In the
Supreme Court of Ohio

PRETERM-CLEVELAND, ET AL.	:	Case No. 2023-0004
	:	
Appellees,	:	On appeal from the Hamilton County
	:	Court of Appeals,
v.	:	First Appellate District
	:	
DAVE YOST, ATTORNEY GENERAL	:	Court of Appeals
OF OHIO, ET AL.,	:	Case No. C-220504
	:	
Appellants.	:	

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INTRODUCTION

The "Ohio Constitution creates a system of separation of powers." *TWISM Enters., LLC v. State Bd. of Registration for Pro. Eng'rs & Surveyors*, __ Ohio St. 3d __, 2022-Ohio-4677 ¶30. This system protects liberty by vesting each branch with distinct authority—authority that, properly cabined but vigorously exercised, each branch can use to check the others' excesses. This division of authority, not the bill of rights, is the "true mettle" of our constitution, "the true long-term guardian of liberty." *In re MCP No. 165*, 20 F.4th 264, 269 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing *en banc*).

This case implicates the scope of the powers vested in each branch. It concerns the executive branch's power to defend, and the judicial branch's power to invalidate, the legislative branch's work.

Start with the legislature, which enacted Ohio's Heartbeat Act. *See* Sub. S.B. 23 (April 11, 2019). The Act protects unborn children and mothers alike. It protects unborn children by largely prohibiting doctors from ending the lives of those whose hearts have started to beat. It protects mothers by leaving doctors with leeway to perform medically necessary abortions. R.C. 2919.16(K); *see also* R.C. 2929.195(B); R.C. 2919.193(B).

Now consider the executive branch, and the Attorney General in particular. The Ohio Attorney General represents the State in challenges to state laws. He did exactly that when abortion clinics challenged the Heartbeat Act in federal court. The federal court preliminarily enjoined the Heartbeat Act as violative of the right to abortion that

the U.S. Supreme Court invented in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). But the U.S. Supreme Court overruled those decisions on June 24, 2022. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). That same day, the Attorney General exercised his duty to defend Ohio's law by moving to vacate the order enjoining the Heartbeat Act. The district court granted the motion.

Ohio's judiciary joined the fray months later, when the plaintiffs here—several abortion clinics and an abortionist—sued to enjoin the Act for allegedly violating the Ohio Constitution. The plaintiffs moved for a preliminary injunction. But they did not seek an injunction in hopes of protecting their own rights. Instead, they argued that the Act violated *their patients*' alleged right to abortion. The trial court accepted that argument, and it preliminarily enjoined the Act. The State appealed, but to no avail: the First District Court of Appeals held that the preliminary injunction was not a final order that the State could appeal immediately. Instead, the First District held, the Attorney General needed to wait for a final judgment from the trial court before filing an appeal seeking to vindicate the legislature's work.

Both the First District and the trial court unduly interfered with the other branches' prerogatives, and with this Court's oversight as well. A decision affirming their rulings will undermine the "true mettle" of our constitution. *MCP No. 165*, 20 F.4th at 269 (Sutton, C.J., dissenting from denial of initial hearing *en banc*).

Begin with the First District, which wrongly held that Ohio law forbade the State

from immediately appealing the preliminary injunction, thus interfering with the executive branch's power to defend state law. *See Preterm-Cleveland v. Yost*, 2022-Ohio-4540 ¶¶18–28 (1st Dist.) ("App.Op."). The State has a statutory right to appeal preliminary injunctions in cases where the State "would not be afforded a meaningful or effective remedy by an appeal following final judgment." R.C. 2505.02(B)(4)(b). The injunction here irreparably harmed the State. For one thing, the State always "suffers a form of irreparable injury" when it is enjoined "from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). Further, if the State is forced to wait for a final judgment before appealing, there will be no way to compensate the State later for the thwarting of its right to protect lives lost in the interim. So the State can immediately appeal.

Embracing the First District's holding would establish a precedent empowering trial courts around the State to hold state laws hostage. A single trial court, by issuing a preliminary injunction and slow-walking issuance of a final judgment, would be able to prevent the executive from enforcing a duly enacted law anywhere in the State for years. Sensing this, the plaintiffs here have asked the trial court to schedule *eighteen months* of discovery and motions practice preceding the issuance of a final judgment—a delay that will free them to violate Ohio law without consequence for the years-long duration of this case. To make matters worse, the decision below invites an uneven application of appealability principles. All parties agree that plaintiffs suing to stop alleged violations

of their constitutional rights—including plaintiffs asserting violations of an alleged constitutional right to abortion—can appeal orders denying preliminary injunctions. *See below* 24–25. What neutral principle could justify denying the State a reciprocal right to appeal orders *granting* preliminary injunctions? None whatsoever.

The trial court, for its part, wrongly held the abortionists and abortion clinics could sue to vindicate rights (allegedly) held by their patients, none of whom are parties here. The trial court thus enjoined the Heartbeat Act for violating an alleged right that no plaintiff before the court had standing to assert. By way of background, a plaintiff may sue to vindicate a third party's rights *only* when the plaintiff "possesses a sufficiently close relationship with the person who possesses the right," and *only* if some "hindrance … stands in the way of the" right-holder "seeking relief" on her own behalf. *Util. Serv. Partners, Inc. v. Pub. Utils. Comm'n*, 124 Ohio St. 3d 284, 2009-Ohio-6764 ¶49 (2009) (quotation omitted). Abortionists and clinics satisfy neither requirement. *First*, "a woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure" or the clinic at which it is performed. *June Med. Services LLC v. Russo*, 140 S. Ct. 2103, 2168 (2020) (Alito, J., dissenting), *overruled by Dobbs*, 142 S. Ct. 2228. Indeed, clinics and abortionists "do not even know who" their future patients are. *Id*. at 2174 (Gorsuch, J., dissenting). Further, clinics and abortionists face a "conflict of interest" in representing their patients in a challenge to the Heartbeat Act, since their patients can sue them for abortions performed in violation of the Act. *Cameron v. EMW Women's Surgical*

Center, PSC, ___ S.W.3d __, 2023 WL 2033788, *16 (Ky. Feb. 16, 2023). *Second*, no "hindrance" keeps women from suing to vindicate a claimed right to abortion. *Util. Serv. Partners*, 124 Ohio St. 3d 284 at ¶49 (quotation omitted). The most famous abortion case ever issued was brought by an individual plaintiff. *See Roe v. Wade*, 410 U.S. 113. It would be tempting to dismiss the trial court's determination that women cannot represent themselves as treating women like children. But for decades, even juveniles have brought suits asserting their own claimed abortion rights. *See below* 32–33 (collecting cases).

In sum, neutral principles defeat the trial court's assertion of third-party standing. Its decision reflects an impulse to single out abortion for favorable treatment—an impulse to wield the law as an "ad hoc nullification machine" that courts may "set in motion to push aside whatever doctrines of constitutional law stand in the way" of facilitating abortion. *Hill v. Colorado*, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting) (quotation omitted). The U.S. Supreme Court, in overruling *Roe v. Wade*, noted that *federal* courts had "ignored" the "third-party standing doctrine" in service of abortion rights. *Dobbs*, 142 S. Ct. at 2275. Its decision repudiates those mistakes. *Id*. "This Court finds itself in the exceedingly rare position of being able to learn from a mistake in applying the law that [its] esteemed brothers and sisters on the U.S. Supreme Court have openly acknowledged making." *Cameron*, 2023 WL 2033788 at *17. "To perpetuate that mistake" in Ohio's courts "by creating a special exception for third-party standing in [Ohio] cases involving abortion would deliver neither predictability nor the promise of a judiciary bound by

law." *Id*. (quotation omitted). Worse, perpetuating this mistake would undermine the separation-of-powers principles that standing is meant to protect. The Court should reject the trial court's application of abortion-specific rules.

Because the First District improperly refused to hear the State's appeal, this Court should reverse. And because the appellees all lacked standing to seek the injunction they obtained, the Court should vacate that injunction.

STATEMENT OF THE FACTS AND CASE

1. This case concerns the constitutionality of Ohio's Heartbeat Act. The Act confers various protections on unborn children with beating hearts.

First, the Heartbeat Act requires any "person who intends to perform or induce an abortion" to first "determine whether there is a detectable fetal heartbeat of the unborn human individual the pregnant woman is carrying." R.C. 2919.192(A). This provision renumbers and modifies slightly a pre-existing law that, beginning in 2013, required doctors to check for fetal heartbeats before aborting babies. *See* R.C. 2919.191 & .192 (2013).

The Act adds force to this requirement by making it a crime to perform an abortion without first checking for a "detectable heartbeat." R.C. 2919.193(A). Critically, however, this criminal prohibition does not apply "to a physician who … believes that a medical emergency, as defined in section 2919.16 of the Revised Code, exists that prevents compliance." R.C. 2919.193(B). The referenced section defines "medical emergency" as:

> a condition that in the physician's good faith medical judgment, based upon the facts known to the physician at that time, so complicates the woman's

> pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman that delay in the performance or inducement of the abortion would create.

R.C. 2919.16(F). The law further defines "[s]erious risk of the substantial and irreversible impairment of a major bodily function" to mean:

> any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function. A medically diagnosed condition that constitutes a "serious risk of the substantial and irreversible impairment of a major bodily function" includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes, [and] may include, but is not limited to, diabetes and multiple sclerosis, and does not include a condition related to the woman's mental health.

R.C. 2919.16(K). All told, R.C. 2919.193(B) lifts the prohibition on aborting a child without checking for a heartbeat if, in the doctor's reasonable medical judgment, doing so would jeopardize the mother's life or long-term health.

Beyond requiring that doctors check for a heartbeat, the Act prohibits anyone who detects a fetal heartbeat from "knowingly and purposefully perform[ing] or induc[ing] an abortion on a pregnant woman." R.C. 2919.195(A). This prohibition, like the one discussed above, comes with a life-or-health exception: it "does not apply to a physician who performs a medical procedure that, in the physician's reasonable medical judgment, is designed or intended to prevent the death of the pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman." R.C. 2919.195(B).

The Act's reach is much more limited than public commentary might suggest. The Act does not regulate contraceptive use. R.C. 2919.197. Its prohibitions apply "only to intrauterine pregnancies," not to ectopic pregnancies. R.C. 2919.191. And the Act imposes no liability on women who receive abortions. Its prohibitions apply exclusively to individuals who perform abortions on others. R.C. 2919.198.

While the just-discussed prohibitions lie at the Act's core, the Act does other things, too. One section creates a "joint legislative committee on adoption promotion and support." R.C. 2919.1910(A). Other sections govern various aspects of civil actions relating to violations. *See* R.C. 2919.199; R.C. 2919.1912.

2. Ohio's General Assembly passed the Heartbeat Act in 2019. Before it took effect, clinics challenged the Act in federal court. They found early success. *See Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796 (S.D. Ohio 2019). The federal district court preliminarily enjoined the Act, which it held violated the right to abortion created by *Roe v. Wade*, 410 U.S. 113, and *Planned Parenthood v. Casey*, 505 U.S. 833.

Then came *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228. *Dobbs* held that there is no federal constitutional right to abortion, reversing *Roe* and *Casey*. 142 S. Ct. at 2242. At that point, the federal 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, 2022, the Act took effect.

3. The same parties who are plaintiffs in this case—several abortion clinics and one abortionist—responded by asking this Court for a writ of mandamus prohibiting the Act's enforcement. The Court, apparently unanimously, refused to issue relief on an emergency basis. *See State ex rel. Preterm-Cleveland v. Yost*, 167 Ohio St. 3d 1448, 2022-Ohio-2317. Eventually, the plaintiffs voluntarily dismissed their case without awaiting a final ruling. *State ex rel. Preterm-Cleveland v. Yost*, 167 Ohio St. 3d 1510, 2022-Ohio-3174.

