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January 11, 2023

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Melissa M. Ferguson, Esq.
Office of the Clerk
Supreme Court of Ohio 65 South Front Street, 8th Floor
Columbus, OH 43215-3431

Re: Request to Recuse The Honorable Joseph T. Deters
Preterm-Cleveland, et al. v. Dave Yost, Attorney General of Ohio, et al.
Case No. _____, Court of Appeals Case No. C-220504

Dear Ms. Ferguson,

I represent Plaintiffs-Appellees Preterm-Cleveland, et al. in the above referenced case. Pursuant to Jud. Cond. R. 2.11 and S. Ct. Prac. R. 4.04, I write to respectfully request that Justice Deters recuse himself from this case, given that at the time his recent appointment to this Honorable Court was announced and the Defendants-Appellants' jurisdictional memorandum was filed, he was a named Defendant in this litigation. An affidavit is attached to this letter.

Under Jud. Cond. R. 2.11, justices "shall" disqualify themselves in "any proceeding in which the judge's impartiality might reasonably be questioned." This includes, but is not limited to, a proceeding in which "[t]he judge knows that *the judge . . . is . . . [a] party to the proceeding.*" Jud. Cond. R. 2.11(A)(2)(a) (emphasis added).

As the Hamilton County Prosecutor, Justice Deters was responsible for the enforcement of the criminal laws in Hamilton County, including the criminal provisions contained in S.B. 23—the law at issue in this case. He was named as a Defendant in this case in his official capacity as Hamilton County Prosecutor, *see* Complaint, Sept. 2, 2022 ¶ 20, and participated in this case in that capacity.¹ On December 17, 2022, the State announced its intention to appeal this case to the Supreme Court. Justice Deters was named to the Supreme Court by Governor DeWine five days later. But he remained the Hamilton County Prosecutor—and a named party in this case—right up until the day before he was sworn in as a Justice of this Court on January 7, 2023.² He was thus still a party at the time the Defendants-Appellants' opening brief was filed in this Court on January 3, 2023, and he is listed as a defendant on that document. Justice Deters' status as a

¹ For example, one of Justice Deters' assistant prosecutors, Pam Sears, attended the September 8, 2022 hearing on Plaintiffs' motion for a temporary restraining order on his behalf. *See* Ex. A, Transcript of September 8, 2022 Hearing.

² Per Ohio Civ. R. 25(D)(1), Justice Deters' successor as Hamilton County Prosecutor was automatically substituted as a party to this action after Justice Deters left that office on January 6, 2023. *See* Ex. B, <https://www.fox19.com/2023/01/07/joe-deters-sworn-ohio-supreme-court-justice/> (Justice Deters' last day at the Hamilton County Prosecutor's office was January 6, 2023).

party in this case while it was pending in this Court clearly mandates recusal. *See, e.g., Caperton v. AT Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (“[N]o man is allowed to be a judge in his own cause.”), quoting *The Federalist* No. 10, p. 59 (J. Cooke ed.1961) (J. Madison). Indeed, it unquestionably undermines the appearance of neutrality and legitimacy in the eyes of the public for a justice to rule on a case in which he was a party so recently that his name appears on the Defendants-Appellants’ brief that he would have to evaluate as a justice.

Plaintiffs-Appellees therefore respectfully request that Justice Deters recuse himself from hearing this action. The facts in the attached affidavit demonstrate that Justice Deters’ prior involvement in this case place his impartiality into question and therefore necessitates recusal.

Very truly yours,



B. Jessie Hill



Affidavit of Recusal.pdf

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E-Signature 1: B. Jessie Hill (bjh)

January 11, 2023 12:49:47 -8:00 [755792F908DC] [173.90.135.91]
bjh11@case.edu (Principal) (Personally Known)

E-Signature Notary: Theresa M Sabo (TMS)

January 11, 2023 12:49:47 -8:00 [91AE9CFA4365] [65.60.211.87]
tess.sabo@gmail.com
I, Theresa M Sabo, did witness the participants named above electronically sign this document.



January 11, 2023

Page 3

AFFIDAVIT OF RECUSAL

I, B. Jessie Hill, Esq., being first duly sworn, hereby depose, state and solemnly swear to the following:

1. I am an attorney at law in good standing, and I represent Plaintiffs-Appellees in *Preterm-Cleveland, et al. v. Dave Yost, Attorney General of Ohio, et al.*, currently pending before this Honorable Court.
2. Justice Deters' impartiality in this case has reasonably been called into question because, in his capacity as Hamilton County Prosecutor, he was named as a Defendant in this action prior to his appointment to this Honorable Court and continued to be a named Defendant when this Court's jurisdiction was invoked.
3. In his role as Hamilton County Prosecutor, Justice Deters was responsible for the enforcement of the criminal laws in Hamilton County, including the criminal provisions contained in S.B. 23—the law at issue in this case.
4. As a party in the underlying litigation, Justice Deters was represented by Ms. Pam Sears at the September 8, 2022 hearing on Plaintiffs' motion for a temporary restraining order.
5. Based on the foregoing facts, Justice Deters' impartiality could be reasonably questioned by the public. Therefore, pursuant to Ohio Code of Judicial Conduct R. 2.1 1, Plaintiffs-Appellees respectfully request that Justice Deters recuse himself from this case.

FURTHER AFFIANT SAYETH NAUGHT.

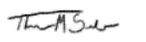

Signed on 2023/01/11 12:49:47 -8:00

B. Jessie Hill

Sworn and subscribed to me this 11th day of January, 2023.



Notarial act performed by audio-visual communication


Signed on 2023/01/11 12:49:47 -8:00

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2023, the foregoing was electronically filed via the Court's e-filing system. I further certify that a copy of the foregoing was served via electronic mail upon counsel for the following parties:

David Yost
Attorney General of Ohio
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Director, Ohio Department of Health
246 N. High Street
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Email: Andrew.McCartney@OhioAGO.gov
Email: Benjamin.Flowers@OhioAGO.gov
Email: Stephen.Carney@OhioAGO.gov

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Email: Benjamin.Flowers@OhioAGO.gov
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Kim G. Rothermel, M.D.
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Email: Amanda.Narog@OhioAGO.gov
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Matthew T. Fitzsimmons
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Jeanine A. Hummer
Amy L. Hiers
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Counsel for G. Gary Tyack, Franklin County Prosecutor

Marvin D. Evans
Attorney for Summit County Prosecutor
Assistant Prosecuting Attorney
53 University Ave., 7th Floor
Akron, OH 44308-1680
Email: mevans@prosecutor.summitoh.net
Counsel for Sherri Bevan Walsh, Summit County Prosecutor

/s/ B. Jessie Hill

B. Jessie Hill (0074770)

Exhibit A

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

- - -

PRETERM-CLEVELAND, et)
al.,)
)
Plaintiffs,)
)
vs.)
)
DAVID YOST, et al.,)
)
Defendants.)

APPEAL NO: C2200504
CASE NO. A2203203
Volume 1 of 4

- - -

MOTION FOR TEMPORARY RESTRAINING ORDER
ON APPEAL

BE IT REMEMBERED that upon the
Motion for Temporary Restraining Order in
this cause on Thursday, September 8, 2022,
before the Honorable Christian A. Jenkins,
a said Judge of the said court, the
following proceedings were had:

1 APPEARANCES ON BEHALF OF PLAINTIFFS
2 PRESENT IN COURTROOM:

3 B. Jessie Hill, Esq.,
4

5 APPEARANCES ON BEHALF OF PLAINTIFFS
6 VIA ZOOM:

7 Michelle Nicole Diamond, Esq.,
8 Allyson Slater, Esq.,
9 Davina Pujari, Esq.,
10 Freda J. Levenson, Esq.,
11 Rebecca Kendis, Esq.,
12 Melissa Cohen, Esq.,
13 Sarah Mac Dougall, Esq.,
14

15 - - -

16 APPEARANCES ON BEHALF OF STATE'S
17 DEFENDANTS IN COURTROOM:

18 Amanda L. Narog, Esq.,
19 Andrew D. McCartney, Esq.,
20

21 APPEARANCES ON BEHALF OF DEFENDANTS
22 VIA ZOOM:

23 Matthew Fitzsimmons, Esq.,
24 Amy L. Hiers, Esq.,
25 Ward Barrentine, Esq.,
Marvin D. Evans, Esq.,
Pam Sears, Esq.,

1 AFTERNOON SESSION, Thursday, September 8, 2022

2 THE COURT: Good Afternoon. We are
3 on the record in Case A2203203. This is
4 Preterm-Cleveland, et al., versus David
5 Yost, et al. We are here today on the
6 Plaintiffs' Motion for a Temporary
7 Restraining Order.

8 I am going to ask everyone to go
9 through an orderly statement of
10 appearances on the record in a second.
11 Let me make sure everyone knows what the
12 Court has so if the Court does not have
13 everything you are going to be referring
14 to, we can get it when you refer to it.

15 The Court has the Complaint and
16 Plaintiff's Motion for a Temporary
17 Restraining Order, as well as the
18 supporting memorandum and several
19 affidavits; specifically, we have the
20 Affidavits of Dr. Liner, Dr. Burkons, Dr.
21 Trick, I think it is, Dr. Krishen and Dr.
22 Haskell.

23 Court has Defendants' Opposition to
24 Plaintiffs' Motion for TRO which, as far
25 as I can tell, I have no supporting

1 affidavits or evidentiary material.

2 Court just had handed to it
3 Plaintiffs' Reply, which I understand was
4 filed maybe an hour ago. The Court has
5 not had a chance to review that. My
6 apologies. We will need to review it.

7 I don't know if Defendants received
8 a copy of it or not.

9 Seeing shaking heads in the
10 courtroom and some nodding heads.

11 MS. NAROG: We saw the draft, but
12 we did not attach it.

13 THE COURT: The Court has also
14 received and granted leave for the filing
15 of an Amicus Brief. It is a little
16 unusual in the Common Pleas Court, but
17 not unheard of. The Rule still applies
18 and the Court has granted leave to the
19 Amici professors. Niven, Smith, Bessett,
20 Norris, Gallo and Mockabee filed their
21 Amicus Brief. The Court has reviewed
22 that Amicus Brief.

23 So that's what the Court has in
24 front of it, as well as its own
25 preliminary research. And so if there

1 are other materials that the Court should
2 have or that anyone has filed the Court
3 is not aware of yet because of the delay
4 in getting materials from the Clerk's
5 office, please let us know in due course.

