Supreme Court of Ohio Clerk of Court - Filed January 03, 2023 - Case No. 2023-0004

In the
Supreme Court of Ohio

PRETERM-CLEVELAND, ET AL.	:	Case No. _____
	:	
Appellees,	:	On appeal from the Hamilton County
	:	Court of Appeals,
v.	:	First Appellate District
	:	
DAVE YOST, ATTORNEY GENERAL OF OHIO, ET AL.,	:	Court of Appeals
	:	Case No. C-220504
	:	
Appellants.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS DAVE YOST, ET AL.

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This case is about power. It is about the People's power to enact laws protecting unborn life; the State's power to appeal orders preliminarily enjoining those laws; and medical providers' power to assert their patients' rights in court. This case squarely presents each issue. The case began when a group of doctors and clinics filed a lawsuit challenging Ohio's Heartbeat Act, *see* Sub. S.B. 23 (Apr. 11, 2019), on the ground that it violated their patients' supposed right to abortion. The trial court accepted their theory and preliminarily enjoined the law. The State attempted to vindicate the law by filing an immediate appeal. But the First District dismissed the appeal for lack of jurisdiction.

If allowed to stand, the First District's ruling will leave the State with no way to protect legislation from egregiously wrong preliminary injunctions. Trial courts that issue such injunctions have every incentive to drag out lower-court proceedings, ensuring their orders remain in effect—and that state laws with which they disagree remain unenforceable—for as long as possible. Nothing in Ohio law requires that result. To the contrary, Ohio law permits the State to immediately appeal orders preliminarily enjoining state laws. The Court should grant review to say so. And, in the interest of resolving the important merits issues presented, the Court should also grant review to decide whether there is a right to abortion and, if there is, whether abortion providers rather than women seeking abortions may sue to enforce it.

STATEMENT OF THE FACTS AND CASE

1. The Heartbeat Act protects unborn children with beating hearts in two principal

ways. *First*, it requires any "person who intends to perform or induce an abortion" to "determine whether there is a detectable fetal heartbeat." R.C. 2919.192(A). Performing an abortion without checking for a "detectable heartbeat" is a crime. R.C. 2919.193(A). *Second*, the Act criminalizes "knowingly and purposefully perform[ing] or induc[ing] an abortion on a pregnant woman" after detecting a fetal heartbeat. R.C. 2919.195(A).

Critically, both provisions apply *only* to those who perform abortions—no penalties may be imposed on the women who obtain abortions. R.C. 2919.198. And the entire Act is subject to health-based exceptions. For example, the Act does not apply at all to ectopic pregnancies. R.C. 2919.191. And both of the just-discussed prohibitions—the prohibition on performing an abortion without checking for a heartbeat, and the prohibition on performing an abortion after detecting a heartbeat—do not apply when the abortionist determines, in good-faith and based on the facts known at the time, that compliance would pose a "serious risk of the substantial and irreversible impairment of a major bodily function." R.C. 2919.16(F); 2929.16(K); *accord* R.C. 2919.193(B); 2919.195(B).

2. Ohio's General Assembly passed the Heartbeat Act in 2019. Before it took effect, clinics challenged the Act in federal district court. That court preliminarily enjoined the Act as violating the federally recognized right to abortion. *See Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796 (S.D. Ohio 2019); *see also Roe v. Wade*, 410 U.S. 113 (1972); *Planned Parenthood of Southeastern. Pa. v. Casey*, 505 U.S. 833 (1992). But in 2022, the Supreme Court of the United States held that there is no federal constitutional right to abortion,

overruling the cases holding otherwise. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022). That day, the district court hearing the challenge to the Heartbeat Act dissolved its injunction. *Preterm-Cleveland v. Yost*, No. 1:19-CV-00360, 2022 WL 2290526, *2 (S.D. Ohio June 24, 2022). On June 24, the Act went into effect.

3. The same parties who are plaintiffs here—five abortion clinics and one abortionist—first asked this Court for a writ of mandamus prohibiting the Act's enforcement. This Court refused to grant emergency relief. *See State ex rel. Preterm-Cleveland v. Yost*, 167 Ohio St. 3d 1448, 2022-Ohio-2317. Eventually, the plaintiffs voluntarily dismissed that case. *State ex rel. Preterm-Cleveland v. Yost*, 167 Ohio St. 3d 1510, 2022-Ohio-3174.