4. Having failed to win relief in this Court, the plaintiffs sued in the court of common pleas. There, they moved for a temporary restraining order. The court granted the order about two weeks later. It determined that the Act likely violated the Ohio Constitution and that the equities favored temporarily enjoining it.

After holding a hearing, the court issued a preliminary injunction. Its opinion began by concluding that the plaintiffs had standing to seek an order enjoining the Act on the ground that it violated their patients' alleged right to abortion. *See* Order Granting Preliminary Injunction, Oct. 12, 2022 ¶¶73–80. Generally, plaintiffs may sue to vindicate only their own rights, not others' rights. But Ohio law recognizes third-party standing in cases where 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 [right-holder] seeking relief" himself. *Id*. ¶76 (quoting *City of E. Liverpool v. Columbiana Cnty. Budget Comm'n*, 114 Ohio St. 3d 133, 2007-Ohio-3759 ¶25) (quotation marks omitted). Relying on federal cases allowing abortion

providers to vindicate their patients' abortion rights, the trial court found these requirements satisfied. *Id.* ¶¶79–80. In the part of the opinion addressing standing, the court noted in passing, and without providing reasoning or identifying the offending provisions, that the Heartbeat Act was unconstitutionally vague. *Id*. ¶78. But the plaintiffs did not raise a void-for-vagueness theory in seeking preliminary relief, *id*. ¶78 n.5, and the trial court did not address vagueness in its discussion of the merits, *id*. ¶¶81–123.

On the merits, the court concluded that Sections 1, 7, 16, 20 and 21 of the Ohio Constitution's first article combine to create a fundamental right to abortion. *Id*. ¶¶81–96. The substantive-due-process doctrine generally forbids States from enforcing laws that burden fundamental rights. Such laws will be upheld only if they satisfy strict scrutiny. The court held that the Heartbeat Act failed this exacting standard. *Id*. ¶¶97–111. It 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.

After deeming the Heartbeat Act unconstitutional, the court concluded that the equities supported an injunction. *Id*. ¶¶124–32. It enjoined nearly all of the Act. *Id.* ¶134. Its order allows the State to enforce only the Act's provisions relating to "adoption and foster care (R.C. 2919.1910 and R.C. 5103.11)"; "section 2919.193 naming the Act"; and "R.C. 2317.56(C)(2) regarding the internal Ohio Department of Health process for producing informed consent materials for the Department of Health." *Id*.

6. Later that same day, the appellants—this brief refers to them collectively as "the State"—appealed to the First District. That court *sua sponte* ordered briefing on the question whether the preliminary injunction was a final, appealable order. *See* Entry Ordering Jurisdictional Briefing (Oct. 28, 2022). After receiving that briefing (along with the State's opening merits brief), the First District dismissed the appeal for lack of jurisdiction. App.Op. ¶1.

Under R.C. 2505.02(B)(4), preliminary injunctions qualify as final, appealable orders if the appealing party can make two showings. *First*, the appealing party must show that the appealed-from order is final "with respect to" the question whether a preliminary injunction is proper. R.C. 2505.02(B)(4)(a). *Second*, the appealing party must show that it "would not be afforded a meaningful or effective remedy by an appeal following final judgment." R.C. 2505.02(B)(4)(b).

The First District determined that, although the State could make the first showing, App.Op. ¶14, it could not make the second, *id*. ¶¶15–28. That second factor, the First District explained, required the State to show that it would sustain irreparable harm if not allowed to appeal immediately. The court acknowledged federal cases holding that "every order enjoining a valid state law inflicts 'serious and irreparable harm' on a state." *Id*. ¶16 (quoting *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (*per curiam*)) (alterations accepted). But the First District declared these cases irrelevant to disputes arising within the state system. *Id*.

The First District also relied on lower-court cases stating that "a preliminary injunction which acts to maintain the status quo pending a ruling on the merits is not a final appealable order under R.C. 2505.02." App.Op. ¶21 (quoting *Quinlivan v. HEAT Total Facility Sols., Inc.*, 2010-Ohio-1603 ¶5 (6th Dist.)). The First District claimed that the injunction simply preserved "the status quo of legal and safe abortion access that ha[d] been in place in Ohio for nearly five decades" before *Dobbs*. App.Op. ¶23. On this basis too, the Court held the order unappealable under R.C. 2505.02.

Finally, the First District deemed inapplicable those cases permitting immediate appeals in circumstances where "the proverbial bell cannot be unrung" absent an interlocutory appeal. App.Op. ¶24 (quoting *State v. Muncie*, 91 Ohio St. 3d 440, 451, 2001-Ohio-93). Those cases, the court explained, have "focused on situations that would irreparably change the party's position between provisional remedy and final judgment." *Id*. "Classic scenarios include divulgence of attorney-client privileged communications or disclosure of other confidential information." *Id*. The State argued that these principles permitted its appeal. After all, a later appeal could neither retroactively restore the Act's enforceability for the period in which it was enjoined, nor restore the lives lost because of the injunction. But the First District disagreed. It claimed that allowing the State to appeal immediately in light of the first injury—namely, the inability to retroactively restore the Act's enforceability—would permit the State to immediately appeal every preliminary injunction. The First District was "unwilling to go that far." *Id*. ¶26. As for the lives

lost, the First District reasoned, those qualified as only third-party concerns in which Ohio had no valid interest. *Id*. ¶25.

The First District thus dismissed the State's appeal, instructing the State to await a final judgment before appealing.

7. Back in trial court, the plaintiffs proposed an eighteen-month-long trial schedule. Discovery would run until December 2023, and dispositive motions would not be fully briefed until May 2024. *See* Joint Scheduling Report, filed Dec. 8, 2022, at 2–3, 6. Any trial would thus be held in late 2024 or early 2025. The State resisted the plaintiffs' efforts to draw out the proceedings, noting that "no further discovery is necessary" because the case presents issues that are "legal, not factual." *Id.* at 3. What is more, the trial court had already said that its earlier legal conclusions were "law of the case" that it would not reconsider. Transcript, Oct. 7, 2022, at 402.

8. Before the trial court set a schedule, the State appealed the First District's ruling. This Court accepted jurisdiction.

ARGUMENT

The First District had jurisdiction to hear the State's appeal of the preliminary-injunction order. This Court should say so. And it should consider the propriety of the preliminary injunction. More precisely, the Court should hold that, because the plaintiffs lacked standing to assert the right to abortion—the only right on which the injunction rests—the trial court erred in entering the preliminary injunction.

Appellants' Proposition of Law No. 1:

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

Ohio law permits aggrieved parties to appeal preliminary-injunction orders if (1) the trial court has finally decided the preliminary-injunction issue, and (2) there is no way in a later appeal to fully redress the harm the injunction inflicts on the appellant. R.C. 2505.02(B)(4). The State can make both showings. As such, it was entitled to appeal immediately the trial court's preliminary-injunction order.

I. R.C. 2505.02(B)(4) permits appeals from some preliminary-injunction orders.

In an ordinary case, a party may appeal only after the trial court enters a final judgment. But "occasions may arise in which a party seeking to appeal from an interlocutory order would have no adequate remedy from the effects of that order on appeal from final judgment." *Empower Aviation, LLC v. Butler Cty. Bd. of Commrs.*, 185 Ohio App. 3d 477, 2009-Ohio-6331 ¶18 (1st Dist.) (quotation and citation omitted). The General Assembly accounted for this. In particular, it enacted R.C. 2505.02, which defines certain interlocutory orders as "final," immediately appealable orders.

Relevant here, R.C. 2505.02(B)(4) governs appeals from orders relating to provisional remedies. A preliminary injunction is always a "provisional remedy." R.C. 2505.02(A)(3). Subsection (B)(4) permits immediate appeals of every "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); *see Muncie*, 91 Ohio St. 3d at 445–46; *Empower Aviation*, 2009-Ohio-6331 ¶10.

The party wishing to appeal under this provision must satisfy both of R.C. 2505.02(B)(4)'s subsections. *Empower Aviation*, 2009-Ohio-6331 ¶10. Thus, to properly appeal a preliminary injunction, the appellant must make two showings. First, the appellant must show that the appealed-from order "prevents a judgment" for the appellant with respect to the provisional remedy itself; that is, the appellant must show that it cannot still win at the preliminary-injunction stage. *See* R.C. 2505.02(B)(4)(a); *see Wells Fargo Ins. Servs. USA, Inc. v. Gingrich*, 2012-Ohio-677 ¶9 (12th Dist.). Second, the appellant must show that it would not be "afforded a meaningful or effective remedy" if forced to await final judgment before appealing. R.C. 2505.02(B)(4)(b).

II. R.C. 2505.02(B)(4) permits Ohio's appeal of the preliminary-injunction order.

The State's appeal seeks review of a preliminary injunction. A preliminary injunction, by definition, is a provisional remedy potentially appealable under R.C. 2505.02. Thus, the State can appeal if it can make the two showings that R.C. 2505.02(B)(4) requires. The State has indisputably made the first showing, since the trial court's decision is final with respect to the preliminary injunction. The question becomes whether the

State can make the second showing. It can, because only an immediate appeal permits it to win a "meaningful or effective remedy." R.C. 2505.02(B)(4)(b).

A. The preliminary injunction irreparably injures Ohio in three ways.

In determining whether a later appeal will provide a "meaningful or effective remedy," courts must focus on whether "the proverbial bell" can "be unrung" later. *Muncie*, 91 Ohio St. 3d at 451 (quotation and brackets omitted). That is, courts must ask whether "an appeal after final judgment on the merits will … rectify the damage" done in the meantime. *Id*. (quotation omitted). When the appealing party cannot be made whole if forced to wait before appealing, the party's interest in speedy resolution trumps "courts' interest in avoiding piecemeal litigation." *Id*. For example, because there is no way to undo after final judgment an order forcing a criminal defendant to take psychotropic medication, an order requiring the administration of medicine may be immediately appealed. *Id*.

In this case, the State will suffer at least three forms of irreparable injury if it is not allowed to appeal immediately.

1. First, because the trial court's order enjoined state law, it necessarily injures Ohio every day that it remains in effect. This follows from the fact that court orders enjoining state laws always inflict irreparable harm on the State—irreparable harm that "only an interlocutory appeal" can stop. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *see King*, 567 U.S. at 1303 (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)); *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (*per curiam*).

This rule flows from first principles. "All political power is inherent in the people." Ohio Const. art. I, §2. The people created a government to exercise that political power. And the government they created vests each branch with different responsibilities. Ohioans elect legislators to represent their will in the General Assembly. They elect executive-branch officials to enforce the laws the General Assembly enacts. And they elect judges to adjudicate "suits and actions." *De Camp v. Archibald*, 50 Ohio St. 618, 625 (1893).

The adjudication of suits and actions entails judicial review. Adjudication requires the interpretation and application of law. And because the Constitution prevails over ordinary statutes in the event of a conflict, courts must refuse to enforce—they must hold unconstitutional—statutes that contradict the Constitution. *Rutherford v. McFaddon*, 2001-Ohio-56 at 4 (1807) (unpublished); *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485–86 (2018) (Thomas, J., concurring).

Critically, however, courts frustrate the constitutional structure when they *incorrectly* deem a statute unconstitutional and enjoin its enforcement. Such orders, by definition, thwart the executive branch's enforcement of legislation that the people empowered the legislature to enact. Put differently, orders wrongly enjoining state laws deny the other branches (at least temporarily) the ability to exercise powers that the people

delegated to them.