6 But, first, what I would like to do
7 is, I would like to go through a
8 statement of appearances to make sure I
9 know who is here for what party and who
10 will be speaking on behalf of the various
11 parties.

12 So why don't we start with the
13 Plaintiffs. If you could take us through
14 who is here for the Plaintiffs.

15 MS. HILL: Your Honor, Jessie Hill
16 on behalf of the Plaintiffs, and I will
17 be arguing.

18 THE COURT: All right.

19 Then I see a number of other folks
20 on the Zoom. Why don't we just make sure
21 their appearances are noted.

22 I see Ms. Levenson. You are here
23 for the Plaintiffs, correct?

24 Your audio is not coming through,
25 Ms. Levenson, but I can tell you said

1 yes.

2 MS. LEVENSON: Sorry, Your Honor.

3 Yes. Thank you.

4 THE COURT: All right.

5 And then Ms. Cohen, you are here
6 for whom?

7 MS. COHEN: Melissa Cohen on behalf
8 of Plaintiffs.

9 THE COURT: Very good.

10 And Ms. Kendis.

11 MS. KENDIS: Yes, Your Honor. I am
12 here on behalf of the Plaintiff.

13 THE COURT: Okay.

14 Ms. Mac Dougall.

15 MS. MAC DOUGALL: Thank you, Your
16 Honor. Also here for the Plaintiff.

17 THE COURT: Mr. Barrentine.

18 MR. BARRENTINE: Good afternoon,
19 Your Honor. Ward Barrentine on behalf of
20 the Defendant Prosecutor from Montgomery
21 County.

22 THE COURT: All right.

23 And then I see a couple folks who
24 are not on video. I see an Assistant
25 Cuyahoga Prosecutor, Mr. Fitzsimmons. I

1 take it he is here for the Cuyahoga
2 County Prosecutor; is that correct?

3 MR. FITZSIMMONS: That's correct,
4 Your Honor. I apologize. I am leaving
5 my video running but, yes, I am here for
6 the Cuyahoga County Prosecutor here in
7 Cuyahoga County.

8 THE COURT: All right. And I see
9 Ms. Hiers; is that correct?

10 MS. HIERS: Good afternoon, Your
11 Honor. It is actually Hiers, on behalf
12 of Franklin County Prosecuting Attorney
13 Gary Tyack. Thank you.

14 THE COURT: There is a 330 Area
15 Code. I don't know who that is. Could
16 you identify yourself, please.

17 MR. EVANS: It is probably me, Your
18 Honor. Marvin Evans. I am representing
19 Summit County Prosecutors here as a
20 matter of law.

21 THE COURT: All right.

22 I think we received an additional
23 filing that the Court did not mention
24 from the outset from Lucas County. Has
25 everyone seen that filing? Am I correct,

1 Mr. Fitzpatrick, it was the Lucas County
2 Prosecutor who filed that?

3 MR. FITZPATRICK: Yes, Judge.

4 THE COURT: I am going to pull this
5 up, just so everyone knows. It is
6 available online on our docket. It
7 appears that the Lucas County Prosecutor
8 has filed a Notice of No Objection in
9 support for the Plaintiffs' Requested
10 Temporary Restraining Order. We do have
11 that. That is on file on the docket.

12 Now I see a whole host of other
13 people being admitted to the Zoom.
14 wonderful. Okay. There were a few
15 people just admitted to the Zoom. We
16 were in the process of identifying
17 everyone who is appearing via Zoom.
18 Let's see if we can figure out who we
19 missed who has just joined us.

20 It looks like Allyson Slater has
21 just joined us; is that correct?

22 Ms. Slater, who are you representing?

23 MS. SLATER: Yes. Good afternoon,
24 Your Honor, on behalf of the Plaintiffs.

25 THE COURT: Okay.

1 And then Michelle Diamond, although
2 it looks like Ms. Diamond is connecting
3 to audio.

4 So we will go to Davina Pujari.

5 MS. PUJARI: Good morning, Your
6 Honor. Davina Pujari here on behalf of
7 the Plaintiffs.

8 THE COURT: Thank you.

9 I think I got everyone. Is anyone
10 aware of anyone I missed on the Zoom?

11 MS. SEARS: That's because you are
12 tired of hearing from me. Hi. This is
13 Pam Sears on behalf of the Hamilton
14 County Prosecuting Attorney Joe Deters.

15 THE COURT: I am sorry, Ms. Sears.
16 You are right. I was going through the
17 Plaintiffs first.

18 MS. SEARS: I am sorry. I
19 apologize.

20 THE COURT: You are fine. Thank
21 you.

22 And Ms. Diamond's audio is still
23 having problems, so we will go ahead and
24 proceed.

25 In the courtroom, if you would put

1 your appearances on the record, please.

2 MS. NAROG: Amanda Narog on behalf
3 of Attorney General David Yost, Director
4 Bruce Vanderhoff, M.D., Kim Rothermel,
5 M.D. and Bruce Saferin.

6 THE COURT: All right.

7 MR. MCCARTNEY: Andrew McCartney,
8 also on behalf of the State.

9 THE COURT: Okay. I don't know if
10 the folks on Zoom could hear that. Maybe
11 when we proceed with argument, if you
12 would use the podium so we get the
13 microphone, I think that would help the
14 folks on Zoom to hear you.

15 Amanda Narog and Andrew McCartney
16 on behalf of the State Defendants are
17 here with us in person in the courtroom.

18 And it looks like we have one more
19 late arrival on Zoom asking to be
20 admitted.

21 I think we have done as well as we
22 are going to do with getting the
23 appearances. It looks like there are
24 still some folks who are having
25 difficulty connecting.

1 Anything else anyone wants to
2 discuss on the record before we proceed
3 with argument on the Plaintiffs' motion?

4 Okay. Then why don't we proceed
5 with argument. I think, Ms. Hill, you
6 said you were going to speak on behalf of
7 the Plaintiffs collectively.

8 And it looks like we have a number
9 of representatives of defendants. Do I
10 take it, is there any consensus among the
11 defendants of a single speaker, or will
12 each of the attorneys representing a
13 defendant be addressing separately on
14 this Motion? Does anyone know?

15 MS. HIERS: Your Honor, this is Amy
16 Hiers on behalf of Franklin County
17 Prosecutor Gary Tyack. We will not be
18 presenting any argument.

19 THE COURT: All right.

20 MS. SEARS: Your Honor, this is Pam
21 Sears on behalf of the Hamilton County
22 Prosecutor's Office. We will be
23 deferring to Prosecuting Attorney John
24 Williams.

25 MR. BARRENTINE: Your Honor, Ward

1 Barrentine. We will defer to the
2 Attorney General's argument.

3 THE COURT: Okay.

4 MR. FITZSIMMONS: Matthew
5 Fitzsimmons on behalf of Cuyahoga County
6 Prosecutor's Office. We will not be
7 making argument, but we will not be
8 opposing the Motion for Temporary
9 Restraining Order.

10 THE COURT: Cuyahoga County is
11 taking the same position as Lucas County?

12 MR. FITZSIMMONS: Right, Your
13 Honor.

14 THE COURT: Just to clear that up
15 before we proceed, any other counties
16 taking that position?

17 MS. HIERS: Your Honor, we are not
18 opposing it, either.

19 THE COURT: Franklin County is not
20 opposing the Motion.

21 MR. BARRENTINE: Montgomery County
22 likewise will not oppose.

23 MS. SEARS: Same here for Hamilton
24 County, Judge.

25 THE COURT: Okay. Hamilton County

1 is not opposing the TRO?

2 MS. SEARS: Correct. Thank you.

3 THE COURT: All right.

4 MS. EVANS: Your Honor, Mark Evans
5 for Summit County. We will not be
6 speaking, but we are in the same position
7 as the other counties. We will not be
8 opposing the TRO.

9 THE COURT: Okay. All right. Very
10 good. Why don't we proceed with argument
11 from the Plaintiffs and then the folks
12 from the AG's office, if at any point any
13 of the other attorneys on the line feel
14 the need that there is something they
15 want to add to the record, just try to
16 signal that and we will do our best to
17 give everyone a chance to participate and
18 add anything they think would be helpful.

19 Why don't we start with Ms. Hill
20 whenever she is ready.

21 And Mr. Fitzpatrick is working on
22 the screen here. I think we are good to
23 go.

24 All right.

25 Ms. Hill, you have the floor.

1 MS. HILL: Thank you, Your Honor.

2 For over two months S.B. 23, which
3 is a near total ban on abortion, has been
4 imposing upon Ohioans the devastating and
5 irreparable harm of being denied access
6 to abortion in Ohio and being forced to
7 continue pregnancies against their will
8 in violation of Article I, Sections 1, 2,
9 16 and 21 of the Ohio Constitution.

10 Now, we have submitted Affidavits
11 detailing numerous of these harms. I
12 just want to give a few examples right
13 now for the Court.

14 One example, there was a young
15 woman who was turned away from a clinic
16 in Ohio because of S.B. 23 who had been
17 so ill, throwing up because of her
18 pregnancy, that she couldn't sit in a
19 classroom to finish her high school
20 degree. When she had to be turned away
21 from the clinic, she ended up in the
22 hospital because she was suicidal.

23 We have an Affidavit that talks
24 about cancer patients whose physicians
25 could not or would not continue their

1 treatment because they were pregnant.
2 And those patients that had to travel out
3 of state did further delay both their
4 abortion care and their cancer treatment.

5 Then, of course, the story of the
6 ten-year-old rape victim who had to
7 travel to Indiana to access abortion
8 care, has made national news. But our
9 Affidavits detail at least two cases of
10 minors who were victims of sexual assault
11 and denied abortions in Ohio because of
12 S.B. 23 just during the two months it has
13 been in effect.

14 This continuous severe and mounting
15 harm to patients, together with the risk
16 of imminent closure at one of the
17 Plaintiff clinics on September 15th, and
18 our clear likelihood of success on the
19 merits of our Constitutional claims
20 entitle Plaintiffs to a Temporary
21 Restraining Order against the enforcement
22 of S.B. 23.

23 So as set forth in our opening
24 Brief, Your Honor, Plaintiffs clearly
25 satisfied all the requirements for a

1 Temporary Restraining Order.

2 But today I would like to focus
3 primarily on two of the four elements;
4 plaintiffs' strong likelihood of success
5 on the merits and the indisputable
6 irreparable harm that S.B. 23 is
7 inflicting on patients every day that it
8 remains in effect.

9 As to the merits, the text of the
10 Ohio Constitution, together with a
11 substantial body of Ohio case law, make
12 it overwhelmingly clear that Article 1,
13 sections 1, 2, 16 and 21, protects the
14 right to abortion.