Having failed to win relief in the State's highest court, the plaintiffs sued in the Hamilton County Court of Common Pleas. That court preliminarily enjoined almost the entirety of the Heartbeat Act. It first concluded that the plaintiffs had standing to sue under Ohio's third-party-standing doctrine. *See* Order Granting Preliminary Injunction, T.d.105, Oct. 12, 2022 ¶¶73–80. Then, on the merits, the court concluded that various sections in Article I of Ohio's Constitution—namely, sections 1, 7, 16, 20, and 21—combine to create an unenumerated, fundamental right to abortion protected by the substantive-due-process doctrine. *Id.* ¶¶81–96. It determined that the Heartbeat Act infringed this fundamental right. And it further held that the law could not satisfy strict scrutiny—the standard that laws burdening fundamental rights must meet. *Id.* ¶¶97–111. The Court further concluded that the Heartbeat Act infringed the equal-protection guarantees

in Article 1, Section 1, by burdening a fundamental right—the right to abortion—that only women may assert. *Id.* ¶¶112–23.

4. The appellants—this brief calls them "the State"—immediately appealed to the First District. That court *sua sponte* called for briefing addressing whether the preliminary injunction was a final, appealable order. *See* Entry Ordering Jurisdictional Briefing (Oct. 28, 2022). And, after receiving that briefing (along with the State's opening merits brief), the First District dismissed the appeal for lack of jurisdiction. *Preterm-Cleveland v. Yost*, 1st Dist. Hamilton No. C-220504, 2022-Ohio-4540 ("App.Op."). It determined that the preliminary injunction was not the sort of interlocutory order that may be immediately appealed.

THIS CASE PRESENTS A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST AND RAISES SUBSTANTIAL CONSTITUTIONAL ISSUES

I. The question of whether and when the State may appeal orders preliminarily enjoining state laws is immensely important.

"All political power is inherent in the people." Ohio Const., Art. I, §2. The State of Ohio is constituted so as to permit the exercise of that power. One way it performs that function is by enforcing the constitution Ohioans ratified and the laws "they and their representatives enact[ed]." *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020) (*per curiam*). As a result, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor*

Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *Abbot v. Perez*, 138 S. Ct. 2305, 2324 (2018); *Thompson*, 959 F.3d at 812.

All that sets up the first question in this case: whether an immediate appeal of an order preliminarily enjoining a state law is, or can be, the State's only "meaningful" and "effective remedy." R.C. 2505.02(B)(4)(b). Ohio law permits parties to immediately appeal "provisional remed[ies]," including preliminary injunctions, whenever:

> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

R.C. 2504.02(B)(4). A preliminary injunction order, unless it is somehow tentative, always satisfies subsection (a). The appealability of such orders thus turns on whether the State can obtain a "meaningful or effective remedy" by filing an appeal after a final judgment.

This question is undoubtedly important. As noted, the State suffers a form of irreparable injury whenever its laws are enjoined. The answer to the question whether and when the State may redress that injury will significantly affect its ability to ensure that "the will of the people" is "effected in accordance with [Ohio] law." *Coal. to Defend Aff. Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (Sutton, J., writing for the Court). What is more, the State often files such appeals to vindicate state law. This Court accepts and resolves such appeals, vindicating state laws in the process. *See, e.g., Newburgh*

Heights v. State, — Ohio St. 3d —, 2022-Ohio-1642. The State needs to know whether it may file such appeals so that it may faithfully discharge its obligation to Ohioans.

The First District's ruling tees up this question. Its opinion seems to prevent the State from *ever* appealing a preliminary injunction that threatens grave injury to Ohioans. That court criticized the State for "focus[ing] on harm to third-parties rather than on harm to itself." App.Op.¶25. This misunderstands the State's role as a sovereign: because the State exists to protect its citizens and to effect their will, injuries to "third-parties" whom the enjoined law is aimed at protecting *are* injuries to the State. Laws prohibiting murder, rape, theft, and so on, all exist to protect Ohioans. Those Ohioans are "third-parties" under the First District's opinion. Are their interests irrelevant to the question whether *the State* would sustain a harm should such laws be enjoined? To immediately appeal an order preliminary enjoining such laws, would the State have to show an injury inflicted directly on the State, rather than on its citizens? Presumably not, though the First District's opinion suggests the answer is "yes." That is almost certainly wrong. If it is right, this Court should say so, so that the General Assembly can address that concerning conclusion.