It follows that, whenever a State is wrongly "enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *King*, 567 U.S. at 1303 (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd.*, 434 U.S. at 1351 (Rehnquist, J., in chambers)); *accord Thompson*, 976 F.3d at 619. Such injunctions always alter the distribution of governmental power—a distribution that the people adopted and charged the State with protecting. So unless a "statute is unconstitutional," an order enjoining it "seriously and irreparably harm[s] the State" by denying it the ability to faithfully execute powers entrusted to it by the people. *Abbott*, 138 S. Ct. at 2324 (footnote omitted). "[O]nly an interlocutory appeal can protect that State interest," as only an interlocutory appeal allows the State to avoid the irreparable harm it will suffer while it is blocked from carrying out the duties assigned to it. *Id.* Put in terms of Ohio law, an order enjoining the enforcement of a constitutionally valid law rings a "bell [that] cannot be unrung" after final judgment. *Muncie*, 91 Ohio St. 3d at 451 (quotation omitted). A later appeal cannot repair the harm done during the (potentially prolonged) period in which the will of the people, as reflected in the work of their elected representatives, was thwarted.

When the State seeks to appeal a preliminary injunction preventing enforcement of the law, it gets the benefit of a presumption that the law is constitutional. To be sure, an order enjoining an unconstitutional law *protects* the distribution of power set forth in

our Constitution, and thus inflicts no legally cognizable harm on the State. But when the State argues (as it has here) that the law *is* constitutional, courts must assume the validity of that argument when assessing their jurisdiction. Any other approach would require courts to resolve the underlying merits *before* assessing their jurisdiction to reach the merits. That circular approach is a "trap" that courts must avoid. *Premier Health Care Servs., Inc. v. Schneiderman*, 2001 WL 1479241, *2 (2d Dist. Aug. 21, 2001) (*per curiam*); *Moore v. Middletown*, 133 Ohio St. 3d 55, 2012-Ohio-3897 ¶23; *Barrow v. Village of New Miami*, 2016-Ohio-340 ¶17 (12th Dist.).

In sum, because the injunction of a state law inflicts a harm that cannot be undone, and because an immediate appeal is the only means for stopping that harm, the State has satisfied R.C. 2505.02(B)(4)(b).

One final note. The conclusion that the State can immediately appeal orders preliminarily enjoining state laws is consistent with, even if not compelled by, this Court's precedent. The Court recently reviewed a preliminary injunction barring the State from enforcing a law aimed at discouraging municipalities' use of traffic cameras. *Newburgh Heights v. State*, __ Ohio St. 3d __, 2022-Ohio-1642. In *Newburgh Heights*, the Court expressly noted that appealability had been disputed below, and that the appeals court deemed the order final and appealable. *Id*. ¶15. Since the Court had an independent duty to consider its jurisdiction, and since it expressly noted the appellate courts' consideration of the jurisdictional issue, one can reasonably infer that the Court was satisfied it

had jurisdiction to decide the case. So too here.

2. The preliminary injunction inflicts a second, related form of irreparable harm. The order permits doctors to perform irreversible medical procedures—abortions—in circumstances where doing so is forbidden by the Heartbeat Act. In passing the Act, Ohio exercised its power to regulate the medical profession. *See, e.g.*, Ohio Const. art. I, §21(D); *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). The State's interest in exercising that power is thwarted every time a doctor performs an irreversible procedure that state law prohibits but that a court-issued injunction allows. *Muncie*, 91 Ohio St. 3d at 451. Because there is no way to compensate the State later for the irreversible procedures that were performed while the State was enjoined from enforcing its medical regulations, the State suffers irreparable harm from the injunction.

3. Finally, because abortions are irreversible, every day the injunction remains in place irreparably undermines the State's efforts to protect the innocent. The State enacted the Heartbeat Act with the goal of protecting innocent life. Every otherwise-prohibited abortion that is performed while the injunction remains in place inflicts the most irreparable injury of all—death—on the unborn babies the State adopted the Act to protect. Just as parties may immediately appeal an order denying a preliminary injunction relating to the expenditure of funds that might be exhausted before entry of a final judgment, *AIDS Taskforce of Greater Cleveland v. Ohio Dep't of Health*, 2018-Ohio-2727 ¶18 (8th Dist.), so too may the State immediately appeal an order that will allow the plaintiffs to end thousands

of lives before entry of final judgment. In both cases, an appeal ensures that the appealing party is able to protect those on whose behalf it acts.

No doubt, the parties dispute whether the State can lawfully act to protect unborn life. But the Court cannot resolve that merits dispute until it assures itself of jurisdiction. And it must assume the correctness of the State's merits arguments in assessing its jurisdiction. *See above* 19. If the Heartbeat Act is valid, then the State sustains harm every time an abortionist ends a life that state law protects. That constitutes irreparable harm of the sort that permits an immediate appeal.

B. The First District's contrary analysis fails.

1. Although the First District acknowledged federal cases holding that orders enjoining state laws always threaten to irreparably harm the State, it distinguished them on the ground that federal law expressly permits appeals of preliminary-injunction orders. App.Op. ¶16. "That is a non-sequitur to end all non-sequiturs." *Helix Energy Solutions Group, Inc. v. Hewitt*, 143 S. Ct. 677, 688 n.5 (2023). The relevant question is whether Ohio faces irreparable harm from orders preliminarily enjoining its laws. The federal cases show the answer is yes. Whether the cases saying so arose on an appeal-of-right makes no difference.

The First District further objected that the State's position on irreparable harm would mean that Ohio may appeal *all* preliminary injunctions. App.Op. ¶26. That is not right. The State's argument that an injunction always inflicts irreparable harm applies

only to injunctions that prohibit enforcement of a law. The argument does not apply to injunctions that affect the State in its proprietary functions, as opposed to its sovereign function. For example, an order enjoining the State from terminating an employee or enforcing a contract would not necessarily impose irreparable harm. The focus is not the State's identity, but rather the State's responsibility for enforcing the laws passed by, and for the benefit of, the People. And for all the reasons laid out above, orders enjoining state laws *do* always irreparably harm the State's sovereign interests. The State, no less than any other party, is entitled to appeal preliminary-injunction orders that are final and that threaten harm for which there is no "meaningful or effective remedy by an appeal following final judgment." R.C. 2505.02(B)(4)(b).

2. The First District next dismissed the injuries to the State's interests in regulating the medical profession and protecting the innocent. It determined that the State had to identify some "harm to itself" that would arise without an immediate appeal; "harm to third-parties" would not suffice. App.Op. ¶25. According to the First District, Ohio's interests in regulating the medical profession and protecting the innocent all implicate third-party harms only.

The First District's reasoning forgets that the State is constituted to exercise the power of its people and to protect its people, not to protect "itself" as an entity. Every constitutionally permitted act by the State is taken on behalf of the people. And every frustration of the State's interests is, fundamentally, a frustration of the people's interests.

When a court order harms the interests the people have charged the State with protecting, it harms the State itself, in the same way that an order interfering with a corporation's ability to pursue the mission for which it was created harms the corporation.

Indeed, by discounting the State's protection of her citizens as "harm to third-parties," the First District's approach creates an anomaly. All agree that an order exposing business trade secrets, attorney-client communications, patient health files, or similar confidential information would inflict irreparable harm of the sort justifying an immediate appeal by the party whose information is at risk of disclosure. The First District said so itself. App.Op. ¶24 (citing *Cleveland Clinic Found. v. Levin*, 120 Ohio St. 3d 1210, 2008-Ohio-6197 ¶¶12–13; *Cuervo v. Snell*, 2000 WL 1376510, at *2–3 (10th Dist. Sept. 26, 2000); and *Premier Health Care Servs.*, 2001 WL 1479241 at *2–3). But suppose a party sued the State, challenging the validity of a law protecting such confidential information. And suppose a court enjoined the law, permitting the release of business secrets, citizens' health information, or some other confidential information. According to the First District, an order like that would impose harm on third parties, not the State, and the State would lack the power to appeal. Thus, while a single party would be able to appeal an order that threatens to expose its confidential information, the State would be unable to appeal an order contravening its interest in protecting millions of citizens' information. That makes little sense.

3. Finally, the First District erred in holding that "a preliminary injunction which

acts to maintain the status quo pending a ruling on the merits is not a final appealable order under R.C. 2505.02." App.Op. ¶21 (quotation omitted).

As an initial matter, and most fundamentally, neither the text of R.C. 2505.02, nor any decision from this Court, makes the *status-quo*-preserving nature of a preliminary injunction relevant to the question whether the injunction can be immediately appealed. The lower-court cases on which the First District relied are therefore indefensible.

Regardless, the trial court's injunction did not preserve the *status quo ante*, but rather disrupted it by enjoining the Heartbeat Act, which had been in force for months before this case was filed. The First District was simply wrong to describe the injunction as preserving "the status quo of legal and safe abortion access that ha[d] been in place in Ohio for nearly five decades." App.Op. ¶23. If the *status quo* can be defined so loosely—if it is defined with reference to anything other than eve-of-suit conditions—it is an infinitely malleable concept that courts can mold to cover injunctions they like and exclude those they dislike. That the First District's *status quo* rule would permit courts to take a results-driven approach to jurisdiction is all the more reason to reject it.

* * *

It bears noting that appealability in this case is a two-way street—one that future parties in the plaintiffs' position are free to travel. Had the trial court denied the preliminary injunction, the plaintiffs would likely have appealed immediately. After all, in their view, any such order would have subjected women to an ongoing violation of their

constitutional rights. And the denial of constitutional rights for even a short period of time constitutes irreparable injury. *United Auto Workers, Local Union 1112 v. Philomena*, 121 Ohio App. 3d 760, 781 (10th Dist. 1998); *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987). Under the State's reading of R.C. 2505.02(B)(4), any such order would be immediately appealable, as it would be conclusive as to the provisional remedy and impose an alleged harm that cannot be undone on appeal.

Appellants' Proposition of Law No. 2:

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

Once the Court confirms that the State had a right to immediately appeal, the question becomes whether the trial court's injunction should be vacated. It should be, because none of the plaintiffs had standing to seek it.

I. Neither abortion clinics nor abortionists may sue to enforce the rights of their patients.

Doctors 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*). The plaintiffs—one abortionist and several abortion clinics—do not claim otherwise. Instead, they say that the Heartbeat Act violates their patients' supposed abortion right. They argue that the third-party standing doctrine permits them to vindicate this alleged right, even though it belongs to third parties—women desiring abortions—if it exists at all. And they obtained a preliminary injunction based

exclusively on the alleged violation of their patients' supposed right to abortion. While the plaintiffs' complaint alleged that the Heartbeat Act violated their own right to due process, they did not move for an injunction on that basis. *See* Order Granting Preliminary Injunction, at ¶78 n.5. And the trial court did not invoke this theory as the basis for enjoining the law. *Id*. ¶¶73–80. (If it had, it would have abused its discretion by enjoining a state law on a meritless theory the State was never given a chance to brief.) Thus, the propriety of the injunction turns entirely on whether the trial court correctly concluded that the plaintiffs had third-party standing to assert their patients' rights. The trial court erred; the plaintiffs lack standing to assert their patients' right to an abortion.

A. Courts lack jurisdiction to issue injunctive relief to plaintiffs who lack standing to sue.

Article IV of Ohio's constitution vests the State's courts with "judicial power." Ohio Const. art. IV, §1. That "judicial power" includes the power to adjudicate "all suits and actions." *De Camp*, 50 Ohio St. at 625. It does not, however, "necessarily include the power to hear and determine a matter that is not in the nature of a suit or action between parties." *Id*. Stated differently, the judicial power includes the authority to resolve concrete cases, not abstract disputes. Courts have no power to issue advisory opinions musing about the operation of law. *See State ex rel. White v. Kilbane Koch*, 96 Ohio St. 3d 395 at ¶18 (2002).