15 We have to start with the principle
16 that the Ohio Constitution is a document
17 of stupendous force and that it can and
18 must be construed independently of the
19 Federal Constitution by the Ohio Courts.

20 And, in fact, the Ohio Supreme
21 Court has found that on a number of
22 occasions that the Ohio Constitution
23 provides more expansive protections than
24 the Federal Constitution, particularly
25 when individual rights are at stake.

1 And the Ohio Supreme Court has held
2 the line on constitutional protections
3 even when the U.S. Supreme Court has
4 taken them away.

5 So in the case of *Humphrey v. Lane*,
6 for example, which we cite in our Briefs,
7 the U.S. Supreme Court had reduced the
8 protection for free exercise of religion
9 under the First Amendment of the United
10 States Constitution in the case of
11 *Employment Division v. Smith*, but the
12 Ohio Supreme Court decided to hold the
13 line and continue to apply a more
14 protective standard of strict scrutiny to
15 the violations under the Ohio
16 Constitution.

17 Notably, the language of our
18 Constitution is also different in some
19 respects from the U.S. Constitution,
20 including the fact that the Ohio
21 Constitution has an inalienable rights
22 clause in Article 1, Section 1. The fact
23 that the due course of law clause and
24 equal protection of benefits clause have
25 broader wording than the Federal clause

1 and, of course, Ohio has the Healthcare
2 Freedom Amendment in Article 1, Section
3 21, which has no Federal analogue.

4 Here, the right to abortion is
5 encompassed in the Ohio Constitution's
6 broad substantive due process protection.

7 So as the Ohio Supreme Court found
8 in the case of Steele v. Hamilton County,
9 Article 1, Section 16, which is the due
10 course of law clause, together with
11 Section 1, the inalienable rights clause,
12 protects a substantive due process right
13 to personal security, bodily integrity
14 and autonomy and also found that
15 intrusions on this right are subject to
16 scrutiny.

17 Another Common Pleas Court in this
18 County has similarly found that these
19 protections under Article 1, Section 116
20 and then also the Healthcare Freedom
21 Amendment extend to matters involving
22 privacy, procreation, bodily autonomy,
23 and freedom of choice in healthcare
24 decision-making and that this includes
25 the right to abortion and, therefore,

1 that restrictions on abortion must be
2 subject to strict scrutiny.

3 Those are the two cases of
4 Southwest Ohio, the Ohio Department of
5 Health, cited in our Briefs.

6 I think it is important here to
7 point out that it is a very
8 well-established principle of Ohio
9 Constitutional law that the provisions of
10 the Ohio Constitution should be read in
11 pari materia. They should be read
12 together holistically to harmonize.

13 So these are mutually reinforcing
14 provisions. Articles 1, 16 and 21, that
15 read holistically, clearly protect a
16 right of Ohioans to access abortion and
17 notwithstanding the Defendants' attempts
18 to sort of individually strip each of
19 those rights and explain why each of them
20 in isolation does not protect those
21 rights.

22 In addition, Ohio's Equal
23 Protection and Benefit clauses are
24 violated by S.B. 23. Recent cases from
25 the Ohio Supreme Court has stated has

1 Ohio's Equal Protection clause may be
2 more protected than its Federal analogue.
3 Those are State v. Mole and State v.
4 Nolling. Of course, sex is a suspect
5 classification under Ohio law and S.B. 23
6 discriminates on the basis of sex.

7 The test of S.B. 23 contains
8 numerous references to pregnant women and
9 it singles out women for differential
10 treatment based on pregnancy, which is a
11 condition, of course, unique to women.

12 Both as written and in practice,
13 S.B. 23 clearly targets women and it is
14 also grounded in outdated stereotypes
15 about women's roles as child-bearers and
16 mothers. S.B. 23 clearly flies in the
17 face of this Constitutional right by
18 banning abortion starting at six weeks
19 LMP, which is only four weeks after
20 conception, two weeks after a missed
21 period, before many women even know they
22 are pregnant and well before the vast
23 majority of women are able to access
24 abortion in the State of Ohio.

25 Plus, because S.B. 23 violates both

1 Ohioans' right to abortion and their
2 right to equal protection and benefit of
3 the laws, it is subject to strict
4 scrutiny. That means that the State
5 bears the heavy burden of proving that
6 S.B. 23 is narrowly tailored to be
7 compatible with government interests,
8 which it clearly can not do and has not
9 done.

10 Plus, as further argued in our
11 Briefs, Plaintiffs have clearly
12 demonstrated the likelihood of success on
13 the merits of both of these claims.

14 Now, just a few more brief words on
15 irreparable harm, Your Honor. The record
16 makes it abundantly clear that S.B. 23 is
17 inflicting and will continue to inflict
18 serious and irreparable harm on Ohioans
19 as injunctive relief. First, again, for
20 the reasons I just explained, S.B. 23
21 violates Ohioans' Constitutional rights,
22 and numerous cases indicate or hold that
23 the violation of Constitutional rights is
24 always irreparable harm.

25 But also, Plaintiffs have submitted

1 several Affidavits documenting in detail
2 the significant harms experienced by
3 their patients. S.B. 23 took effect in
4 June, some of which I just mentioned at
5 the outset.

6 Every day that S.B. 23 remains in
7 effect, more and more pregnant women are
8 forced either to attempt to travel
9 hundreds of miles out of state to access
10 care or to continue pregnancies against
11 their will, or to attempt to self-induce
12 abortion outside the medical system, all
13 at risk to their physical, mental, and
14 emotional well-being.

15 Moreover, Your Honor, Kentucky,
16 losing abortion access on August 1st, and
17 Indiana, poised to stop abortion just one
18 week from today, many patients are going
19 to find themselves having to travel even
20 further than they already do, which
21 increases the expense and delays access
22 to healthcare, which, in turn, both
23 increases health risks and makes it more
24 likely that those patients will
25 ultimately be unable to access that care.

1 So, for all of these reasons, Your
2 Honor, Plaintiffs and their patients
3 urgently need and request relief from
4 this Court against this unconstitutional
5 near total abortion ban.

6 And with that, I am happy to answer
7 any questions Your Honor would have.

8 THE COURT: I guess one question
9 that the Court has, having looked over
10 all of this material for the Plaintiffs
11 and, Ms. Hill, if you want to, or if you
12 need to pass to someone else on any
13 question, feel free. I want to make sure
14 we have as good a discussion as we
15 possibly can.

16 One question that came up in the
17 Court's mind was, if the Court grants the
18 Temporary Restraining Order, what would
19 be the state of the law in Ohio with
20 respect to abortion rights or any
21 restrictions?

22 I mean, in the past where TROs have
23 been granted by Judge Hatheway in this
24 Court, Roe was still in effect. We don't
25 have that anymore. So I guess the

1 question for the Court is, to entertain
2 this relief, what exactly would it mean?
3 Because I think the Defendants have
4 argued -- or at least the State AG's
5 Office has argued, and I understand some
6 of the Defendants are taking a different
7 position, they have argued that if I
8 granted the relief you are requesting, it
9 would mean that abortion is lawful at any
10 time in Ohio.

11 I don't think that's what you are
12 asking for, but I would like to make sure
13 I am really clear on exactly what it
14 would mean to grant this motion.

15 Could you elaborate?

16 MS. HILL: Yes, Your Honor. I
17 would be happy to. So, you are correct.
18 We are not asking the Court to rule that.
19 What we are asking the Court to rule is
20 that S.B. 23, which bans abortion as
21 early as six weeks of pregnancy, is
22 unconstitutional. And so if the
23 enforcement of S.B. 23 were to be
24 enjoined by this Court, that would mean
25 we would return to the status quo that

1 has been in place for decades in Ohio,
2 essentially, the preexisting regulatory
3 framework would still be in effect in
4 Ohio.

5 So Ohio had abortion access
6 available until approximately 22 weeks
7 LMP under Ohio law before S.B. 23, so we
8 are only asking for a ruling that S.B. 23
9 is unconstitutional, and any other laws
10 that were passed that regulate abortion
11 or that are not currently joined in other
12 proceedings would be in effect.

13 THE COURT: Okay. So there were a
14 number of other preliminary injunctions
15 that were in effect that have been
16 dissolved since the Dobbs decision, but I
17 guess I just don't want to create a
18 chaotic situation by entertaining this
19 relief or granting this relief.

20 Are there preliminary injunctions
21 in Ohio in effect on other restrictions
22 that have not been dissolved? I am
23 concerned about creating an inconsistent
24 situation or something where people don't
25 know what the restrictions are.

1 MS. HILL: I see.

2 Your Honor, the two injunctions
3 that were dissolved on the day Dobbs was
4 decided were in Federal court cases and
5 that was S.B. 23, so the current ban.
6 And the other one was the so-called D and
7 E ban. It was a ban on a particular
8 method of abortion used in the second
9 trimester, so after about 15 weeks or so
10 of pregnancy.

11 Those two laws are currently not
12 enjoined. Those injunctions were solved.
13 If the Court were to enjoin S.B. 23 at
14 that moment, the D and E ban would remain
15 in effect.

16 Now, there are also injunctions
17 that were issued by the Hamilton County
18 Court of Common Pleas, so those are
19 pending in State court. Those cases are
20 being decided. Those injunctions were
21 decided under the Ohio Constitution where
22 the Judge already found, Judge Hatheway
23 already found that the Ohio Constitution
24 protects a right to abortion and requires
25 strict scrutiny.

1 So those cases are currently not
2 affected by the Dobbs ruling because they
3 were under the Ohio Constitution.

4 Other than that, there is one other
5 case that's ongoing in Federal court
6 because it is not under the claims,
7 although it involves abortion
8 restrictions that don't involve Roe and
9 Casey. There is one motion by the State
10 to reopen an old case from several years
11 ago.

12 But those are not abortion bans
13 that will significantly change the status
14 of the law in Ohio.

15 THE COURT: All right. So if the
16 Court was to grant the relief you are
17 requesting and make it very specific that
18 the only thing being enjoined was the
19 application of this 2019 statute that you
20 are challenging -- let me make sure that
21 I get it right -- S.B. 23 from 2019. I
22 have a complete copy of it here that we
23 went through -- if the Court was to make
24 it very specific that the enforcement of
25 that statute is the only thing being

1 enjoined, then that would not create
2 challenges for providers or law
3 enforcement officials in Ohio to
4 understand exactly where things stand, at
5 least in your view, right? Is that
6 right, Ms. Hill?