One further note. The First District's ruling creates an anomaly. It cited, as examples of allowable appeals, orders to reveal businesses' trade secrets or confidential information. App.Op.¶27 (citing cases). It noted that, in these cases, the proverbial "bell" cannot be "unrung." *Id.* That insight supports an immediate appeal here. To see why,

suppose a law protected millions of Ohioans' confidential information. And suppose it were enjoined, allowing the release of that information. Could the State immediately appeal? Not under the First District's logic, as the harms from the release would be felt by citizens rather than by the State itself. That makes little sense, and proves the problem with barring the State from immediately appealing to protect interests other than those that are, strictly speaking, its own.

II. The Court should review the constitutional challenge to the Heartbeat Act, and it should do so now, as the issue is as ripe as it gets and ought not be delayed.

Upon assuring itself of jurisdiction, the Court may "proceed to the merits" when "it is in the interest of judicial economy" to do so. *State v. Moore*, 154 Ohio St. 3d 94, 2018-Ohio-3237 ¶20. Here, the interests of judicial economy require reaching the merits. Remanding to the First District would simply delay this Court's reaching the immensely important merits questions this case presents. Those questions are purely legal in nature, and this Court must decide them sooner or later. "Remanding th[e] case for further consideration ... merely to reach an inevitable result would result in additional, unnecessary delay." *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St. 3d 231, 2013-Ohio-3019 ¶52; *see also Apel v. Katz*, 83 Ohio St. 3d 11 (1998). (The result in the trial court is especially inevitable, as that court has declared that its legal conclusions are "law of the case" that it will not reconsider. Transcript, Oct. 7, 2022, at 283.) The Court's "authority to address the merits" in this appeal of a preliminary injunction "is clear." *Munaf v. Geren*, 553 U.S. 674, 691 (2008). It should not shrink from its responsibility to exercise that authority.

To describe the merits issues is to highlight their importance.

First, do abortion clinics and abortionists—as opposed to women seeking abortions—have standing to challenge laws infringing a supposed right to abortion? Standing principles are important because they bear directly on the separation of powers: they "prevent the judicial process from being used to usurp the powers of the political branches." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quotation omitted). These principles *generally* mean that plaintiffs can sue to vindicate only their own rights, not the rights of others. But a plaintiff may assert another's rights if it: (1) "suffers its own injury in fact"; (2) "possesses a sufficiently 'close' relationship with the person who possesses the right'"; and (3) "shows some 'hindrance' that stands in the way of the [rights holder] seeking relief" herself. *City of E. Liverpool v. Columbiana Cnty. Budget Comm'n*, 114 Ohio St. 3d 133, 2007–Ohio-3759 ¶22 (quotation omitted). This "third-party-standing doctrine" tests the judiciary's commitment to separation of powers; the U.S. Supreme Court, for example, famously distorted its own third-party-standing principles to accommodate abortion litigants. *See Dobbs*, 142 S. Ct. at 2275 & n.61. This case presents the Court with an opportunity to further develop third-party-standing principles in Ohio. In so doing, it can make clear that the same rules apply *regardless* of the alleged right at issue. Standing principles, and thus the judiciary's fidelity to the separation of powers, cannot be allowed to wax and wane depending on the right asserted.

Second, this case presents the question whether the Ohio Constitution protects a

right to abortion. The sooner the Court settles that question, the better. "Abortion contests of this sort are not going away." *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 535 (6th Cir. 2021) (Sutton, J., concurring). Abortion is a morally contentious issue on which well-meaning citizens hold deeply felt, irreconcilable views. Some see abortion as murder. Others think it is a medical procedure central to women's freedom. For still others, abortion is something less absolute. "Complete elimination of the debate in one direction—that only the public, never the woman, has a say in the matter—shortchanges some interests. Complete elimination of the debate in the other direction—that only the woman, never the public, has a say in the matter—shortchanges other interests." *Id.* "A healthy society should have free rein to navigate between these poles." *Id.* By deciding whether the Ohio Constitution takes this issue from the democratic process, the Court can clarify Ohio's ability to regulate abortion so as to address these competing interests.