The standing doctrine protects the court from exercising authority outside the scope of the judicial power. "Traditional standing principles require litigants to show, at

a minimum, that they have suffered '(1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief.'" *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St. 3d 520, 521 (2014) (quoting *Moore*, 133 Ohio St. 3d 55 at ¶22). Plaintiffs must make these showings regarding each provision they challenge; standing is not "dispensed in gross." *Preterm-Cleveland, Inc. v. Kasich*, 153 Ohio St. 3d 157, 2018-Ohio-441 ¶30 (quotation omitted). Properly applied, this test ensures that every case before a court is "in the nature of a suit or action between parties," *De Camp*, 50 Ohio St. at 625, rather than a request for an advisory opinion on an abstract issue of law, *see State ex rel. Lorain Cnty. Bd. of Comm'rs. v. Lorain Cnty. Ct. of Common Pleas*, 143 Ohio St. 3d 522, 2015-Ohio-3704 ¶21 (2015).

"In order to have standing to challenge the constitutionality of legislation, a party must have a direct interest in the legislation of such a nature that his or her rights will be adversely affected by its enforcement." *City of N. Canton v. City of Canton*, 114 Ohio St. 3d 253, 2007-Ohio-4005 ¶11 (2007). Parties do not generally have standing to challenge a law on the ground that it violates *someone else's* rights. That makes sense. One does not generally suffer a legally cognizable "injury" through the violation of another's rights. Thus, "the general rule is that," to have standing, "'a litigant must assert its own rights, not the claims of third parties.'" *Util. Serv. Partners*, 124 Ohio St. 3d 284 at ¶49 (2009) (quoting *City of N. Canton*, 114 Ohio St. 3d 253 at ¶11).

This Court has recognized a narrow exception to this general rule. Specifically,

following the U.S. Supreme Court's lead, this Court has adopted the third-party standing doctrine, under which parties may have standing to assert a non-party's rights in narrow circumstances. *See City of N. Canton*, 114 Ohio St. 3d 253 at ¶14. But lest the exception swallow the rule, "[t]hird-party standing is not looked favorably upon." *Util. Serv. Partners*, 124 Ohio St. 3d 284 at ¶49 (quotation omitted). Courts will allow it only if the plaintiff "(i) suffers its own injury in fact, (ii) possesses a sufficiently close relationship with the person who possesses the right, and (iii) shows some hindrance that stands in the way of the" right-holder "seeking relief." *Id*. (quotation omitted).

In keeping with the doctrine's narrowness, this Court has found third-party standing just once. Specifically, it held that a local government had standing to seek an injunction based on an alleged violation of its citizens' equal-protection rights. *City of E. Liverpool*, 114 Ohio St. 3d 133 at ¶22. The unique facts of that case allowed the local government to satisfy all three parts of the third-party standing test. First, the alleged constitutional violation inflicted a "direct injury to" the local government's "own treasury." *Id*. ¶23. Second, the local government and its citizens had an "interdependent interest in the city's treasury," which sufficed to establish the requisite "close relationship." *Id*. ¶24. Finally, the citizens lacked standing to sue on their own, which "hindered" their ability to vindicate their rights. *Id*. ¶25.

Every other case to consider a party's third-party standing found it lacking. Consider *City of North Canton*. 114 Ohio St. 3d 253. There, the Court held that North Canton

lacked standing to challenge the annexation of private property located within city limits. The city sought to challenge the annexation on the ground that the annexation law violated the property owner's equal-protection rights. This Court determined that North Canton lacked standing to make that argument. The city established neither that it had a unique relationship with the property owner, *id*. ¶16, nor that the owner had been "hindered from asserting its own rights," *id*. ¶17. Accordingly, North Canton had not established the second or third factors of the third-party-standing test.

The Court also rejected a claim of third-party standing in *Utility Service Partners*. 124 Ohio St. 3d 284. There, the Public Utility Commission empowered Columbia Gas to assume responsibility for maintaining "service lines"—lines connecting the grid to homes and businesses. Before the Commission's order, the owners of the buildings to which the lines attached bore responsibility for maintaining the lines. Utility Service Partners sold warranties that insured the lines' maintenance. Believing that the Commission's decision would "eradicate the … warranty component of its business," *id*. ¶8 (brackets omitted), Utility Service Partner sued. Among other things, it argued that the Commission's decision unlawfully took ownership of the private lines without providing just compensation to the lines' owners. In other words, Utility Service Partners argued that *its customers* rights were violated by the Commission's order. The Court held that Utility Service Partners lacked standing to make this argument. *Id*. ¶¶48–52. While the Commission's order injured Utility Service Partners, the company "fail[ed] to establish the second or the third

factors" of the third-party standing analysis, *id*. ¶50, because the company had no special relationship with its customers and "no hindrance [stood] in the way of property owners who might desire to seek relief," *id*. ¶¶51–52.

In sum, this Court has recognized third-party standing just once. And in that case, the plaintiff's interests were fully aligned with the interests of third parties who lacked any ability to sue on their own. No lesser showing has ever succeeded.

B. The plaintiffs lack third-party standing to sue.

As the discussion above explains, a party has third-party standing only if it "(i) suffers its own injury in fact, (ii) possesses a sufficiently close relationship with the person who possesses the right, and (iii) shows some hindrance that stands in the way of the" right-holder "seeking relief." *Util. Serv. Partners*, 124 Ohio St. 3d 284 at ¶49 (quotation omitted). Even assuming the plaintiffs can satisfy the first factor, they cannot satisfy the second or third. They lack third-party standing to sue.

1. Beginning with the second factor, the plaintiffs do not "possess a sufficiently close relationship" with their patients. This follows for a few reasons.

First, "a woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure," let alone with the clinic where the doctor works. *June Med.*, 140 S. Ct. at 2168 (Alito, J., dissenting), *overruled by Dobbs*, 142 S. Ct. 2228. Plaintiffs introduced no evidence suggesting otherwise.

Second, "the fact that the plaintiffs do not even know who" their future patients

are is "enough to preclude third-party standing." *Id*. at 2174 (Gorsuch, J., dissenting). After all, how can the plaintiffs have a "close relationship" with hypothetical future plaintiffs whose identities are literally unknowable? A "future '*hypothetical* attorney-client relationship' (as opposed to an '*existing*' one) cannot confer third-party standing." *Id*. (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004)). "Likewise, … a pediatrician lacks standing to *defend* a State's abortion laws on the theory that fetuses are his future potential patients." *Id*. (citing *Diamond v. Charles*, 476 U.S. 54, 66 (1986)). "If standing isn't present in cases like those, it is hard to see how it might be present in this one." *Id*.

Finally, any close relationship is upended by a "potential conflict of interest" between the plaintiffs and their patients. *Id*. While this Court has never addressed the issue, the U.S. Supreme Court has held that plaintiffs lack third-party standing to assert claims that "may have an adverse effect on the person" who holds the asserted right. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17 (2004). The Supreme Court of Kentucky recently agreed. *Cameron*, 2023 WL 2033788 at *16. Understandably so, as conflicts of interests make the plaintiff unsuitable to represent the third party's interests, destroying any close relationship that might otherwise exist.

Here, the conflict between the plaintiffs and the women whose interests they purport to represent is glaring. Under Ohio's Heartbeat Act, women may sue doctors who perform abortions on them in violation of the Heartbeat Act, even if those women wanted the abortion when seeking it. *See* R.C. 2919.199(A). "Consequently, the abortion

providers' interest in not being" subject to the Heartbeat Act "potentially conflict[s] with a pregnant woman's interest in" seeking a civil remedy under the Act. *Cameron*, 2023 WL 2033788 at *16.

2. The plaintiffs' inability to satisfy the third factor is especially stark, and independently dispositive. That factor is satisfied only when "some hindrance" prevents the right-holder from "seeking relief." Nothing stops women desiring an abortion to sue for a court order allowing them to obtain the procedure. To be sure, women may wish not to publicize their desire for abortion. But for two reasons, the desire for privacy is insufficient to constitute a hindrance to suit.

First, and most fundamentally, women can sue to vindicate a supposed right to abortion without compromising their privacy interests. The plaintiffs here "have provided no argument as to why their patients would be *unable* to challenge the bans pseudonymously, nor have they explained why a court order [requiring secrecy] would be insufficient to ensure their patients' identities remain protected." *Cameron*, 2023 WL 2033788 at *16. *Roe v. Wade* itself was brought by a woman asserting her own rights, not by a provider asserting her rights for her. And for decades, juveniles have pseudonymously sought court orders allowing them to obtain abortions. *See, e.g.*, *In re Doe*, 2011-Ohio-6373 ¶1 (7th Dist.); *In re Doe*, 2011-Ohio-5482 ¶1 (1st Dist.); *In re Jane Doe 01-01*, 141 Ohio App. 3d 20, 21 (8th Dist. 2001) (*per curiam*); *In re Complaint of Jane Doe*, 134 Ohio App. 3d 569, 570 (4th Dist. 1999) (*per curiam*); *In re Doe*, 1991 WL 96269, *1 (2d Dist. May 30,

1991). Because juveniles can and do litigate their claimed abortion rights in the face of parental opposition, the claim that adult plaintiffs suffer a unique hindrance in doing so is plainly false. *See June Med.*, 140 S. Ct. at 2168–69 (Alito, J., dissenting); *id*. at 2174 (Gorsuch, J., dissenting).

Second, privacy concerns are not unique to abortion litigation. Plaintiffs in many areas of law would prefer to hide their identities. Consider employment-discrimination plaintiffs concerned for their reputations, or medical-malpractice plaintiffs injured during an embarrassing procedure. Courts have never held that even an understandable desire for privacy, by itself, is the sort of hindrance that allows third parties to sue on another's behalf.

All told, the plaintiffs have not, and could not possibly, establish that women are categorically incapable of suing to vindicate their own interests in this context.

3. It is true, but irrelevant, that *federal* courts long allowed clinics and abortionists to sue on behalf of their patients. *See June Med.*, 140 S. Ct. at 2118 (plurality). As *Dobbs* noted, a principled application of third-party standing principles would have precluded standing in such cases. 142 S. Ct. at 2275; *accord June Med.*, 140 S. Ct. at 2142–49 (Thomas, J., dissenting); *id.* at 2169 (Alito, J., dissenting); *id*. at 2174 (Gorsuch, J., dissenting). The federal courts modified third-party standing principles for abortion cases. Indeed, *Dobbs* cited this abortion-specific exception to standing principles to demonstrate how *Roe* caused courts to improperly distort other doctrines in service of abortion. 142 S. Ct. at

2275. This Court ought not import that distortion of federal law into our state constitution.

One court recently avoided repeating the U.S. Supreme Court's errors. The Kentucky Supreme Court held that, under Kentucky law, "abortion providers lack third-party standing to challenge" various abortion "statutes on behalf of their patients." *Cameron*, 2023 WL 2033788 at *1. Applying this principle, the court concluded that the providers lacked standing to challenge a "heartbeat" law that is nearly identical to Ohio's. The court reasoned that, although the heartbeat law subjected the plaintiffs to punishment for violations, the law did not violate any of the plaintiffs' *rights*; the right to abortion, if it exists, is held only by individual women, on whose behalves the providers lacked standing to sue. Just so here.