7 MS. HILL: That's correct.

8 THE COURT: I think that's
9 something the Defendants will address in
10 their arguments. I want to make sure
11 that if there is a disagreement on that,
12 the Court understands, because the last
13 thing the Court wants to do is to make a
14 challenging situation worse with an order
15 that is not fully informed.

16 I think I understand the
17 Plaintiffs' position on that.

18 The only other thing before we move
19 on to the Defendants, and I will give the
20 Plaintiffs a chance for rebuttal because
21 it is their burden, the only other thing
22 I would like to hear the Plaintiffs
23 expand on, if they want to, is how the
24 Plaintiff thinks the Court should
25 consider this Healthcare Freedom

1 Amendment, because it seems that in the
2 briefing and in your argument, you sort
3 of just suggest that it is something that
4 the Court should consider when it is
5 reading the due-process protections and
6 the equal protection arguments as an
7 expression of policy by the voters of
8 Ohio to recognize some sort of freedom of
9 choice in healthcare and privacy, but it
10 is sort of unclear to the Court exactly
11 how you think that amendment applies in
12 this context. It is not very clear.

13 Particularlly, the Court's question
14 is about Subsection C of the Ohio
15 Constitution, Section 21, which would
16 seem to have some application to the
17 statute at issue just read on the plain
18 text of the statute. Subsection C, and
19 just for the record, this is an amendment
20 that was passed, I believe, in 2011 on a
21 referendum petition. It was apparently
22 advocated by folks who opposed the ACA,
23 the Federal ACA. But the language of it,
24 just looking at its text states, "No
25 Federal, State, or local law or rule

1 shall impose a penalty or fine for the
2 sale or purchase of healthcare or health
3 insurance."

4 I don't think there is any dispute
5 that an abortion procedure is a medical
6 procedure and it is healthcare.

7 So I am just wondering if you can
8 expand on that. How are we supposed to
9 apply that in Plaintiffs' view because I
10 am not getting a clear picture from the
11 Briefs, if you could help us.

12 MS. HILL: Absolutely, Your Honor.
13 I am sorry. The sound is a little
14 wobbly. I could hear everything. I will
15 adjust my internet for a moment.

16 THE COURT: Okay. Go ahead.

17 MS. HILL: Can you hear me?

18 THE COURT: Yes, we can hear you.

19 MS. HILL: Thank you. Yes, I would
20 be happy to answer that question.

21 So, that's right. So we cite and
22 rely on the Ohio Healthcare Freedom
23 Amendment to say that -- so we are not
24 saying and we are not asserting that
25 abortion restrictions must be struck down

1 under that amendment alone. So we do not
2 read that amendment alone as necessarily
3 conferring a right to abortion. Your
4 Honor, largely, because it is not clear
5 that that provision is necessarily
6 self-executing, but we do believe that
7 the language of the Healthcare Freedom
8 Amendment is sufficiently broad and it
9 really does express a very broad value of
10 healthcare freedom that, as you noted,
11 Ohio voters embraced by a two-to-one
12 margin.

13 And whatever the intent of the
14 drafters of that provision, that's not
15 relevant. The only thing important is
16 the text. The only thing the voters
17 voted on was this broad, protective,
18 textual language.

19 We rely on the Healthcare Freedom
20 Amendment because of the way that the
21 Ohio Constitution should be read
22 holistically and to view all of the
23 provisions harmoniously, we view the
24 Healthcare Freedom Amendment as
25 supporting our view that the substantive

1 due process right protected by Article 16
2 includes the right to abortion, which is
3 not to say that it would be unreasonable
4 to find the right to abortion in that
5 amendment.

6 There is a recent case out of
7 Wyoming. Wyoming's Constitution has a
8 similar provision, and the Court did rely
9 on that provision in striking down that
10 law.

11 But we don't think the Court needs
12 to find that because we think that the
13 three provisions read together lead to
14 the conclusion that abortion is protected
15 as an aspect of the due course of law,
16 the inalienable rights and the Healthcare
17 Freedom Amendment.

18 THE COURT: One more question
19 before we move to the Defendants.

20 The Plaintiff cites this case that
21 the Court took an interest in. This is
22 the Tenth District Court of Appeals
23 opinion from 1993 in Preterm Cleveland
24 versus Voinovich.

25 The defendant, in its response,

1 argues that this hurts the Plaintiff more
2 than it helps them. But the Court has
3 taken the time to review the decision
4 carefully. And it is a clear holding by
5 an Appellate Court in Ohio in 1993 that
6 the Ohio Constitution, that the
7 provisions that you are relying on are
8 broader and recognize so-called natural
9 law, which is not expressly recognized in
10 the Federal Constitution, and that under
11 the Ohio Constitution there is a right to
12 an abortion independent of the Federal
13 Constitutional right.

14 Now, at that time Roe was in effect
15 and the opinion goes on and on about
16 Casey's effect. But there is a footnote
17 nine in there that recognizes and
18 anticipates the situation we are in today
19 where Roe is no longer the law of the
20 land. And it says that an Ohio Court
21 would be free to find a statute to
22 violate the Ohio Constitution even though
23 it does not violate the United States
24 Constitution.

25 That's the situation you are

1 arguing today, right?

2 MS. HILL: That's exactly right,
3 Your Honor. We are saying it is an
4 independent right under the Ohio
5 Constitution. Of course, we recognize
6 that the Tenth District decision is not
7 binding upon this Court, but it is
8 certainly persuasive precedent along with
9 decisions out of the Ohio Common Pleas
10 Court and, of course, there is the Ohio
11 Supreme Court decision in Steele which,
12 again, recognizes the substantive
13 component of the due course of law clause
14 saying that the rights to reproductive
15 decision-making, sexual autonomy, and so
16 on, are protected by the due course of
17 law clause. But that's even before. And
18 both Preterm and Steele were before the
19 Ohio Healthcare Freedom Amendment.

20 THE COURT: That's sort of where I
21 was going with this and wanted to get
22 some comment on, actually, is that in
23 1993, Court of Appeals decision, that
24 although it is not binding as far as this
25 Court can tell, is still good law in

1 Ohio, has not been reversed, doesn't even
2 have a yellow flag on it on the Court's
3 service. In fact, it has positive
4 citations. It is a 1993 decision
5 recognizing an Ohio Constitutional right
6 to an abortion was in place when the
7 Healthcare Freedom Act -- or Amendment --
8 was passed. The drafters of that
9 amendment did include several specific
10 carve-outs that it did not do, but they
11 did not address the issue of abortion,
12 even though it was, I won't say
13 established at that time, but it had been
14 held. And insofar as I can tell, there
15 is no Ohio Court of Appeals decision or
16 Supreme Court decision holding to the
17 contrary. I assume someone would have
18 brought it to our attention; is that
19 right?

20 MS. HILL: That's right, Your
21 Honor. We are not aware of any. It
22 hasn't been presented to the Ohio Supreme
23 Court. So that would explain why there
24 isn't one recognizing the right, either.

25 THE COURT: All right. I just

1 wanted to make sure the Court was fully
2 aware of the circumstances before we move
3 on to the Defendants. And this enables
4 the Defendants to have a sense of some of
5 the things that are on the Court's mind
6 and to address them in your argument. So
7 we are going to do that now unless anyone
8 else for the Plaintiffs feels a need to
9 chime in on the Plaintiffs' case in
10 chief.

11 I am not seeing anything.

12 So let's move to the Defendants.
13 If you could use the podium, I think that
14 will help the folks on Zoom hear you.

15 MS. NAROG: As an initial matter,
16 Your Honor, the State would like to bring
17 to the Court's attention that the Supreme
18 Court has not granted Plaintiffs'
19 application for dismissal of the mandamus
20 action involving the same parties and the
21 same claims made there. That Court then
22 still maintains jurisdiction over the
23 issues now before this Court.

24 THE COURT: So are you saying that
25 the Court can't consider this matter?

1 MS. NAROG: Under the Ohio law
2 which has adopted the rule for
3 jurisdictional authority, yes, this Court
4 should not consider the TRO today.

5 THE COURT: Well, obviously, the
6 Supreme Court takes priority over our
7 little trial court here.

8 MS. NAROG: Yes.

9 THE COURT: Can you hear Ms. Narog?
10 I think it is important everybody hear
11 each other so they can respond.

12 Mr. Fitzpatrick, can you move the
13 microphone maybe into the middle here so
14 the folks on Zoom can hear? Is the cord
15 long enough? If you need to turn the
16 screen, that's fine, too.

17 Please try to speak clearly.

18 MS. NAROG: would you like me to
19 restart?

20 THE COURT: Yes, why don't you
21 restart.

22 MS. NAROG: Okay. I wanted to
23 bring to the Court's attention that the
24 Supreme Court has not granted Plaintiffs'
25 application for a dismissal of their

1 mandamus action involving the same
2 parties and the same claims as are made
3 here. That Court then maintains its
4 jurisdiction over the issues now advanced
5 in this motion. Under Ohio law, which
6 adopted the jurisdictional priority rule,
7 this Court lacks jurisdiction to issue a
8 TRO today.

9 THE COURT: Can everyone hear that?
10 Yes. Okay. They can hear you now.
11 Okay. Good. Please try to use your
12 outdoor voice so that we can get as much
13 volume as possible.

14 MS. NAROG: There is no need for
15 emergency relief here because the
16 emergency Plaintiffs claim is one of
17 their own making. The Plaintiffs'
18 strategic choices defeat their claim for
19 a TRO.

20 TROs exist to serve the status quo
21 long enough for the aggrieved party to
22 seek a preliminary injunction. At this
23 point, the Heartbeat Act is the status
24 quo in Ohio. It has been effective law
25 for over two months now.

1 And since July 1, Plaintiffs knew
2 that they could not obtain emergency
3 relief in the Supreme Court but they
4 decided nonetheless to wait another two
5 months before seeking emergency relief
6 here.

7 Now, in deciding a Temporary
8 Restraining Order, the Court must
9 consider whether the movement has a
10 strong likelihood of success on the
11 merits, whether the movement will be
12 irreparably harmed if the order is not
13 granted, what injury to others will be
14 caused in granting the Motion, and what
15 public interests is served or harmed by
16 granting the Motion.

17 Of course, States always suffer
18 irreparable harm when their
19 Constitutional permissible laws are
20 enjoined, and giving effect to the will
21 of the people by enforcing laws that they
22 and their representatives have enacted
23 serves the public interest.

