rowitz v. McClain*, 2019-Ohio-5438 ¶79 (10th Dist.) (Brunner, J., dissenting). But the fact that a law will have a disparate impact on one sex or the other does not require heightened scrutiny. If it did, then courts would have to apply heighted scrutiny to laws that provide funding for procedures—like breast and prostate exams, or birth and vasectomies—relevant to only men or only women. The same heightened scrutiny would apply to laws that tax or regulate products that only men or only women can use, like tampons or beard oil. That is not the law. *See Rowitz* , 2019-Ohio-5438 at ¶¶20, 39 (majority) (Beatty Blunt, J., for the court); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 272–73 (1993); *Poelker v. Doe*, 432 U.S. 519, 520–21 (1977); *Maher v. Roe*, 432 U.S. 464, 471 (1977); *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). While Congress and the General Assembly can pass laws to address policies that disparately impact the sexes, *see Allen v. totes/Isotoner Corp.*, 123 Ohio St. 3d 216, 2009-Ohio-4231 ¶¶24–32 (O'Connor, J., concurring in judgment) (recounting history), the Court must strenuously avoid "substitut[ing] [its] own views of those issues for those of

the legislature as they are embodied in the Revised Code," *id.* at ¶32 n.1.

It makes sense that laws regulating "a medical procedure that only one sex can undergo do[] not trigger heighted constitutional scrutiny" unless they are a "mere pretext designed to effect an invidious discrimination" on the basis of sex. *Dobbs*, slip op. 10–11 (quotation omitted; alteration accepted). Ohio's Equal Protection Clause, just like the Fourteenth Amendment's analogue, requires the government to "treat all similarly situated persons alike." *Sherman*, 163 Ohio St. 3d 258 at ¶14. When laws regulate (or decline to regulate) procedures based on characteristics unique to those procedures, they *do* treat similarly situated persons alike. So it is with abortion laws. "Abortion restrictions do not impose legal burdens on the basis of gender, but on the basis of the asserted presence and value of a human life in utero." Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995, 1009 n.35 (2003). Put differently, an "abortion restriction's target category—pregnancies (or some subset thereof)—embraces all relevant instances of the identified harm that the restriction seeks to prevent." *Id*. It thus treats like persons alike, and comports with equal-protection principles. *Bray*, 506 U.S. at 272–73.

The State readily concedes that an abortion law would run into constitutional difficulties if it were motivated by animus towards women—if, for example, it were a pretext for misogyny. The relators insinuate that the many legislators who voted to adopt the law were motivated by discriminatory attitudes toward women, saying that Ohio's law

is "rooted in subordinating sex-role stereotypes." Br. in Supp. 41. That accusation wrongly assumes that no legislator could be motivated by a genuine desire to protect unborn life. That assumption is unfounded. The Heartbeat Act expressly codifies the State's "interest in protecting the life of an unborn human." Heartbeat Act, 2019 Ohio Laws File 3, §3(G) (Sub. S.B. 23). True, it *also* notes that the State "has a valid interest in protecting the health of the woman." *Id*. But that is simply a correct statement of the law, as *Casey* itself recognized. *See* 505 U.S. at 846. The relators wrongly dismiss those who do not share their views on abortion—men and women alike—as bigots. This Court should not follow suit. To suggest that laws restricting abortion rest on animus toward women would cast aspersions on millions of "decent and honorable" Ohioans who hold opposing views on this weighty moral issue. *Obergefell*, 576 U.S. at 672.

Due Course of Law and Inalienable Rights. Section 16 of Ohio's Bill of Rights guarantees that "courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Section 1 says that Ohioans have "inalienable rights" including "liberty." The relators argue that these provisions, too, confer a right to abortion. This argument is, if anything, even weaker.

First, the Court has "recognized [Section 16] as the equivalent of the 'due process of law' protections in the United States Constitution." *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948 ¶48. The federal Due Process Clause confers no right to

an abortion. *See Dobbs*, slip op. 69. Therefore, neither does Ohio's. As for Section 1, the Court has given it no separate force apart from the guarantees read into Section 16. Indeed, the Court has held that Section 1 is not self-executing—a holding the relators do not contest. *See* Br. in Supp. 19; *State v. Williams*, 88 Ohio St. 3d 513, 523 (2000).

Second, when this Court engages in what is often called substantive-due-process analysis, it does so under Section 16, not Section 1. *See, e.g.*, *Stolz v. J & B Steel Erectors*, 155 Ohio St. 3d 567, 2018-Ohio-5088 ¶12; *Ferguson v. State*, 151 Ohio St. 3d 265, 2017-Ohio-7844 ¶43. So any claim to a substantive-due-process right to abort a child must flow through Section 16, not Section 1.

The relators' claim seeks to vindicate a *substantive* right to obtain an abortion. If that seems odd, it should. On its face, Section 16 confers no substantive rights—instead, it guarantees procedural rights to sue for redress. The oxymoronic substantive-due-process doctrine is hard to defend as a matter of textual interpretation. *State v. Aalim*, 150 Ohio St. 3d 489, 2017-Ohio-2956 ¶48 (DeWine, J., concurring); *Timbs v. Indiana*, 139 S.Ct. 682, 692 (2019) (Thomas, J., concurring in the judgment); David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789–1888*, p. 272 (1985). And, if not properly cabined, it vests a concerning amount of policymaking authority in courts. To avoid that, the Supreme Court of the United States has adopted a framework that strictly limits the doctrine's application. *See Dobbs*, slip op. 14–15; *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). This Court has adopted the same framework. *Aalim*, 150 Ohio St. 3d 489

at ¶16.