ARGUMENT

Appellants' Proposition of Law No. 1:

The State may, under R.C. 2505.02(B)(4), immediately appeal orders preliminarily enjoining state laws.

Section 2505.02(B) of the Revised Code outlines when parties may immediately appeal interlocutory orders. Relevant here, it states:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> ...

> (4) An order that grants or denies a provisional remedy and to which both of the following apply:
>
> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

R.C. 2505.02(B)(4)(A). This language makes the trial court's order preliminarily enjoining Ohio's Heartbeat Act immediately appealable. A "preliminary injunction" is a provisional remedy by definition. R.C. 2505.02(A)(3). Thus, if the State can satisfy subsections (a) and (b) of R.C. 2505.02(B)(4), it is entitled to appeal immediately. The State has satisfied both. Even the First District acknowledged that the State satisfied subsection (a), as the trial court's order was final, not tentative, with respect to the question whether to issue a preliminary injunction. App.Op.¶14. And subsection (b) is satisfied because the State cannot obtain "a meaningful or effective remedy" if it awaits a final judgment before appealing. For one thing, States *always* suffer irreparable harm when their constitutionally permissible laws are enjoined. *See Maryland*, 567 U.S. at 1303 (Roberts, C.J., in chambers); *Abbot*, 138 S. Ct. at 1324; *Thompson*, 959 F.3d at 812. That irreparable harm cannot be fixed in a later appeal—the law cannot be put back into effect for the time that passed between the order's issuance and the final judgment. Further, in the abortion context, the irreparable harm is apparent for an additional reason: every abortion inflicts the most irreparable harm imaginable—death—on the unborn child. Thus, every abortion

performed because of the preliminary injunction inflicts irreparable harm that Ohio has an interest in preventing. Only an immediate appeal can redress Ohio's injuries.

Appellants' Proposition of Law No. 2:

Neither abortion clinics nor abortionists have standing to challenge the Heartbeat Act.

The plaintiffs—one abortionist and five abortion clinics—do not claim a right to perform abortions. Instead, they lean on the disfavored doctrine of third-party standing to assert *their patients'* supposed abortion rights. *See Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St. 3d 284, 2009-Ohio-6764 ¶49. They cannot meet any of the three requirements—much less do so for *each* provision they challenge, as they must. *See Preterm-Cleveland, Inc. v. Kasich*, 153 Ohio St. 3d 157, 2018-Ohio-441 ¶30.

Courts allow third-party standing only if the plaintiff: (1) "suffers its own injury in fact"; (2) "possesses a sufficiently 'close' relationship with the person who possesses the right'"; and (3) "shows some 'hindrance' that stands in the way of the [rights holder] seeking relief" herself. *City of E. Liverpool*, 114 Ohio St. 3d 133 ¶22 (quotation omitted).

Plaintiffs fail that test. First, doctors and clinics have no right to perform abortions. *See State v. Alfieri*, 132 Ohio App.3d 69, 79 (1st Dist. 1998); *see also Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (*en banc*). So the Heartbeat Act does not deprive *the plaintiffs* of any legal interest—it inflicts no injury in fact upon them. Second, women seeking abortions usually do "not develop a close relationship with the doctor who performs the [abortion]," let alone with the clinic. *June Med. Services L.L.C. v.*

Russo, 140 S. Ct. 2103, 2168 (2020) (Alito, J., dissenting), *overruled by Dobbs*, 142 S. Ct. 2228; *id.* at 2174 (Gorsuch, J., dissenting). Third, nothing prevents would-be patients from suing to vindicate abortion rights. *Roe v. Wade* itself involved an individual woman suing anonymously. *Id.* at 2168 (Alito, J., dissenting). For decades, even *juveniles* have anonymously sought court orders allowing them to obtain abortions. *See, e.g., In re Doe*, 7th Dist. Columbiana No. 11CO34, 2011-Ohio-6373 ¶1. So it is absurd to say that patients generally, most of whom are *adults*, cannot do the same. *June Med.*, 140 S. Ct. at 2169 (Alito, J., dissenting); *id.* at 2174 (Gorsuch, J., dissenting).