II. The trial court's reasons for finding third-party standing are unconvincing.

The trial court claimed "that Plaintiffs have standing to raise claims on behalf of their clients and patients" under "settled law." Order Granting Preliminary Injunction at ¶73. In support of that proposition, the court cited one thirty-year-old, non-binding appellate decision, along with two preliminary-stage trial-court decisions. *Id*. (citing *Preterm-Cleveland v. Voinovich*, 89 Ohio App. 3d 684 (10th Dist. 1993)); *Planned Parenthood Sw. Ohio Region v. Ohio Dep't of Health*, Hamilton C.P. No. A 2101148, at 5 (Apr. 19, 2021); *Planned Parenthood Sw. Ohio Region v. Ohio Dep't of Health*, Hamilton C.P. No. A. 2100870 at 3 (Jan. 31, 2022)). That hardly demonstrates "settled law." Order Granting Preliminary

Injunction at ¶73.

Beyond citing that precedent, the trial court offered little analysis. It did not reject any of the State's arguments. Its assessment of the third factor was especially unconvincing. The court asserted that women "may be chilled" from suing "by a desire to protect" their privacy. *Id*. ¶80 (quotation omitted). But the court ignored the option to file pseudonymously. It also ignored the fact that the same desire for privacy arises in many other contexts. *See above* 33. So the desire for privacy does not establish the requisite hindrance.

In addition, the trial court made no effort to find standing regarding each challenged provision. It implicitly assumed that standing could be dispensed in gross. *Contra Preterm-Cleveland*, 153 Ohio St. 3d 157 at ¶30. Even assuming it correctly found that the plaintiffs had standing to challenge *some* provision, it erred in finding that they therefore had standing to challenge the entire Act. For example, Ohio law has banned performing an abortion without checking for a heartbeat for at least seven years. Plaintiff Dr. Liner admits she has easily complied with these requirements. *See* Preliminary Injunction Hearing Transcript, Oct. 7, 2022, at 51–52. The Heartbeat Act's similar requirement inflicts no injury whatsoever on doctors, clinics, or patients.

All told, the trial court awarded a preliminary injunction based on a theory that the plaintiffs lacked standing to raise.

CONCLUSION

The Court should vacate the trial court's preliminary injunction and remand for further proceedings consistent with its decision.

Respectfully submitted,

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I certify that a copy of the foregoing Merit Brief of Appellants was served by e-mail this 1st day of May, 2023 upon the following:

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Additionally, the foregoing Brief of Appellants was served by U.S. mail this 1st day of May, 2023, upon the following:

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/s/ Benjamin M. Flowers
Benjamin M. Flowers
Solicitor General

APPENDIX

Exhibit A

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

PRETERM-CLEVELAND, :

PLANNED PARENTHOOD SOUTHWEST OHIO REGION, :

PLANNED PARENTHOOD OF GREATER OHIO, :

WOMEN'S MED GROUP PROFESSIONAL CORP., :

NORTHEAST OHIO WOMEN'S CENTER, LLC, d.b.a. TOLEDO WOMEN'S CENTER, :

and :

SHARON LINER, M.D., :

Plaintiffs-Appellees, :

vs. :

DAVID YOST, ATTORNEY GENERAL OF OHIO, :

BRUCE VANDERHOFF, DIRECTOR, OHIO DEPARTMENT OF HEALTH, :

KIM ROTHERMEL, SECRETARY, STATE MEDICAL BOARD OF OHIO, :

and :

APPEAL NO. C-220504
TRIAL NO. A-2203203

JUDGMENT ENTRY.

BRUCE SAFERIN,
SUPERVISING MEMBER, STATE MEDICAL BOARD OF OHIO,

Defendants-Appellants.

This cause was heard upon the appeal, the record, and the briefs.

This appeal is dismissed for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs are taxed under App.R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App.R. 27.

To The Clerk:

Enter upon the Journal of the Court on 12/16/2022 per Order of the Court.

By: Beth A. Myers
Administrative Judge

Exhibit B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

PRETERM-CLEVELAND, :

PLANNED PARENTHOOD SOUTHWEST OHIO REGION, :

PLANNED PARENTHOOD OF GREATER OHIO, :

WOMEN'S MED GROUP PROFESSIONAL CORP., :

NORTHEAST OHIO WOMEN'S CENTER, LLC, d.b.a. TOLEDO WOMEN'S CENTER, :

and :

SHARON LINER, M.D., :

Plaintiffs-Appellees, :

vs. :

DAVID YOST, ATTORNEY GENERAL OF OHIO, :

BRUCE VANDERHOFF, DIRECTOR, OHIO DEPARTMENT OF HEALTH, :

KIM ROTHERMEL, SECRETARY, STATE MEDICAL BOARD OF OHIO, :

and :

APPEAL NO. C-220504
TRIAL NO. A-2203203

OPINION.

BRUCE SAFERIN,
SUPERVISING MEMBER, STATE MEDICAL BOARD OF OHIO,

Defendants-Appellants.

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Appeal Dismissed

Date of Judgment Entry on Appeal: December 16, 2022

ACLU of Ohio Foundation, B. Jessie Hill, Freda J. Levenson and *Rebecca Kendis, Planned Parenthood Federation of America, Melissa Cohen, Meagan Burrows, American Civil Liberties Union, Ryan Mendias, Michelle Nicole Diamond, Peter Neiman, Wilmer Cutler Pickering Hale* and *Dorr LLP, Alan E. Shoenfeld, Davina Pujari, Christopher A. Rheinheimer* and *Allyson Slater*, for Plaintiffs-Appellees,

David Yost, Attorney General of Ohio, *Benjamin M. Flowers*, Solicitor General, *Stephen P. Carney*, Deputy Solicitor General, and *Amanda L. Narog* and *Andrew D. McCartney*, Assistant Attorneys General, for Defendants-Appellants.

BERGERON, Presiding Judge.

{¶1} In the wake of the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022), much of the attention on the question of abortion has shifted to state courts and state constitutions. This case involves the fate of a state statute that largely bans abortion access in Ohio. The trial court entered a preliminary injunction that barred the state from enforcing the statute, designed to preserve the status quo until it could convene a trial on the merits. The state appealed this decision, but we find that it appealed prematurely. Our jurisdiction as an appellate court is limited both by our constitution and relevant state statutes. Consistent with the wealth of authority in Ohio concerning injunctions and appellate jurisdiction, we conclude that we lack jurisdiction over the state's appeal. We accordingly dismiss this appeal, but of course any aggrieved party can appeal after the trial court issues its final judgment in the case. Our answer on the merits of this dispute and the underlying constitutionality of the statute (even though many may wish that we decide the merits of this case now) must await another day.

I.

{¶2} Ohio's so-called "Heartbeat Act" ("S.B. 23") generally proscribes abortions after a fetal heartbeat is detected. R.C. 2919.19-2919.1913; 2019 Sub.S.B. No. 23. The Ohio General Assembly enacted S.B. 23 in April 2019. Under S.B. 23, a healthcare provider who intends to perform an abortion must first determine whether there is embryonic or fetal cardiac activity. If the provider detects cardiac activity, S.B. 23 renders it a crime to "caus[e] or abet[] the termination of" the pregnancy. R.C. 2919.195(A). S.B. 23 also carves out two limited exceptions. After the detection of cardiac activity, providers may perform abortions that they determine are necessary

(1) to preserve the pregnant woman's life, or (2) to prevent a "serious risk of the substantial and irreversible impairment of a major bodily function." R.C. 2919.195(B). Moreover, the act applies only to intrauterine pregnancies; it does not prohibit doctors from aborting tubal or ectopic pregnancies. R.C. 2919.191.

{¶3} In September 2022, plaintiffs-appellees—several abortion clinics and a doctor—filed a complaint, seeking a preliminary (and, ultimately a permanent) injunction regarding the enforcement of S.B. 23, naming various state officials (collectively, "the state") as defendants (now appellants). But this action does not exist in a vacuum; rather, it followed on the heels of two related proceedings.

{¶4} In July 2019, a federal district court preliminarily enjoined S.B. 23 before it went into effect, based on *Roe v. Wade*, 410 U.S. 113, 153-154, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 876, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). *Preterm-Cleveland v. Yost*, 394 F.Supp.3d 796, 800-801 (S.D.Ohio 2019). On June 24, 2022, following the United States Supreme Court's decision in *Dobbs*, 142 S.Ct. 2228, 213 L.Ed.2d 545, however, the district court vacated that preliminary injunction and S.B. 23 went into effect. *Preterm-Cleveland v. Yost*, S.D.Ohio No. 1:19-cv-00360, 2022 U.S. Dist. LEXIS 112700 (June 24, 2022).

{¶5} Plaintiffs immediately petitioned the Supreme Court of Ohio for a writ of mandamus on June 29, 2022, *see State ex rel. Preterm-Cleveland v. Yost*, 167 Ohio St.3d 1468, 2022-Ohio-2558, 191 N.E.3d 443. The mandamus action sought a prohibition on the enforcement of S.B. 23 and a declaration that S.B. 23 was unconstitutional under the Ohio Constitution. Plaintiffs voluntarily dismissed the

mandamus action in September 2022, when at least one of the plaintiff clinics faced imminent closure due to the enforcement of S.B. 23.

{¶6} Subsequently, on September 2, 2022, plaintiffs filed their complaint in the Hamilton County Court of Common Pleas seeking declaratory relief and a permanent injunction enjoining the enforcement of S.B. 23. Plaintiffs also filed a motion for a temporary restraining order followed by a preliminary injunction. On September 14, the trial court entered a 14-day temporary restraining order, which it later extended to October 12. Following an evidentiary hearing on an expedited basis, the trial court issued a preliminary injunction enjoining the enforcement of S.B. 23 and prohibiting the state from later taking any enforcement action premised on a violation of S.B. 23 that occurred while the act was in effect.

{¶7} The trial court's order emphasized the provisional nature of the injunction, explaining, "The Court's findings at this stage are based on the limited record before the Court. This matter shall be set for a case management conference at which time the Court shall issue a scheduling order providing the parties with adequate time to conduct full discovery in preparation for trial." The trial court also noted that the preliminary injunction hearing afforded only "limited expedited discovery in preparation for the hearing," clarifying that the injunction at issue was granted in anticipation of more fulsome discovery preceding its ultimate determination of whether to grant a permanent injunction enjoining the enforcement of S.B. 23.

{¶8} Nevertheless, the state immediately appealed the order granting the preliminary injunction. Upon review of the state's appeal, this court sua sponte raised a question regarding appellate jurisdiction, and on October 28, this court ordered the

parties to submit briefs addressing whether the preliminary injunction order constitutes a final appealable order under Ohio law. At this time, we do not weigh the merits of the case; rather, we must determine the threshold question of whether, under Ohio law, we may exercise jurisdiction over the state's appeal of the preliminary injunction order.

II.