24 Plaintiffs cannot satisfy the first
25 two prongs of this test so they are not

1 entitled to a TRO. Plaintiffs here ask
2 this Court to recognize a new right, a
3 right to abortion under the State
4 Constitution and enjoin duly elected
5 legislation that has been effective law
6 for over two months, the Heartbeat Act.

7 On that basis, the Ohio Supreme
8 Court has never held that there is a
9 right to abortion in the Ohio
10 Constitution, and no provision of the
11 Ohio Constitution can be reasonably
12 interpreted to contain a right to
13 abortion.

14 Now abortion was illegal by statute
15 in Ohio starting in 1834 and at all times
16 during the drafting and adoption of our
17 current Constitution and remained a crime
18 until the decision in Roe v. Wade.

19 Throughout the 50 intervening
20 years, the Ohio General Assembly has
21 enacted legislation imposing greater and
22 greater restrictions on abortions
23 practice.

24 Now, as to the Plaintiffs' argument
25 that there is a substantive due process

1 right found in the Constitution.

2 Regardless of the Tenth District case,
3 which I can opine on further in my
4 argument, we have adopted a test here
5 that is similar to the Federal core task
6 which is in Washington v. Glucksberg,
7 which requires that the right, being
8 recognized, be deeply rooted in the
9 nation or state's history and tradition.

10 Now, being that abortion was a
11 crime for over 100 years in Ohio cuts
12 sharply against that holding as well.

13 THE COURT: What about the last 50
14 years?

15 MS. NAROG: The last 50 years we
16 were under a different regime. Roe v.
17 Wade was required -- required states to
18 allow abortion within their boundaries
19 regardless of what their laws were. Ohio
20 had a statute in 1973 that criminalized
21 abortion practice that was advocated by
22 the Supreme Court's decision in Roe v.
23 Wade.

24 As I said just a moment ago, the
25 General Assembly has worked diligently to

1 restrict the abortion practice in the
2 State of Ohio on behalf of Ohio citizens.
3 So for as long as the Federal Court
4 imposed abortion in Ohio, Ohio has worked
5 very diligently to try to counter its
6 performance and its pervasiveness.

7 The only rights asserted here in
8 this litigation, however, are the rights
9 of pregnant women and potential patients
10 of the Plaintiffs, the abortion clinics.
11 To litigate on behalf of third parties, a
12 litigant must show that they suffered
13 their own injury in fact, that they
14 possess a sufficiently close relationship
15 with the person that possesses the right,
16 and show some hindrance that stands in
17 the way of the third party seeking
18 relief.

19 Now Plaintiffs assert this in a
20 footnote it is well-established that they
21 have third-party standing to bring claims
22 of their patients here today, but they
23 make no attempt to show the necessary
24 elements under Ohio law.

25 Neither the Ohio Supreme Court nor

1 the First District Court of Appeals has
2 held that abortion clinics have
3 third-party standing to assert claims on
4 behalf of their patients in the 50 years
5 of Roe inspired litigation or before.

6 But case law shows that third party
7 has no fundamental liberty interest in
8 terminating another's pregnancy.

9 Now Plaintiffs dealt with this
10 issue in their argument that State v.
11 Moore was a Second District case which
12 the First District Court agreed with in
13 its holding in State v. Alpiere in which
14 they stated certainly the State's
15 interest in protecting pregnant women and
16 unborn children outweighs a third-party's
17 right to terminate another's pregnancy by
18 specifically defined conduct that is
19 deemed to be criminal.

20 Because the law in this district
21 holds that the State's interest is
22 superior to the Plaintiffs' right to
23 terminate another's pregnancy by conduct
24 deemed criminal, which is exactly what
25 the Heartbeat Act does, the Plaintiffs

1 cannot suffer injury in fact by being
2 denied the ability to perform abortions
3 under the law.

4 They also cannot be injured by
5 having to close a clinic, which is also a
6 direct consequence of the State's
7 superior interest in prohibiting a third
8 party from performing abortions after
9 fetal heart tones are detected.

10 And the injury is also claimed by
11 only one Plaintiff in this case. And all
12 Plaintiffs must show that they have
13 suffered an injury in fact in order to
14 secure a TRO.

15 As to the additional harms that are
16 listed in Plaintiffs' briefing; for
17 instance, canceling appointments and
18 turning patients away, plaintiffs do not
19 say that these harms represent their own
20 injury in fact or provide any evidence of
21 actual harm. In fact, the affidavits
22 contain anecdotal accounts of what
23 patients may or may not have said.

24 However, we have not had the
25 opportunity to cross-examine or speak to

1 any of these patients, so we only know
2 that what it is, their account is hearsay
3 in its barest form.

4 THE COURT: Wait just a second
5 here. That's a little bit of a fraught
6 area. But let's talk about that for just
7 a second. Because the plaintiffs, in
8 their filing, talk at length about an
9 issue that has been a matter of great
10 public concern with a 10-year-old rape
11 victim who had to travel to Indiana, who
12 I believe your boss got in the hot seat a
13 little bit about because he doubted the
14 truth of the story. And that's actually
15 what you are saying now is that you
16 haven't had a chance to test these
17 stories, you don't know if they are true
18 or not.

19 I believe it has been pretty
20 well-established in the public arena that
21 that story was substantially true, and
22 that a 10-year-old, because of this law,
23 had to travel to Indiana to get an
24 abortion because she was, what, three or
25 six days past the date under the

1 Heartbeat Bill; is that right?

2 MS. NAROG: I am not familiar with
3 the exact timing of her abortion.

4 THE COURT: It is in the Briefs.
5 Do you guys dispute that? Are you
6 seriously saying, after all the media
7 coverage and investigation that has been
8 done in that matter, are you still saying
9 that it didn't happen?

10 MS. NAROG: No, Your Honor, we are
11 not.

12 THE COURT: So how is that not
13 potentially irreparable harm that a
14 10-year-old is denied care here in Ohio
15 because of this law?

16 MS. NAROG: It can only be
17 irreparable harm if she has a
18 Constitutional right to an abortion in
19 the State of Ohio, and the State's
20 position is there is no right in the Ohio
21 Constitution that gives her a right to
22 abortion. So she can not be irreparably
23 harmed by being denied access to abortion
24 in the state of Ohio.

25 THE COURT: Okay. I understand you

1 are trying to make a bright-line argument
2 there is just no right and that ends the
3 discussion. But the statute that you are
4 defending also has these exceptions to
5 it. And I don't think anyone has dwelled
6 on those exceptions and the problems that
7 those exceptions create.

8 The plaintiff makes a pretty
9 substantial argument that those
10 exceptions are phrased in a way that, as
11 a practical matter, means abortion will
12 be denied, even when it might be needed
13 to protect the life or the health of the
14 mother, or in this case, of a 10-year-old
15 rape victim.

16 Now as a practical matter, I think
17 that if you want to talk about the
18 absence of irreparable harm, you should
19 direct your comments to those exceptions
20 and whether or not in the argument that
21 the plaintiffs make, that they are
22 unworkable. And as a practical matter,
23 mean that no provider is going to go down
24 that road. Because if they are wrong or
25 if they are challenged, they are exposed

1 to criminal penalties.

2 And if you read the statute, S.B.
3 23, if a provider is going to provide an
4 abortion under those circumstances where
5 he or she is making a decision that there
6 is a -- I want to get the language
7 correct -- a serious risk of substantial
8 and irreversible impairment of a major
9 bodily function, they want to make that
10 call, they have to be prepared to defend
11 it. They have to document it at that
12 time and they are forced to include that
13 in that documentation in the mother's
14 medical records.

15 So I would like to hear you address
16 how that exception actually works and why
17 you think, rather than just say there is
18 no right to an abortion in Ohio, to say
19 why that works. Because I think this
20 goes to the substance of the plaintiffs'
21 claims that this is, in fact, their
22 argument, at least, a complete ban, as a
23 practical matter, on abortion in Ohio
24 after six weeks. Can you address that?

25 MS. LEVENSON: Excuse me, Your

1 Honor. I am so sorry to interrupt. I
2 apologize profusely. The folks on Zoom
3 can't hear when you speak.

4 THE COURT: This is good. It will
5 give you time to think about your
6 response.

7 So for the folks on Zoom, we have
8 one large boom mike in the courtroom and
9 my staff had moved it to Ms. Narog so
10 that you could hear her. I stopped her
11 in her argument about irreparable harm to
12 ask her to direct some comments to the
13 effect of the exceptions in the statute
14 and the plaintiffs' argument that those
15 exceptions are ineffective and
16 effectively mean that this is a complete
17 and total ban.

18 And what drew the Court's attention
19 was her reference to the evidence that
20 the plaintiffs had presented in their
21 affidavits as being anecdotal and not
22 subject to cross-examination or testing.
23 And so that drew the Court's attention.

24 One of the cameras in the room is
25 going off and making a noise. That's one

1 reason we like to limit it to one camera.

2 There we go.

3 why that drew the Court's
4 attention, and I want Ms. Narog to
5 respond to it, is because we all know,
6 and it is in the plaintiffs' papers about
7 the highly publicized case of the
8 ten-year-old rape victim, which
9 Ms. Narog's ultimate boss made extensive
10 public comments on. And I think it is
11 relevant here.

12 If the defense is actually going to
13 argue there is no evidence of irreparable
14 harm, and we have that public case, which
15 the State of Ohio's Attorney General has
16 publicly commented on, and I don't know
17 if he ever apologized, but I think he
18 should have, then I think we ought to get
19 straight to it and talk about what's the
20 effect of that statute. And that's what
21 I have asked Ms. Narog to respond to.

22 Can you move the microphone back so
23 the folks on Zoom can hear her.

24 MS. NAROG: So the Act contains two
25 exceptions that allow for a physician in

1 his medical, reasonable judgment to
2 perform abortions after cardiac activity
3 is found. The first applies to abortion
4 when necessary to prevent the patient's
5 death. Some examples are given in the
6 actual statutory language.

7 The second applies when there is a
8 great risk of substantial and
9 irreversible impairment of a major bodily
10 function. And that is defined in the Act
11 as meaning a medically diagnosed
12 condition that complicates the pregnancy
13 of the woman so as to directly or
14 indirectly cause substantial or
15 irreversible impairment of a major bodily
16 function. And that is mainly limiting
17 the application of these exceptions to
18 physical conditions and not mental
19 conditions. And that is made clear in
20 the statutory language as well.

21 These limitations and exceptions
22 are nearly identical to the prior
23 exceptions that were allowed for
24 abortions past the previous limitation,
25 which was viability post under Roe. We

1 did not hear as many objections to these
2 exceptions at that time.