Appellants' Proposition of Law No. 3:

The Ohio Constitution creates no right to abortion.

The Ohio Constitution creates no right to abortion. In concluding otherwise, the trial court invoked the substantive-due-process doctrine and the Equal Protection and Benefit Clause. *See* Art I, §2. It erred.

A. The Due Course of Law Clause provides:

> All 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. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Ohio Const., Art. I, §16. As originally understood, this provision granted only procedural rights, not substantive rights. *See State v. Aalim*, 150 Ohio St. 3d 489, 2017-Ohio-2956 ¶¶40, 45–48 (DeWine, J., concurring). But this Court has long interpreted the Clause to protect

some unenumerated "fundamental" rights—in other words, "rights 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 ¶16 (quotation omitted). Laws that burden fundamental rights are unconstitutional unless they are narrowly tailored to meet a compelling state interest. *See Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948 ¶48; *Stolz v. J & B Steel Erectors*, 155 Ohio St. 3d 567, 2018-Ohio-5088 ¶14.

The Due Course of Law Clause confers no right to abortion. First, abortion is not a "fundamental right," *Stolz*, 2018-Ohio-5088 ¶14, because it is not "objectively, deeply rooted in this Nation's history and tradition." *Aalim*, 150 Ohio St. 3d 489 ¶16 (quotation omitted). Indeed, abortion was a *crime* for much of American history. Ohio, for its part, criminalized abortion at all times between 1834 and *Roe v. Wade*. *See* Ohio Gen. Stat. §§ 111(1), 112 (2) (1834); Ohio Gen. Stat. §§111, 112 (1841); R.C. 2901.16 (1972). This Court even affirmed a conviction under the 1834 law shortly after the People ratified the Due Course of Law Clause, proving that the Clause was not understood to confer any abortion right. *Wilson v. State*, 2 Ohio St. 319, 320–21 (1853).

Second, this Court has held that the Due Course of Law Clause and the federal Due Process Clause confer "equivalent" protections. *Arbino*, 116 Ohio St. 3d 468, 2007-Ohio-6948 ¶48. Because the Due Process Clause confers no right to abortion, *see Dobbs*, 142 S. Ct. at 2242–43, neither does the Due Course of Law Clause.

B. Likewise, Ohio's Equal Protection and Benefit Clause does not create a right to abortion. That clause states that "[g]overnment is instituted for [the People's] equal protection and benefit," and that "no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly." Ohio Const., Art. I, §2. This Court has held that the clause is co-extensive with its federal analogue. *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St. 3d 55, 59–60 (1999). Because the federal Equal Protection Clause grants no right to abortion, *Dobbs*, 142 S. Ct. at 2245–46, neither does Ohio's.

In any event, the Clause simply "requires that the government treat all similarly situated persons alike." *Sherman v. OPERS*, 163 Ohio St. 3d 258, 2020-Ohio-4960 ¶14. The trial court held that the Act impermissibly differentiates on the basis of sex, but that is wrong. The Act applies to all abortionists, regardless of sex. True, the Act regulates a procedure—abortion—that only women can obtain. But that does not mean the Act discriminates against women; it simply reflects the reality that only women can become pregnant. Laws that regulate a procedure available to only one sex *do* treat like individuals alike—specifically, they treat equally all people capable of obtaining the procedure. Thus, although a law that funds only pap smears can be used only by women, no such law is subject to heightened scrutiny. Likewise, a law funding prostate exams would be constitutional. And presumably even the plaintiffs would take no issue with a law funding abortions, even though only women can obtain abortions.

"Abortion restrictions [thus] 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.* Such restrictions thus treat all similarly situated people identically, and therefore satisfy equal-protection princples.

CONCLUSION

The Court should reverse the First District's judgment and hold that the trial court erred when it entered a preliminary injunction.

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Additionally, the foregoing Memorandum in Support of Jurisdiction was served by U.S. mail this 3rd day of January, 2023, upon the following:

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/s/ Benjamin M. Flowers
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