{¶9} Appellate courts are courts of limited jurisdiction, and we must honor the jurisdictional constraints imposed by our constitution and state statutes. Pursuant to Article IV, Section 3(B)(2) of the Ohio Constitution, appellate courts possess jurisdiction to "review and affirm, modify, or reverse * * * final orders of the courts of record inferior to the court of appeals within the district * * *." "An appellate court can review only final orders, and without a final order, an appellate court has no jurisdiction." *Riscatti v. Prime Properties Ltd. Partnership*, 137 Ohio St.3d 123, 2013-Ohio-4530, 998 N.E.2d 437, ¶ 18, quoting *Supportive Solutions, L.L.C. v. Electronic Classroom of Tomorrow*, 137 Ohio St.3d 23, 2013-Ohio-2410, 997 N.E.2d 490, ¶ 10. "If a lower court's order is not final, then an appellate court does not have jurisdiction to review the matter, and the matter must be dismissed." *Taxiputinbay, LLC v. Village of Put-In-Bay*, 6th Dist. Ottawa No. OT-20-021, 2021-Ohio-191, ¶ 7, quoting *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989). As an appellate court, we are obliged to consider our jurisdiction even if neither party raises the issue. *See State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002-Ohio-5315, 776 N.E.2d 101, ¶ 4 ("R.C. 2505.03 * * * limits the appellate jurisdiction of courts * * * to the review of final orders, judgments, or decrees. This jurisdictional issue cannot be waived and may be raised by [an appellate court] sua sponte."); *see also J.B. v. R.B.*,

9th Dist. Medina No. 14CA0044-M, 2015-Ohio-3808, ¶ 4, citing *Whitaker-Merrell Co. v. Geupel Constr. Co., Inc.*, 29 Ohio St.2d 184, 185, 280 N.E.2d 922 (1972) ("This Court is obligated to raise sua sponte questions related to our jurisdiction.").

{¶10} The question of whether an order constitutes a "final order" that we can review obligates us to consider the language of the governing statute as well as how Ohio courts have interpreted this language. R.C. 2505.02 serves as our guide in this inquiry. "For an order to be final and appealable, it must meet the requirements of R.C. 2505.02(B)." *In re C.B.*, 129 Ohio St.3d 231, 2011-Ohio-2899, 951 N.E.2d 398, ¶ 5. The parties agree that the only subsection of R.C. 2505.02 at issue here is R.C. 2505.02(B)(4), which provides:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> * * *
>
> (4) An order that grants or denies a provisional remedy and to which both of the following apply:
>
> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶11} The threshold question in determining whether an order constitutes a final appealable order under R.C. 2505.02(B)(4) is whether the order "grants or denies a provisional remedy." *See State v. Muncie*, 91 Ohio St.3d 440, 447, 746 N.E.2d 1092

(2001) ("To satisfy the definition of 'final order' contained in R.C. 2505.02(B)(4), the order at issue must either grant or deny a provisional remedy."). R.C. 2505.02(A)(3) answers that question for the case at hand, defining a "provisional remedy" as "a proceeding ancillary to an action, including * * * a proceeding for a preliminary injunction." In the present case, the appealed-from order granted a preliminary injunction; therefore, this case squarely falls within the scope of R.C. 2505.02(B)(4).

{¶12} The provisional remedy must then satisfy both prongs of R.C. 2505.02(B)(4) to constitute a final appealable order. *See Muncie* at 450-452; *Empower Aviation, LLC v. Butler Cty. Bd. of Commrs.*, 185 Ohio App.3d 477, 2009-Ohio-6331, 924 N.E.2d 862, ¶ 10 (1st Dist.); *Deyerle v. City of Perrysburg*, 6th Dist. Wood No. WD-03-063, 2004-Ohio-4273, ¶ 13 ("[A]n order denying or granting a preliminary injunction is a final appealable order if it satisfies the two prongs of R.C. 2505.02(B)(4)."). Only if the order meets both requirements can we exercise jurisdiction.

{¶13} The first prong requires that the order effectively determines the action with respect to the provisional remedy and prevents a judgment in favor of the appealing party with respect to the provisional remedy for an order to be deemed final under R.C. 2505.02(B)(4). R.C. 2505.02(B)(4)(a). However, the statute on its face gives courts little guidance for ascertaining what "determines the action" or "prevents a judgment" with respect to the provisional remedy, and Ohio caselaw on the topic is limited. In fact, characterizing any provisional remedy—such as a preliminary injunction—as determining the action or preventing a judgment strikes us as at odds with the very concept of provisional remedies, which are, by their nature, temporary

and interlocutory.[1] While this requirement may pose a conceptual conundrum, in practice, the Ohio Supreme Court has explained that an order satisfies the requirement if "there existed nothing further for the trial court to decide with respect to the provisional remedy." *In re Special Docket No. 73958*, 115 Ohio St.3d 425, 431, 2007-Ohio-5268, 875 N.E.2d 596; *see Muncie* at 450-451.

{¶14} Here, the trial court's decision is, as best we can tell, final with respect to issuing the preliminary injunction. By that, we mean that the trial court gave no indication that its decision was tentative or contingent in any manner. While a trial court generally retains the ability to revisit interlocutory rulings, under the Ohio Supreme Court's interpretation of R.C. 2505.02(B)(4)(a), we conclude that the state has satisfied this requirement. *See In re Special Docket No. 73958* at 430-431; *Muncie*, 91 Ohio St.3d at 450-451, 746 N.E.2d 1092. We accordingly proceed to the next step of the R.C. 2505.02(B)(4) analysis.

{¶15} To satisfy the second prong of R.C. 2505.02(B)(4), the appealing party must show that, if it cannot appeal now, it will be deprived of "a meaningful or effective remedy" if it must await "an appeal following final judgment as to all proceedings." R.C. 2505.02(B)(4)(b). This requirement exists in recognition that, "in spite of courts' interest in avoiding piecemeal litigation, occasions may arise in which a party seeking to appeal from an interlocutory order would have no adequate remedy from the effects of that order on appeal from final judgment." *Muncie* at 451. In other words, "[i]n some instances, 'the proverbial bell cannot be unrung and an appeal after final

---

[1] As explained in Painter and Pollis, *Ohio Appellate Practice*, Section 2:20, at 163 (2021-2022 Ed.), it appears that the General Assembly included this language to track R.C. 2505.02(B)(1), which involves decisions that truly "determine[] the action and prevent[] a judgment." Appropriating such language in the provisional remedy context seems to be the source of confusion.

judgment on the merits will not rectify the damage' suffered by the appealing party." *Id.*, quoting *Gibson-Myers & Assocs. v. Pearce*, 9th Dist. Summit No. 19358, 1999 Ohio App. LEXIS 5010, *7-8 (Oct. 27, 1999).

{¶16} Before we apply Ohio caselaw to the case at hand, we pause to address the federal authority featured by the state in its jurisdictional brief. The state seeks to convince us that it lacks a "meaningful or effective remedy" if it cannot appeal now by pointing to various federal cases. For example, the state refers to *Thompson v. DeWine*, 976 F.3d 610 (6th Cir.2020), and *Abbott v. Perez*, 138 S.Ct. 2305, 201 L.Ed.2d 714 (2018), to establish that every order enjoining a valid state law inflicts "serious[] and irreparabl[e] harm" on a state. *See Thompson* at 619. However, we find the state's references to federal authorities in the preliminary injunction context unpersuasive. Under federal law, orders granting a preliminary injunction are *always* appealable. 28 U.S.C. 1292(a)(1) ("[T]he courts of appeals shall have jurisdiction of appeals from * * * [i]nterlocutory orders of the district courts of the United States * * * granting, continuing, modifying, refusing or dissolving injunctions * * *."). In contrast, as explained above, Ohio law permits the appeal of orders granting preliminary injunctions only in limited circumstances. Accordingly, we find the federal cases relied upon by the state inapposite, as they shed no light on Ohio's statutory regime.

{¶17} Turning back to the Ohio standard, to understand how this "meaningful or effective remedy" requirement applies, we consider three different strands of Ohio caselaw: (1) cases holding that a preliminary injunction does not meet the standard of R.C. 2505.02(B)(4)(b) when the plaintiff ultimately seeks a permanent injunction; (2)

cases recognizing that preservation of the status quo generally fails to satisfy the requirements of finality; and (3) cases illustrating the "unringing" of the bell concept.

{¶18} We begin with the first consideration—the fact that "Ohio courts generally hold that the second prong of R.C. 2505.02(B)(4) cannot be met when the provisional remedy is a preliminary injunction and the ultimate relief sought in the lawsuit is a permanent injunction." *Clean Energy Future, LLC v. Clean Energy Future-Lordstown, LLC*, 11th Dist. Trumbull No. 2017-T-0110, 2017-Ohio-9350, ¶ 7; *see Hootman v. Zock*, 11th Dist. Ashtabula No. 2007-A-0063, 2007-Ohio-5619, ¶ 15; *Katherine's Collection, Inc. v. Kleski*, 9th Dist. Summit No. 26477, 2013-Ohio-1530, ¶ 17 ("This Court has held that where, as here, the provisional remedy affected the type of claims and relief that are at the heart of the underlying litigation, the order determining the provisional remedy is not immediately appealable."); *Jacob v. Youngstown Ohio Hosp. Co., LLC*, 7th Dist. Mahoning No. 11 MA 193, 2012-Ohio-1302, ¶ 24.

{¶19} The logic animating these decisions is that an appeal after issuance of the permanent injunction will provide the meaningful and effective remedy. *See Fatica Renovations, LLC v. Bridge*, 11th Dist. Geauga No. 2017-G-0106, 2017-Ohio-1419, ¶ 15 ("[G]enerally, if a permanent injunction is sought, this will allow for a remedy at the conclusion of the proceedings."). And this case helps illustrate the point—the court issued its preliminary injunction on a limited record and on an expedited basis, and it was poised to shift gears swiftly to resolve the permanent injunction. Yes, some delay would occur between the preliminary and permanent injunction, but that delay must be measured against providing the appellate court a complete record on appeal and avoiding piecemeal appeals. Applying that logic, Ohio

courts have consistently recognized that parties will have their meaningful and effective remedy after issuance of the permanent injunction (or they will prevail at the permanent injunction phase and secure effective relief through that manner).

{¶20} Here, although the trial court granted a preliminary injunction enjoining S.B. 23, plaintiffs ultimately seek relief in the form of a permanent injunction on the enforcement of S.B. 23 and a declaration that S.B. 23 is unconstitutional under the Ohio Constitution, bringing this case squarely within the scope of the rule delineated above. The arguments that plaintiffs marshalled in favor of the preliminary injunction—that they are being deprived of their fundamental rights under the Ohio Constitution, causing them to suffer constitutional, medical, emotional, and other harms—echo the arguments they frame in their complaint in support of an eventual permanent injunction. Because the provisional remedy is a preliminary injunction and plaintiffs ultimately seek a permanent injunction to enjoin the same act on the same reasoning, it supports the conclusion that the second prong of R.C. 2505.02(B)(4) is not met in this case.

{¶21} This point is bolstered when we turn next to the second strand of Ohio caselaw that guides our analysis: "[C]ourts have found that 'a preliminary injunction which acts to maintain the status quo pending a ruling on the merits is not a final appealable order under R.C. 2505.02.' " *Quinlivan v. H.E.A.T. Total Facility Solutions, Inc.*, 6th Dist. Lucas No. L-10-1058, 2010-Ohio-1603, ¶ 5, quoting *Hootman*, 11th Dist. Ashtabula No. 2007-A-0063, 2007-Ohio-5619, at ¶ 15, and *E. Cleveland Firefighters, IAFF Local 500 v. City of E. Cleveland*, 8th Dist. Cuyahoga No. 88273, 2007-Ohio-1447, ¶ 5; *see In re Estate of Reinhard*, 12th Dist. Madison No. CA2019-11-028, 2020-Ohio-3409, ¶ 17. In the context of preliminary injunctions,

various Ohio appellate districts have defined "status quo" as the "last, actual, peaceable, uncontested status which preceded the pending controversy." *Taxiputinbay*, 6th Dist. Ottawa No. OT-20-021, 2021-Ohio-191, at ¶ 17, quoting *Quinlivan* at ¶ 5, and *Hootman* at ¶ 16.