3 Again, yes, the physician does need
4 to attest to the fact that he has
5 determined that there is a risk to the
6 mother's life or that she may have some
7 kind of serious impairment, but that is
8 not an unworkable -- it is a very clear
9 statutory guideline for these doctors and
10 it is provided it needs to be in their
11 reasonable medical judgment, so we are
12 going to defer to the physicians in
13 making judgment calls on these situations
14 as long as they are doing so in their
15 reasonable medical judgment.

16 I don't believe that anyone at this
17 point denies that there was this case of
18 a 10-year-old girl. And I don't believe
19 that the Attorney General actually said
20 that he did not believe. He said he
21 could not find any evidence.

22 Our office had been trying to find
23 evidence that this had occurred, and we
24 were not able to substantiate it. He, in
25 no way, was trying impugn the veracity of

1 the statements made by a 10-year-old
2 girl.

3 THE COURT: Well, and then it
4 turned out there was evidence, though,
5 right?

6 MS. NAROG: Yes. Eventually, we
7 did learn of that case.

8 Again, it may be a harm. It is
9 certainly not a good situation. No one
10 says that it is. But as a legal matter,
11 it is not irreparable harm if there is no
12 Constitutional right for her to obtain an
13 abortion, but there was an aspect of
14 these exceptions that she very likely
15 would have fallen within.

16 Certainly, a 10-year-old giving
17 birth could sustain serious bodily harm,
18 and no one has argued that she could not
19 fall within these exceptions.

20 THE COURT: But yet she couldn't
21 get that care in Ohio.

22 MS. NAROG: It is not that she
23 couldn't. It is that she -- and I don't
24 know all the details, but whatever
25 provider she went to did not offer her

1 abortion care. They would rather send
2 her to Indiana instead.

3 THE COURT: I think we can all
4 understand why, right?

5 MS. NAROG: I don't --

6 THE COURT: Because that physician
7 would have to be standing behind their
8 opinion that it fit within one of the
9 exceptions or face a felony of the fifth
10 degree, right?

11 MS. NAROG: As long as it is made
12 in his reasonable medical judgment, I
13 don't think he has to worry that he is
14 going to be prosecuted for performing an
15 abortion in this instance.

16 THE COURT: And there we have it,
17 don't we? There we have it. If the
18 physician is willing to take that risk
19 and be confident in that they won't be
20 prosecuted, then the exception works,
21 right?

22 But if the physician is concerned
23 and practicing defensive medicine or
24 being cautious, then people are going to
25 be denied care that they might actually

1 be entitled to under the exception
2 because of the risk of criminal
3 prosecution. would you agree?

4 MS. NAROG: I would agree that that
5 potentially could be an outcome, but it
6 is not in and of itself a direct
7 consequence of the statutory language.
8 The statutory language, we feel, is very
9 clear in how the exceptions are to
10 function. And they are almost exactly
11 the same exceptions that were applied in
12 the former abortion litigation or
13 legislation that has a viability ban.

14 THE COURT: well, I think we should
15 just be very honest about what it is we
16 are actually talking about. And I think
17 that a lot of the arguments dance around
18 it.

19 This statute says that a doctor who
20 provides a procedure to a person, if they
21 are second-guessed later on about whether
22 or not it actually presented a serious
23 risk of substantial and irreversible
24 impairment of a major bodily function.
25 If they are second-guessed after the

1 fact, they are at risk of being
2 prosecuted for practicing medicine and
3 they are faced with a felony.

4 If there is any right to an
5 abortion under the Ohio Constitution, as
6 good law from the Tenth District Court of
7 Appeals says there is and has never been
8 reversed, then how is that situation not
9 a substantial burden or a substantial
10 impairment of that right?

11 That's what I would really like to
12 hear the State articulate. Criminalizing
13 or putting a physician at risk of
14 criminal prosecution for a felony and
15 then for licensure, to make that judgment
16 call, don't we all expect the physician
17 to do what they did in the case of the
18 ten-year-old girl and say, go somewhere
19 else, I don't want to take that risk?

20 If there is some right to abortion,
21 regardless whatever the parameters are
22 under the Ohio Constitution, which I know
23 you don't agree with, but if there is,
24 assuming for the sake of argument, how is
25 that not a substantial burden on that

1 right?

2 MS. NAROG: A substantial burden on
3 the right to obtain an abortion, if one
4 exists?

5 THE COURT: Yes.

6 MS. NAROG: I would say that the
7 exceptions are clear in the statutory
8 language. I understand a physician might
9 be fearful of prosecution but, again, the
10 provision of the language, in your
11 reasonable, medical judgment, as long as
12 he is exercising reasonable, medical
13 judgment, then he does not have to fear
14 prosecution for performing an abortion
15 that he feels could prevent death or
16 serious bodily injury. I don't think
17 that that actually swallows the rule. I
18 think that it actually does provide a
19 very clear guideline for when abortions
20 can be practiced after heart tones or
21 cardiac activity is found in a pregnancy.

22 THE COURT: And does the State have
23 any evidence on that point that there are
24 physicians in Ohio who have no problem
25 with exercising that judgment and putting

1 them at risk of criminal prosecution? Do
2 you have affidavits from physicians who
3 say, I am okay with this language, I am
4 going to continue to exercise my judgment
5 and provide this procedure when it is
6 necessary; for example, in the case of a
7 10-year-old rape victim, or someone else?

8 MS. NAROG: I don't have
9 affidavits, but that is not to say that
10 there are not doctors that are willing to
11 perform abortions in the event -- in
12 fact, the Director of Health obviously
13 feels that these exceptions are adequate,
14 the language is clear, and I feel as
15 though the statutory language also
16 provides a very clear guideline and
17 provides examples of what would actually
18 be substantial bodily harm, and what
19 would actually be a condition that would
20 put the woman's health at risk of
21 potential death.

22 THE COURT: Okay. You can resume.
23 I am done interrupting you. So, go
24 ahead.

25 MS. NAROG: That's okay.

1 And all of this is to say that,
2 obviously, in our analysis on the legal
3 issue, irreparable harm has to be tied to
4 a Constitutional right or some right
5 under the law, and it is our position and
6 we believe we have demonstrated there is
7 no right to abortion in the Ohio
8 Constitution.

9 They also are not able to meet the
10 third element of the third-party standing
11 analysis, and that is really fatal for
12 Plaintiffs' ability to bring these claims
13 on behalf of their patients. Plaintiffs
14 provide these anecdotal accounts of these
15 patients that are obviously distraught
16 because they are unable to obtain an
17 abortion because there is already cardiac
18 activity detectable, some as early as
19 five-and-a-half weeks, according to
20 Plaintiffs' Affidavits, yet none of those
21 patients have chosen to file a suit in
22 the two plus weeks the Heartbeat Act has
23 been effective law. The litany of
24 injuries claimed have been felt almost
25 entirely by these patients, yet not a

1 single patient had chosen to file a suit
2 of their own.

3 And any claim of the short
4 timeframe provided by the Heartbeat Act
5 actually undercuts any possible hindrance
6 to their patients advocating their own
7 rights. If the Act prohibits abortion at
8 the point so early many women don't know
9 they are pregnant, certainly that is
10 adequate time for her to bring a suit and
11 have a hearing on a TRO, as we are doing
12 today and as Plaintiffs have done in this
13 last week.

14 In considering that Plaintiffs
15 rarely admit they historically performed
16 abortions in the 16th, 19th and 21st week
17 of gestation, that is certainly adequate
18 time for a patient to advocate for her
19 own rights in a court of law and obtain a
20 TRO in service of trying to, for herself,
21 obtain abortion care.

22 Roe itself was not a case that was
23 brought by an abortion provider, but by
24 an individual pregnant woman.

25 Plaintiffs only cite two Appellate

1 Court decisions on this point at
2 two-thirds party standing. And both of
3 those cases denied third-party standing
4 to those plaintiffs.

5 This Court should similarly hold
6 that plaintiffs lack standing to sue
7 here. They must show that they have
8 actually sustained a harm in fact of
9 their own, and they have failed to do
10 that.

11 Plaintiffs' lack of diligence in
12 filing the Complaints and the Motion for
13 Temporary Restraining Order is
14 inconsistent with their assertion that
15 they will suffer immediate and
16 irreparable harm.

17 Plaintiffs have not made any
18 showing that they have any right
19 violating the Heartbeat Act or any other
20 irreparable harm of their own, nor can
21 they leverage the harms of their patients
22 or potential patients to fill that void.
23 They must show their own injury in fact,
24 and they have failed to do so.

25 The Plaintiffs have failed to meet

1 their burden to show that they have
2 third-party standing on their own and/or
3 their own injury in fact, and they are
4 not entitled to a TRO in this court, and
5 this Court should deny that TRO
6 specifically because the mandamus action
7 is still ongoing and thus, this Court
8 lacks the jurisdiction to enter a TRO in
9 this case.

10 THE COURT: All right. Thank you,
11 Ms. Narog.

12 I don't think you addressed the
13 Healthcare Freedom Amendment in your
14 arguments. I know you did in your
15 filing. And I understood your filing. I
16 actually thought it was somewhat
17 effective to give examples of other
18 things that might be called healthcare,
19 that if the argument of the plaintiffs
20 was taken to its logical conclusion under
21 this Healthcare Freedom Amendment, would
22 also be illegal. That was somewhat
23 effective.

24 I guess my question is, because the
25 Court looked. As far as the Court can

1 tell, there has been no -- no one has
2 ever tried to argue that the Healthcare
3 Freedom Amendment had application to
4 limit any regulation of healthcare. So,
5 I mean, we just don't know because it
6 hasn't happened, or are you aware? I
7 pulled the section here. It looks like
8 there has been one case ever that
9 discussed the Healthcare Freedom
10 Amendment, and it found that it fell
11 within an exception that was in the text
12 of the amendment itself.

13 So, I mean, are you just saying
14 just because it hasn't happened before
15 that someone has asserted this amendment
16 to have some effect on a regulation of
17 healthcare that, therefore, it can't be
18 applied that way? Is that the argument
19 of the state?

20 MS. NAROG: well, the argument of
21 the state is that neither the people of
22 Ohio nor the drafters ever anticipated
23 this would incorporate any kind of right
24 to an abortion in the Ohio Constitution.
25 This it was a reaction to the Affordable

1 Care Act and mainly dealt with the
2 purchase of insurance on State exchanges
3 versus being able to purchase insurance
4 from any provider that Ohioans would want
5 to purchase from.