That framework confers no right to abortion. Under the substantive-due-process doctrine, "[g]overnment actions that infringe upon a fundamental right are subject to strict scrutiny, while those that do not need only be rationally related to a legitimate government interest." *Stolz*, 155 Ohio St. 3d 567 at ¶14. The challenged law survives rational-basis review for reasons discussed already. So unless the law infringes a "fundamental right," any substantive-due-process challenge fails. The relators claim the law infringes the fundamental right to abortion. There is no such "fundamental" right. A right is "fundamental" only if it is "objectively, deeply rooted in this Nation's history and tradition' … and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Aalim*, 150 Ohio St. 3d 489 at ¶16 (quotations omitted). There is no plausible argument that abortion is so deeply rooted in the nation's history—even the dissent in *Dobbs* conceded that point. *See, e.g.*, *Dobbs*, slip op. 12–14 (Breyer, Sotomayor, Kagan, JJ., dissenting). And the argument is even weaker with respect to Ohio's history. Again, for most of Ohio's history, abortion was not a right but rather a crime. *See above* 25. (Because there is no fundamental right to abortion, the relators' long discussion of strict scrutiny's application to this case irrelevant, *see* Br. in Supp. 28–34—though the State preserves its argument that the Heartbeat Act satisfies strict scrutiny also.)

All this makes plain that the 1802 language about the process for remedying

recognized wrongs has nothing to say about any right to abort an unborn child. The General Assembly is free to outlaw an act that harms another living being—human or otherwise. Indeed this Court's precedent most relevant to this case undermines the relators' claims about the Constitution. In 1949, this Court held that a "viable child, injured while en ventre sa mere, who survives such injury," has a remedy against the tortfeasor. *Williams v. Marion Rapid Transit*, 152 Ohio St. 114, 116, 129 (1949) (quotation marks omitted). The Court concluded that the Constitution *required* a remedy, even though no statute afforded one. *Id*. The relators' claimed "right to bodily integrity" has no stopping point at in-utero viability. So if the Constitution truly confers a right to harm an in-utero child, it must include the right to harm a viable in-utero child. That claim runs headlong into *Williams*, which recognized the right of the *child* to a remedy for anyone harming *her* when she was in utero.

The relators do not grapple with any of this. They cite no decision of this Court interpreting Article I, Section 16. They instead locate the right to abort in the language of Section 16 affording a remedy "by due course of law" for injuries to a "person." Br. in Supp. 17. According to the relators, a remedy for an injury entails "bodily integrity," (or "privacy") which in turn entails a right to abort a child. *Id*. That chain of logic fails the test of precedent at the first step. If every injury to the body must have a remedy, then this Court's many cases upholding laws that foreclosed relief for personal injury are all wrongly decided. That includes cases upholding laws that blocked recovery for medical

malpractice and product liability. *See, e.g.*, *Ruther v. Kaiser*, 134 Ohio St. 3d 408, 2012-Ohio-5686 ¶¶13–14; *Antoon v. Cleveland Clinic Found.*, 148 Ohio St. 3d 483, 2016-Ohio-7432 ¶¶27–28; *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546 ¶150. If those cases are right, the relators' argument must be wrong. Along the same lines, if any of the immunity doctrines are constitutionally valid, *see, e.g.*, *Borkowski v. Abood*, 117 Ohio St. 3d 347, 2008-Ohio-587 (judicial immunity), the relators' arguments must be wrong.

Much of the relators' brief consist of a string cite to lower and out-of-state courts that did not consider this Court's cases interpreting Article I, Section 16. And the one appellate decision from within this State recognizing a right to an abortion does not help the relators. *See Preterm Cleveland v. Voinovich*, 89 Ohio App. 3d 684 (10th Dist. 1993). As an initial matter, this Court is not bound by a Tenth District case—it is bound by its own precedents and the Ohio Constitution, neither of which confers a right to abortion. In any event, the majority in that case never adopted a standard by which abortion laws are to be judged. *Id.* at 695. The majority did, however, reject strict scrutiny and suggest that laws regulating abortion should probably be analyzed under something akin to a rational-basis test. *Id.* at 695 & n.10. A holding that the right to abortion is not infringed by laws that satisfy rational-basis review leads to the same place as a holding that there is no right to abortion: the Heartbeat Act would survive constitutional scrutiny.

As for the out-of-state cases, they largely parrot the now-overruled *Roe* and *Casey* decisions and mostly ground their holdings in clauses other than a due-course-of-law

provision. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 613 (2019); *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645, 653 (Miss. 1998); *Women of the State of Minnesota by Doe v. Gomez*, 542 N.W.2d 17, 26 (Minn. 1995). More recently, courts have recognized that their analogous provisions *do not* confer a right to abortion. *See, e.g.*, *Planned Parenthood of the Heartland, Inc. v. Reynolds*, 962 N.W.2d 37, 44 (Iowa 2021).

Healthcare Freedom Amendment. That leaves only the Healthcare Freedom Amendment. The Court has never announced any interpretation of that Amendment. Accordingly, its plain meaning controls. As addressed above, the plain meaning confers no right to abortion.

* * *

In sum, neither first principles nor precedent justifies interpreting the Ohio Constitution to confer a right to abortion. The relators will not likely prevail in this challenge.

CONCLUSION

The Court should deny the relators' motion for emergency relief.

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