{¶22} Ohio courts generally do not permit immediate appellate review of preliminary injunctions that preserve the status quo because, if the status quo is being preserved, the aggrieved party will have an opportunity to obtain its "meaningful or effective remedy" if a permanent injunction is issued. In other words, if the status quo doesn't change—the party isn't truly harmed (at least in the manner contemplated by R.C. 2505.02(B)(4)(b)). Needless to say, any party losing a preliminary injunction decision can muster some claim of immediate harm, but the statute keeps our eyes on the "meaningful or effective remedy" standard. And with respect to preliminary injunction orders that preserve the status quo, Ohio courts have spoken.

{¶23} The last legally uncontested status in Ohio with regard to laws regulating abortions was, as the trial court aptly recognized in its order, "the status quo of legal and safe abortion access that has been in place in Ohio for nearly five decades." Indeed, S.B. 23 has been challenged in various lawsuits even before its effective date. As the state points out, S.B. 23 was briefly in effect between the injunction issued by the federal court and the preliminary injunction issued by the trial court below. The fact that this interlude allowed S.B. 23 to be effective does not alter the status quo assessment because Ohio law confirms that the "status quo" is that which precedes the enforcement of a challenged law (particularly given the pendency of other litigation seeking similar relief before the federal court and the Ohio Supreme Court). *See Taxiputinbay* at ¶ 17; *Quinlivan* at ¶ 5; *Hootman* at ¶ 16. The trial court

here determined that its preliminary injunction would preserve the status quo, and—consistent with the caselaw above—we have no basis to question that determination. Accordingly, the status quo consideration supports a conclusion that the state will have a meaningful and effective remedy following final judgment, because the preliminary injunction maintains the precontroversy status quo.

{¶24} As to the third thread of jurisprudence, courts have recognized that an immediate appeal might be warranted if "the proverbial bell cannot be unrung." *Muncie*, 91 Ohio St.3d at 451, 746 N.E.2d 1092. But courts have emphasized the narrowness of this inquiry, lest an expansive view swallow the rule: "Ordinarily, an order issuing or denying a preliminary injunction is not a final appealable order." *Ankrom v. Hageman*, 10th Dist. Franklin No. 06AP-735, 2007-Ohio-5092, ¶ 8, quoting *LCP Holding Co. v. Taylor*, 158 Ohio App.3d 546, 2004-Ohio-5324, 817 N.E.2d 439, ¶ 18 (11th Dist.). Cases considering this context have focused on situations that would irreparably change the party's position between provisional remedy and final judgment. Classic scenarios include divulgence of attorney-client privileged communications or disclosure of other confidential information, *Cleveland Clinic Found. v. Levin*, 120 Ohio St.3d 1210, 2008-Ohio-6197, 898 N.E.2d 589, ¶ 12-13, *Cuervo v. Snell*, 10th Dist. Franklin Nos. 99AP-1442, 99AP-1443 and 99AP-1458, 2000 Ohio App. LEXIS 4404, *6-7 (Sept. 26, 2000), and *Premier Health Care Servs. v. Schneiderman*, 2d Dist. Montgomery No. 18795, 2001 Ohio App. LEXIS 5170, *4-9 (Aug. 21, 2001), forced administration of psychotropic medication to an incompetent criminal defendant, *Muncie* at 452, and cases implicating the right against double jeopardy, *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 53-59. This vein of cases tends to generally involve information which, once disclosed,

would be "irretrievably lost," *Cleveland Clinic Found.* at ¶ 13, "particularly severe" interferences with an individual's liberty interest, *Muncie* at 452, or even "the potential for serious or * * * fatal side effects," *id.*, and other cases in which, absent an immediate appeal, the right cannot be vindicated. *Anderson* at ¶ 53-59.

{¶25} We cannot fit the state's claimed harm within these confines. The state delineates three purported forms of harm that it believes it will suffer in the absence of the right to an immediate appeal. First, the state contends that it and its citizens will suffer inherent harm every day that it is barred from giving effect to S.B. 23 (presumably because a state always suffers harm when its laws are enjoined). Second, the state submits that it is being irreparably harmed because the injunction allows the performance of an irreversible procedure—abortion—in circumstances not permitted by S.B. 23. And third, according to the state, because abortions are irreversible, every day the injunction remains in force irreparably undermines the state's efforts to protect its citizens. At bottom, however, the state focuses on harm to third-parties rather than on harm to itself, which colors its jurisdictional analysis. *See Mentor Way Real Estate Partnership v. Hertanu*, 8th Dist. Cuyahoga No. 103267, 2016-Ohio-4692, ¶ 11 (dismissing the appeal for want of a final appealable order upon concluding that harm to a third party would not deny appellant a meaningful and effective remedy).

{¶26} But, as the caselaw described above demonstrates, just because a party can fashion a claim of harm does not mean it will be deprived of a "meaningful or effective remedy" by waiting to "appeal following final judgment as to all proceedings." *See* R.C. 2505.02(B)(4)(b). Indeed, the state's argument is tantamount to a conclusion that *any* preliminary injunction of a state statute warrants an immediate appeal. We

are unwilling to go that far, nor does extant Ohio law. More importantly, it is difficult to square the alarmist claims in the state's jurisdictional brief with the fact that S.B. 23 had already been enjoined for nearly three years by the federal court. The state will have a "meaningful or effective remedy" after the conclusion of the permanent injunction hearing.

{¶27} Confirming our determination, the state's defense of appellate jurisdiction is notably sparse on Ohio caselaw, and the cases it does cite are distinguishable from the controversy at hand.[2] Two of the cases to which the state cites deal with concrete and imminent harms, such as the risk of trade secret misappropriation, *Premier Health Care Servs.*, 2d Dist. Montgomery No. 18795, 2001 Ohio App. LEXIS 5170, at *4-9, or where certain funds would otherwise be distributed to other parties before the trial court could determine to whom they rightfully belonged, *AIDS Taskforce of Greater Cleveland v. Ohio Dept. of Health*, 2018-Ohio-2727, 116 N.E.3d 874, ¶ 17-18 (8th Dist.). The state did not refer to any cases that specifically support any of its three claims of harm in the absence of immediate appeal, and conspicuously absent are any cases where a third-party's rights are factored into the calculus. The state also relied on *Puruczky v. Corsi*, 2018-Ohio-1335, 110 N.E.3d 73, ¶ 15 (8th Dist.). But this case can be distinguished because it involves an infringement of a party's constitutional right to free speech, and preliminary injunctions restraining free speech fall under a separate category of order requiring immediate appellate review. *Id.*, quoting *Connor Group v. Raney*, 2d Dist. Montgomery No. 26653, 2016-Ohio-2959, ¶ 1 ("[A] preliminary injunction that

[2] The state also cites *Village of Newburgh Hts. v. State*, Slip Opinion No. 2022-Ohio-1642, but that case offers no analysis of the R.C. 2505.02(B)(4) factors, so it provides no guidance to us.

constitutes a prior restraint on speech requires immediate appellate review."). We therefore hold that the state has failed to establish that the "proverbial bell cannot be unrung," *see Muncie*, 91 Ohio St.3d at 451, 746 N.E.2d 1092, or that an appeal on the final merits will not be sufficient.

{¶28} In the case at hand, the trial court issued a preliminary injunction to preserve the rights (of access to abortion care in Ohio) of the party in whose favor the preliminary injunction was granted until such time as the matter could finally be decided on the merits. At that time, if a permanent injunction is granted, the state will have a meaningful and effective remedy—the right to an appeal. The trial court issued a preliminary injunction designed to maintain the status quo, and the state fails to successfully demonstrate that it will be deprived of a meaningful or effective remedy if it cannot appeal now. Accordingly, we hold that the trial court's order granting plaintiffs' motion for a preliminary injunction does not satisfy the requirements of a final appealable order under R.C. 2505.02(B)(4).

* * *

{¶29} We appreciate that many citizens may be interested in the resolution of the merits of this appeal, but we cannot expand our jurisdiction simply because the case is a significant one. In light of the foregoing analysis, we must dismiss this appeal for lack of a final appealable order.

Appeal dismissed.

CROUSE and **WINKLER, JJ.**, concur.

Please note:

The court has recorded its entry on the date of the release of this opinion.

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PRETERM-CLEVELAND, *et al.*,	:	
	:	Case No.: A2203203
Plaintiffs,	:	
	:	
v.	:	Judge Christian A. Jenkins
	:	
DAVID YOST, *et al.*,	:	
	:	Preliminary Injunction Order
Defendants.	:	
	:	
	:	

Introduction

In accordance with Civ. R. 65(B), a duly noticed evidentiary hearing on Plaintiffs' motion for preliminary injunction was conducted before this Court on October 7, 2022. Prior to said hearing, the parties were afforded the opportunity to undertake limited expedited discovery in preparation for the hearing. However, the trial on the merits in this matter was not consolidated with the hearing on Plaintiffs' motion for preliminary injunction pursuant to Civ. R. 65(B)(2). Thus, at trial on the merits, admissible evidence received during the preliminary injunction hearing shall become part of the record at trial and need not be re-presented.[1]

The Court having considered the record in this matter, including the record before the Court on Plaintiffs' motion for temporary restraining order, the filings of the parties in support of and in opposition to the motion for preliminary injunction, and the evidence and arguments received at

[1] The Court's findings at this stage are based on the limited record before the Court. This matter shall be set for a case management conference at which time the Court shall issue a scheduling order providing the parties with adequate time to conduct full discover in preparation for trial in accordance with Civ. R. 16(B). The parties are directed to comply with Civ. R. 26(F) and the Court's standing orders (https://hamiltoncountycourts.org/index.php/common-please-court-judge-christian-a-jenkins/) in advance of the case management conference.

the October 7, 2022 hearing, finds that plaintiffs have demonstrated by clear and convincing evidence a strong likelihood of success on the merits and that they face immediate, irreparable injury, such that the issuance of a preliminary injunction enjoining the enforcement of S.B. 23 (as described in detail below) is appropriate during the pendency of this matter. In support thereof, the Court incorporates the reasons set forth in its September 14, 2022 Decision and Entry, the reasons set forth on the record on October 7, 2022, and the following findings of fact and conclusions of law:

FINDINGS OF FACT

Senate Bill 23

1. On April 10, 2019, the Ohio General Assembly passed 2019 Am.Sub.S.B. No. 23 ("S.B. 23").

2. Under S.B. 23, if a pregnancy is located in the uterus, the provider who intends to perform an abortion is required to determine whether there is cardiac activity. If there is cardiac activity, S.B. 23 makes it a crime to "caus[e] or abet[] the termination of" the pregnancy. S.B. 23, Section 1, amending R.C. 2919.192(A), 2919.192(B), and 2919.195(A). Cardiac activity typically occurs approximately six weeks into pregnancy (as measured from the first day of a patient's last menstrual period, or "LMP") but can occur as early as the fifth week LMP.

3. S.B. 23 has two limited exceptions. After cardiac activity is detected, abortion is permitted only if it is necessary (1) to prevent the woman's death, or (2) to prevent a "serious risk of the substantial and irreversible impairment of a major bodily function." S.B. 23, Section 1, amending R.C. 2919.195(B). The statute defines "'[s]erious risk of the substantial and irreversible impairment of a major bodily function' [to mean] any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and

irreversible impairment of a major bodily function." R.C. 2919.16(K). A "medically diagnosed condition that constitutes a 'serious risk of the substantial and irreversible impairment of a major bodily function' includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes," and "may include, but is not limited to, diabetes and multiple sclerosis," but "does not include a condition related to the woman's mental health." *Id.*

4. A violation of S.B. 23 is a fifth-degree felony, punishable by up to one year in prison and a fine of $2,500. S.B. 23, Section 1, amending R.C. 2919.195(A); R.C. 2929.14(A)(5) and 2929.18(A)(3)(e).