6 You mentioned Subsection C, and
7 that really does forbid government from
8 punishing the sale or purchase of
9 healthcare. But, again, it is referring
10 in the majority to insurance.

11 Of course, the State can outlaw or
12 ban certain medical practices. As you
13 noted, we list several that are obviously
14 banned for good reason and are considered
15 perfectly Constitutional under even the
16 Healthcare Freedom Amendment. So I don't
17 think it reaches as far as Plaintiffs
18 state that it does.

19 THE COURT: I mean, the text of the
20 Amendment, and this is a Constitutional
21 Amendment in the Ohio Constitution,
22 doesn't say health insurance. It says
23 healthcare or health insurance, right? I
24 don't know why they use that language.
25 If they were only trying to deal with

1 health insurance, they didn't say that.
2 We have to follow the text. So if there
3 is an Ohio Constitutional right to be
4 free from penalty or fine for the sale of
5 healthcare, which is exactly what that
6 statute says, how does that not have
7 application in this context? Because
8 that is exactly what Senate Bill 23 does
9 is it provides a penalty for the
10 provision of healthcare.

11 why shouldn't the Court consider
12 that at all in this context? On what
13 basis, I guess? What authority do you
14 have that the Court can simply say, well,
15 I know because I know that's about health
16 insurance and I can just ignore the
17 actual text of the Constitution? Because
18 reading your Brief as a whole, as the
19 plaintiffs would say, holistically, there
20 is a lot of textual argument in here.
21 And I am just wondering if the State is a
22 textualist when it likes the text, and
23 some sort of interpretivist when it
24 doesn't, because we have seen where that
25 goes in other cases. It seems

1 convenient. How can I ignore the text of
2 the Ohio Constitution that the voters
3 overwhelmingly adopted, because the
4 language has application here. There is
5 no -- I mean, there is not any way to say
6 it doesn't. You can say it wasn't
7 intended that way, or find some authority
8 to say we shouldn't consider it. But I
9 haven't heard any of that. Do you have
10 anything for us?

11 MS. NAROG: Well, look at
12 subsection D. That language expressly
13 preserves the legislature's power to
14 punish wrongdoing in the healthcare
15 industry, which presupposes a power to
16 determine what qualifies as wrongdoing.
17 Obviously, the General Assembly's power
18 to prohibit or regulate certain states in
19 which procedures can be offered is not
20 actually -- is actually upheld in Section
21 D. It is -- makes it clear that that is
22 still the ability of the General Assembly
23 to regulate healthcare and what kind of
24 procedures can be offered.

25 Obviously, the Amendment, even

1 after the Amendment's passage, Ohio
2 continues prohibiting unlicensed practice
3 of medicine. It prohibits the use of
4 anabolic steroids. It prohibits the use
5 of female genital mutilation. All of
6 those can be considered healthcare sort
7 of instances, and they don't come within
8 this language because Section D preserves
9 the right of the legislature to regulate
10 the provision of healthcare.

11 THE COURT: All right. I
12 appreciate you making the argument. It
13 doesn't say, regulate the provision of
14 healthcare. It says, deter fraud or
15 punish wrongdoing in the healthcare
16 industry.

17 I think we would probably agree it
18 is not the most well-drafted piece of
19 Constitutional language. Would that be
20 fair?

21 MS. NAROG: I would say that if you
22 are trying to apply it in this context,
23 it certainly would appear that it is not
24 well-drafted, but I think as it applies
25 to the situation and circumstances under

1 which it was actually passed, I think
2 that it is as well-drafted as one could
3 expect.

4 THE COURT: All right. Very good.
5 I appreciate your arguments very
6 much.

7 Is there anything else you want to
8 put on the record or your co-counsel
9 wants to put on the record, or anyone
10 else for the defendants wants to put on
11 the record, you are welcome to do so.

12 Okay.

13 If we can have rebuttal for the
14 plaintiffs or if there is anyone else
15 that wants to put anything on the record.

16 MS. HILL: Yes, thank you. I want
17 to make a few points in response.

18 Some of these points are addressed
19 in our Reply Brief, but I realize it was
20 filed shortly before this hearing. So I
21 will refer the Court to that Brief for
22 some of these points as well.

23 I want to explain, first of all, in
24 terms of the Ohio Supreme Court case, the
25 plaintiffs did file an application to

1 dismiss that case on September 2nd, which
2 was this past Friday. My understanding
3 is that because the case has not
4 proceeded or been granted, it is a
5 ministerial matter that that dismissal
6 will be granted.

7 So our understanding is that this
8 Court has jurisdiction, that this is a
9 separate case. We are asking for a
10 different relief in this case.

11 I am not sure what provision the
12 defendants are relying on to say this
13 Court doesn't because they didn't cite
14 anything in their Brief to that effect, I
15 don't believe.

16 THE COURT: Let's talk about that
17 for a second, Ms. Hill. What happens if
18 I issue the relief you are requesting and
19 then tomorrow, the Ohio Supreme Court
20 denies your motion for voluntary
21 dismissal, by some chance? I guess by
22 you saying it is a ministerial act, are
23 you saying, well, that's just not going
24 to happen?

25 MS. HILL: Our understanding is

1 that plaintiffs have a right to dismiss
2 the case that they instituted in the Ohio
3 Supreme Court in that where the Ohio
4 Supreme Court has not yet taken any steps
5 to cure the case or even better, its
6 granting the petition. So that is my
7 opinion.

8 Yes, that's our understanding, that
9 it is merely a clerical matter.

10 But I also did want to take a few
11 moments because the defendants addressed
12 this point to also talk about why they
13 are here and the sequencing of events.

14 we did initially file within days
15 after S.B. 23 went into effect, we filed
16 immediately in the Ohio Supreme Court and
17 sought emergency relief, which was
18 denied.

19 And we were at the time hoping to
20 get both an expedited schedule, an
21 expeditious ruling out of the Ohio
22 Supreme Court that would be final and
23 binding and provide definitive guidance
24 that only the Ohio Supreme Court can
25 provide for abortion providers and

1 patients in the State of Ohio. That,
2 obviously, hasn't happened, so we were
3 sort of balancing the need for that kind
4 of ruling against the increasing harm
5 suffered by patients and by our clients
6 until, eventually, it got to the tipping
7 point where we just couldn't wait any
8 longer.

9 And as I noted, the one clinic is
10 on the verge of closure. Kentucky has
11 now eliminated abortion rights, and
12 Indiana is about to.

13 So this is why we are here today
14 asking this Court to issue a Temporary
15 Restraining Order.

16 I also want to address a sort of
17 related point of the status quo and what
18 is the status quo here. For acceptance
19 of a TRO, Ohio law states that the status
20 quo is, and I am quoting, "the last
21 actual peaceable uncontested status which
22 preceded the pending controversy."

23 And, again, cases to that effect
24 are cited in our Brief. So here, the
25 status quo is clearly 50 years of

1 abortion access in Ohio. S.B. 23 is not
2 the status quo, even though it has been
3 in effect for a couple of months. There
4 are plenty of cases in which the law has
5 been in effect for a couple of months but
6 the Court finds that the status quo was
7 the pre-law state of affairs.

8 So S.B. 23, obviously, has been
9 contested since it was passed, it has
10 been the subject of a lawsuit virtually
11 continuously, so it remains contested
12 and, obviously, the status quo is the
13 state of the law that we discussed
14 earlier before S.B. 23.

15 I want to make a couple more
16 points. One is I want to address
17 third-party standing. There, again, we
18 cite in a footnote in our opening and we
19 discuss again in our Reply Brief numerous
20 phases in which the Ohio Supreme Court
21 and lower courts have stated that
22 third-party standing is acknowledged. It
23 is accepted in Ohio courts.

24 The reason for that is that, again,
25 it is very clear the Ohio Supreme Court

1 has made it very clear that Ohio follows
2 Federal law on standing, including
3 third-party standing.

4 And it remains the case that
5 abortion providers have third-party
6 standing to assert claims on behalf of
7 their plaintiffs. That's true under
8 Federal law. Dobbs is no exception to
9 that. Dobbs didn't change that. Dobbs
10 was an example of an abortion clinic
11 asserting the Supreme Court accepting the
12 third-party standing in that scenario.

13 We also have numerous Court of
14 Appeals, at least a few, in which
15 abortion providers have asserted
16 third-party standing on behalf of their
17 patients in Ohio in State Court. Like I
18 said, there are numerous Ohio Supreme
19 Court cases that don't necessarily
20 involve abortion providers but that make
21 it very clear. So it is far too late in
22 the day to question this.

23 The reason plaintiffs are not
24 required to go into the details of
25 meeting the requirements of third-party

1 standing is because it has been so clear
2 that the requirements are met and have
3 already been recognized.

4 Finally, I want to say a few words,
5 well, I guess two more points. I want to
6 say a few words about the exceptions to
7 the law. In particular, the medical
8 exceptions to the law. It is entirely
9 unclear to me. There was a long
10 discussion about the ten-year-old rape
11 victim, and, again, this is not an
12 isolated incident. The Attorney General
13 himself surely has access to the crime
14 statistics that show multiple cases of
15 rape against minors, against children in
16 the state every year.

17 I just cannot understand what
18 aspect of the exception for a serious
19 risk of substantial and irreversible harm
20 to a major bodily function, the
21 impairment of a major bodily function,
22 that this would fall under. I don't
23 understand. I can't see how that
24 scenario fits under the exception, as the
25 Defendants are trying to contend.

1 Finally, I just want to say a few
2 words about the Healthcare Freedom
3 Amendment. Again, we have made it clear
4 that we are not contending the Healthcare
5 Freedom Amendment is independent at all
6 on its own in isolation, what requires
7 this Court to find that S.B. 23 is
8 unconstitutional. Also, even if it were,
9 we would not be saying that it is an
10 absolute bar to absolutely any regulation
11 of healthcare. It has very broad
12 language. That's clear. And it appears
13 to function that way. But like any
14 Constitutional provision, it would be
15 subject to interpretation by the Court.
16 A court would presumably apply some form
17 of scrutiny to determine whether or not a
18 law would be struck down under that
19 Amendment.

20 But we contend instead this
21 language, again, is a very broad
22 affirmation that Ohioans possess a right
23 to healthcare freedom, and that they
24 voted overwhelmingly for this very broad
25 language, in fact, two-to-one, which the

1 Amicus Brief that's being filed today
2 will also indicate that a majority of
3 Ohioans do support abortion rights, so it
4 is not at all inconceivable that they
5 could have been thinking -- as a matter
6 of fact, it is quite likely they were
7 thinking it included the right to
8 abortion, which is healthcare.

9 So, I think unless Your Honor has
10 any questions about any of that, I think
11 that's all I want to respond to.

12 THE COURT: All right. Thank you,
13 Ms. Hill.

14 Anyone else want to put any
15 statements or arguments on the record for
16 the Court's consideration of this matter?

17 No one else?

18 Anyone from the defense?

19 Anything else you want to add for
20 the record?

21 Go ahead. We want to have a full
22 argument.

23 Move the microphone around so the
24 plaintiffs can hear.

25 MS. NAROG: I would like to first

1 address the plaintiffs' last argument
2 there about how the Healthcare Freedom
3 Amendment doesn't actually provide the
4 right that's in par materia with all the
5 other rights they have identified, which
6 sounds suspiciously like the holding in
7 Roe v. Wade in the first instance. We
8 are not exactly sure where it is, but if
9 you look at it all together, here is this
10 right.

11 well, we know for certain that
12 nowhere in the Constitution is it
13 actually provided in the text that there
14 is a right to abortion. We know that the
15 Ohio Supreme Court has never held that
16 there is a right to abortion under the
17 Ohio Constitution, and our long history
18 and tradition in this state is that
19 abortion has been a crime until the
20 Federal courts forced Ohio to allow
21 abortion within its borders.

22 As far as the Tenth District case
23 which you were asking about earlier, the
24 text of that case, they actually find
25 that there is no reason under the

1 circumstances of that case to find that
2 the Ohio Constitution confers on a
3 pregnant woman a greater right to choose
4 whether to have an abortion or to bear a
5 child. That is confirmed by the United
6 States Constitution.

7 As explained throughout the opinion
8 in Planned Parenthood, State can,
9 conversely, see no reason of finding the
10 Ohio Constitution places greater
11 restrictions upon State action than are
12 placed by the United States Constitution
13 as construed by the broad surrounding of
14 Planned Parenthood v. Casey. So in that
15 way, this is not a broader right, and
16 even the Tenth District recognized that.
17 They did not interpret Ohio's
18 Constitution to do more than the United
19 States Constitution did and, certainly,
20 they were guided by the Roe v. Wade
21 decision and the decision in Planned
22 Parenthood v. Casey.

23 In the time since 1993, no other
24 Court made that holding with the
25 exception of the Common Pleas Court here

1 in Hamilton County. Certainly, the
2 Supreme Court has never upheld or
3 affirmed that decision, either. So while
4 it may be persuasive, it is not actually
5 a holding that is binding upon this
6 Court.

7 And we argue that looking at the
8 textual provisions of the Court and our
9 deeply rooted history and traditions,
10 there is no right to abortion in the Ohio
11 Constitution.

12 THE COURT: All right. The Court
13 understands your arguments. I am
14 curious. It is about cherrypicking
15 comments from a case. I don't know what
16 part of the Tenth District's opinion you
17 were reading from. The Court studied the
18 opinions, and it does contain a good
19 history of the state of abortion
20 litigation at that time in '93.

21 But it was clear, at least insofar
22 as this Court reads the decision, that
23 the Court found, "It would seem almost
24 axiomatic that the right of a woman to
25 chose whether to bear a child is a

1 liberty within the Constitutional
2 protection."

3 That's the Tenth District in 1993
4 applying the Ohio Constitution. So it
5 certainly is something that the Court
6 has, I believe, even an obligation to
7 consider even if it is not bound. So the
8 Court will consider it for what it is
9 worth.

10 All right. Anything any of the
11 plaintiffs want to say in response to the
12 State's final argument, because the
13 plaintiff does have the burden and the
14 plaintiff does get the last say.

15 MS. HILL: Voinovich recognizes the
16 right of the Ohio Constitution and finds
17 in fact that it says that applying undue
18 burden standard to the Court's
19 interpretation, the Ohio Constitution
20 provides, except to the extent that if
21 any that they afford greater restrictions
22 upon State action imposed by the Federal
23 Constitution so recognizing the
24 possibility also that the Constitution is
25 even broader than that.

1 THE COURT: Very good.

2 The Court understands the
3 arguments.

4 Just a couple of closing comments
5 and to see if anyone does want to advance
6 any argument on it. One of the issues
7 that the Court is not exactly clear on
8 what to make of is the fact that several
9 Ohio County Prosecutors are not opposing
10 the issuance of a TRO in this case.

11 I am sensitive to the fact that not
12 opposing it doesn't necessarily mean they
13 support it. They simply are not opposing
14 it. But at least one has filed with the
15 Court and indicated that they actually
16 support the issuance of the TRO.

17 Does either party want to address
18 what the Court should make of that?
19 Because I don't think the relief being
20 requested is that the Court limit the
21 scope of a TRO in any way. I am not
22 clear on what effect that should have in
23 anyone's view on the Court's
24 consideration in this matter. Or if any
25 of those prosecutor's offices who are on

1 the line want to enlighten the Court
2 about why they are not opposing it, that
3 might be helpful to the Court. Because
4 they are not very clear what to make of
5 that and how to take that into account
6 with coming up with a decision in this
7 case. Does anyone want to try to help?

8 I am seeing no volunteers
9 whatsoever.

10 MS. HILL: I would just emphasize
11 that the plaintiffs do require broader
12 relief than just enjoining the County
13 Prosecutors. I think they are willing to
14 be bound because the law carries numerous
15 penalties, including penalties that can
16 be enforced by the State Medical Board
17 and by the Department of Health, so it
18 would not be sufficient only to enjoin
19 only the County prosecutors.

20 THE COURT: All right. Good. I
21 see Ms. Sears is unmuted.

22 MS. SEARS: Yes, sir. I have been
23 involved in several of the Planned
24 Parenthood pieces of litigation. What
25 has been problematic, at least in my

1 view, is we are several parties. And my
2 understanding from one of the first cases
3 I was in is, we are here in terms of an
4 injunction, if it were issued, would
5 obviously be enforceable in the counties
6 in which Planned Parenthood has agency.
7 Additionally, it has always been my
8 position that should the Court find the
9 law unconstitutional, that as a matter of
10 duty, the prosecutors would be bound to
11 follow the rule of the Court. Obviously,
12 as prosecutors, we don't enforce
13 unconstitutional laws.

14 The other position that I have
15 taken throughout the years is that we
16 represent County agencies and County
17 elected officials, and we do not have a
18 role, in my opinion, necessarily in
19 representing the General Assembly.

20 So at least from my perspective as
21 a nominal party, my goal is to get out of
22 the way, if you will, of the Court's
23 determination on behalf of the parties
24 that are representing the Attorney
25 General's State interests. So at least

1 with regard to, in the past, we have
2 actually taken the position as a group as
3 a nominal party, we, essentially, would
4 get out of the way of the Court in terms
5 of the determining the Constitutionality
6 and scratching a fight out of whatever
7 ruling the Court would make. I am not
8 sure if that helps elucidate our
9 position. But that's, essentially, our
10 position.

11 THE COURT: That's very helpful to
12 the Court, not having handled a case like
13 this before. Thanks, Ms. Sears.

14 If anyone else has anything to add
15 before we adjourn, please let me know
16 now.

17 Okay. Very good.

18 The Court is going to take this
19 matter under advisement and not issue an
20 opinion at this time. The Court would
21 like to investigate the threshold issue
22 of jurisdiction and the effect of the
23 Supreme Court still not having dismissed
24 the case. So the Court does not have the
25 benefit of any briefing on that unless it

1 is addressed in this Reply Brief. It was
2 not addressed in the State's response.
3 Not faulting the State for that. These
4 were very hurried proceedings and the
5 filings and the responses were excellent
6 and helpful and were read by the Court.

7 So, the Court will take that issue
8 up very quickly and try to determine if
9 it does, indeed, present a problem for
10 the Court considering this case and get
11 an entry on as quickly as the Court is
12 able.

13 Thank you all for your arguments
14 and your excellent work in this case. We
15 will get an entry on as soon as possible.

16 Thank you very much. We are
17 adjourned.

18 (Proceedings adjourned.)
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1 CERTIFICATE

2 I, Ann Marie Stowers, RPR,
3 the undersigned, an Official Court Reporter
4 for the Hamilton County Court of Common
5 Pleas, do hereby certify that at the same
6 time and place stated herein, I recorded in
7 stenotype and thereafter transcribed the
8 within 85 pages, and that the foregoing
9 Transcript of Proceedings is a true,
10 complete, and accurate transcript of my
11 said stenotype notes.

12 IN WITNESS WHEREOF, I
13 hereunto set my hand this 14th day of
14 September, 2022.

15
16 

17 Ann Marie Stowers, RPR
18 Official Court Reporter
19 Court of Common Pleas
20 Hamilton County, Ohio
21
22
23
24
25

Exhibit B

ADVERTISEMENT

Joe Deters sworn in as Ohio Supreme Court justice



Joe Deters was sworn in Saturday as Ohio Supreme Court Justice. (Hamilton County Prosecutor's Office)

By FOX19 Digital Staff

Published: Jan. 7, 2023 at 2:18 PM EST



CINCINNATI (WXIX) - Hamilton County Prosecutor Joe Deters was sworn in as Ohio Supreme Court Justice Saturday morning, according to Assistant Prosecuting Attorney for Hamilton County Amy Clausing.

Gov. Mike DeWine appointed Deters to fill a vacancy on the high court because Justice Sharon Kennedy was elected as Chief Justice of the Ohio Supreme Court.

Deters must run for election in 2024.

The Hamilton County Republican Party Central Committee [selected Mark Piepmeier](#) to be the interim Hamilton County prosecutor who will serve until the next general election in November 2024.

Deters was Hamilton County's longest-serving prosecuting attorney from 1992-1999 and 2005 to 2023.

[Deters gives last interview as Hamilton County's top prosecutor](#)



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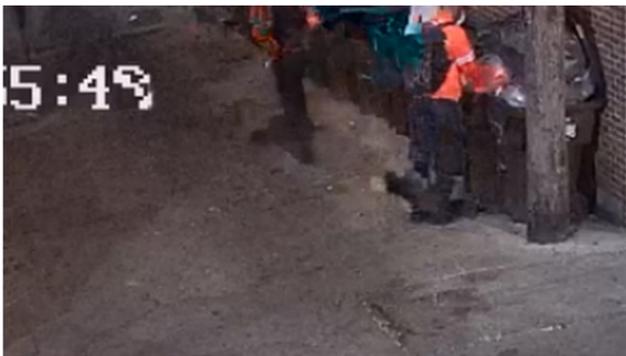




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