5. In addition to criminal penalties, the state medical board may assess a forfeiture of up to $20,000 for each violation, S.B. 23, Section 1, amending R.C. 2919.1912(A), and limit, revoke, or suspend a physician's medical license based on a violation of S.B. 23, *see* R.C. 4371.22(B)(10).

6. Clinics providing abortion care also face civil penalties and revocation of their ambulatory surgical facility licenses for a violation of S.B. 23. R.C. 3702.32; R.C. 3702.30(A)(2)(a).

7. A patient may also bring a civil action against a provider who violates S.B. 23 and recover damages in the amount of $10,000 or more. S.B. 23, Section 1, amending R.C. 2919.199(B)(l).

8. On July 3, 2019, a federal district court preliminarily enjoined S.B. 23 before it went into effect, finding that the ban would pose an "insurmountable" obstacle to abortion access and "prohibit almost all abortion care in Ohio," violating Ohioans' rights under the Fourteenth Amendment of the United States Constitution. *Preterm-Cleveland v. Yost*, 394 F.Supp.3d 796, 800-801 (S.D. Ohio 2019).

9. On June 24, 2022, following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 213 L.Ed.2d 545 (2022), the district court vacated the

preliminary injunction and S.B. 23 went into effect. *Preterm-Cleveland v. Yost*, No. 1:19-cv-00360, Dkt. #100.

10. On September 14, 2022, this Court entered a 14-day temporary restraining order ("TRO"), which it later extended to October 12, 2022. The TRO enjoined enforcement of S.B. 23 and any later enforcement action premised on a violation of S.B. 23 that occurred while such relief was in effect.

11. The Court held a preliminary injunction hearing on October 7, 2022, during which it heard live testimony from three witnesses for the Plaintiffs and two for Defendants.

The Parties

12. Plaintiffs Preterm-Cleveland ("Preterm"), Planned Parenthood Southwest Ohio Region ("PPSWO"), Planned Parenthood of Greater Ohio ("PPGOH"), Women's Med Group Professional Corporation ("WMGPC"), Northeast Ohio Women's Center, LLC ("NEOWC"), and Sharon Liner, M.D. provide abortion services in Ohio.

13. Defendant David Yost is the Attorney General of Ohio. He is the chief law officer for the state, and ultimately responsible for the criminal enforcement of S.B. 23. R.C. 109.02. He is also charged with commencing and prosecuting civil forfeiture under S.B. 23 when directed to do so by the State Medical Board. S.B. 23, Section 1, amending R.C. 2919.1912(B). He is sued in his official capacity.

14. Defendant Bruce T. Vanderhoff, M.D., M.B.A., is the Director of the Ohio Department of Health ("ODH"), which is responsible for promulgating rules to assist in compliance with S.B. 23. He is charged with administering ODH. He is sued in his official capacity.

15. Defendant Kim G. Rothermel, M.D., is the Secretary of the State Medical Board of Ohio, which is charged with enforcing the physician licensing and civil penalties contained in S.B. 23. She is sued in her official capacity.

16. Defendant Bruce R. Saferin, D.P.M., is the Supervising Member of the State Medical Board of Ohio, which is charged with enforcing the physician licensing and civil penalties contained in S.B. 23. He is sued in his official capacity.

17. Defendants Michael C. O'Malley, Cuyahoga County Prosecutor, Joseph T. Deters, Hamilton County Prosecutor, G. Gary Tyack, Franklin County Prosecutor, Mathias H. Heck, Montgomery County Prosecutor, Julia R. Bates, Lucas County Prosecutor, and Sherri Bevan Walsh, Summit County Prosecutor, are responsible for prosecuting criminal violations of S.B. 23 that occur within their respective jurisdictions. They are sued in their official capacities.

Witnesses

Plaintiffs' Witnesses

18. Sharon Liner, M.D., is a board-certified family physician with 19 years of experience in women's health. She is licensed to practice medicine in the state of Ohio. For nearly 17 years, she has been the Director of Surgical Services and, since October 2018, the Medical Director of PPSWO in Cincinnati, Ohio. She has worked as a physician at PPSWO since 2004, and has provided abortion in an outpatient setting since 2002. Before S.B. 23 went into effect, Dr. Liner provided medication abortions up to 10 weeks LMP and procedural abortions through 21 weeks 6 days LMP. She oversees all medical services that PPSWO provides, including abortion. This includes supervising other physicians and clinicians, developing PPSWO's policies and procedures, and providing direct reproductive health care to patients. Without objection, the Court

accepted Dr. Liner as an expert qualified on the treatment and care of pregnant persons and the provision of abortion care in Ohio. (Liner Direct; PX-2 (Liner CV)).

19. Steven J. Ralston, M.D., M.P.H. is a board-certified obstetrician/gynecologist (OB/GYN) with more than two decades of experience with abortion care, high-risk pregnancies, prenatal diagnosis, and fetal therapy. He is also board-certified in maternal-fetal medicine (MFM), an area of obstetrics that focuses on the medical and surgical management of high-risk pregnancies. He is currently a clinical professor at the University of Maryland School of Medicine in Obstetrics, Gynecology and Reproductive Services. He is also the Director of the Obstetric Care Unit, where he is responsible for the functioning of the labor and delivery floor, as well as for making sure that the policies and guidelines for the care and treatment of pregnant women are evidence-based and up-to-date. He is also responsible for the education of fellows, residents, and medical students on the labor floor. Dr. Ralston provides care to pregnant patients throughout their pregnancies (from the point they first learn they are pregnant through to birth), and also provides abortion care to patients who have made the decision to end a pregnancy. Dr. Ralston is very familiar with the complications that can arise during pregnancy, childbirth, and abortion, and with the relative safety of abortion as compared to childbirth. Dr. Ralston is licensed to practice medicine in Maryland, Pennsylvania and the District of Columbia. He has also been licensed in New Jersey, South Carolina and Massachusetts in the past. Without objection, the Court accepted Dr. Ralston as an expert qualified on obstetrics, gynecology and the provision of abortion care. (Ralston Direct; PX-10 (Ralston CV)).

20. Steven Joffe, M.D., M.P.H. is the Art and Ilene Penn Professor of Medical Ethics & Health Policy and Professor of Pediatrics at the University of Pennsylvania Perelman School of Medicine. In this capacity, he teaches and conducts research into various topics related to medical ethics. He

also serves as Chair of the Department of Medical Ethics and Health Policy and as Chief of its Medical Ethics Division. In this role, he oversees faculty, trainees, and staff and supervises biomedical ethics research initiatives. In addition, he serves as Director of the Penn Postdoctoral training program in the Ethical, Legal, and Social Implications of Genetics and Genomics. Dr. Joffe also trained as a pediatrician and as a pediatric hematologist/oncologist. Until 2019, he practiced at the Children's Hospital of Philadelphia, where he took care of children undergoing bone marrow transplants for cancer and other serious diseases. He has authored and co-authored over 150 peer-reviewed research articles and chapters in medical textbooks, including numerous articles and chapters on issues of medical ethics. In addition, he regularly speaks and presents on bioethical issues that arise in clinical practice to a variety of different audiences at national medical conferences, as well as at medical centers and universities. He has also led and been a member of numerous national and institutional ethics committees, including acting as the Chair of the Bioethics Committee of the Children's Oncology Group, the world's largest pediatric cancer research organization, between 2008 and 2017, and acting as a member of the Pediatric Ethics Subcommittee of the Food and Drug Administration between 2007 and 2022. He has completed four fellowships, including a medical ethics fellowship at Harvard Medical School and a professional ethics faculty fellowship at the Center for Ethics and the Professions at Harvard University. Without objection, the Court accepted Dr. Joffe as an expert qualified in medical ethics. (Joffe Direct; PX-12 (Joffe CV)).

21. Plaintiffs' witnesses testified credibly, cogently, and thoroughly.

Defendants' Witnesses[2]

22. Dennis M. Sullivan, M.D., M.A. is a physician who was licensed to practice medicine from 1978 until 2020. Without objection, the Court accepted Dr. Sullivan as an expert qualified in medical ethics. Dr. Sullivan has no formal training in obstetrics, no training in the clinical practice of abortion, and has never observed an abortion. (Sullivan Cross). He has not cared for the pregnancies of pregnant women in the U.S. (Sullivan Cross). He is not an expert on the safety of abortion as compared to childbirth, nor is he an expert on the topic of mental health outcomes as related to abortion care. (Sullivan Cross). He testified that he could not comment on the clarity of the legal language of S.B. 23 since he is neither a legal scholar nor a physician practicing under the law's limitations. (Sullivan Cross). He has been a member of and held positions in Ohio Right to Life and the Christian Medical and Dental Association, two organizations with defined anti-abortion missions and position statements. Dr. Sullivan opined that S.B. 23 is in accord with the four widely-accepted principles of medical ethics—patient autonomy, beneficence, non-maleficence, and distributive justice—because, in his view, it appropriately subordinates the patient's autonomy to non-maleficence to the fetus, which Dr. Sullivan asserted is due moral regard from conception and throughout pregnancy. Dr. Joffe, who testified in rebuttal, agreed with Dr. Sullivan's identification of the four relevant principles, but strongly disagreed with Dr. Sullivan's near-absolute privileging of non-maleficence as it pertains to the fetus. Dr. Joffe testified that, by according almost absolute weight to non-maleficence towards the fetus no matter the situation, Dr. Sullivan presumes that all patients and physicians share his opinion that the fetus should be accorded moral status throughout pregnancy. (PX-11 ¶ 22 (Joffe Decl.); Joffe Direct).

[2] Defendants originally informed the Court they would call a third witness, Dr. C. Brent Boles. At the October 7, 2022 preliminary injunction hearing, Defendants withdrew Dr. Boles as a witness, as well as his expert report.

But Dr. Sullivan admitted that there is a diversity of views on the issue of a fetus's moral status and extensive disagreement within medical ethics as to whether and when the fetus should be accorded moral status. (Sullivan Cross). Dr. Joffe testified that Dr. Sullivan ignores that debate and instead seeks to impose his own view on all patients regardless of their moral or personal views, whereas the proper medical ethical approach would respect the views and commitments of the patient. (PX-11 ¶¶ 17-22 (Joffe Decl.); Joffe Direct). The Court does not credit the testimony of Dr. Sullivan. Dr. Sullivan was offered as an expert on biomedical ethics, but on questioning by the Court could not provide a cogent explanation of his near complete disregard for the rights of pregnant women in favor of the rights of zygotes, embryos and fetuses, regardless of any of factors such as fetal anomalies that preclude fetal survival. Dr. Sullivan's evasive responses and obvious personal bias further diminish the value of his testimony in the Court's view.

23. Michael S. Parker, M.D., is a board-certified OB/GYN licensed to practice medicine in Ohio. Without objection the Court accepted Dr. Parker as an expert in the practice of obstetric and gynecological medicine. Dr. Parker has not performed or assisted in performing an abortion in the last 29 years. (Parker Cross). He currently serves as a medical advisor and Board Member for the Women's Care Center of Columbus, an anti-abortion Crisis Pregnancy Center located across the street from the largest abortion care provider in the region, and which measures its success by the number of women it discourages from getting abortions. (Parker Cross). Dr. Parker served as the president of the Catholic Medical Association (CMA) and signed off on a brief filed by the CMA with the Supreme Court advocating for the overturn of *Roe v. Wade.* (Parker Cross). He was previously a member of the American College of Obstetricians and Gynecologists ("ACOG") but resigned because of ACOG's position on abortion. (Parker Cross). He is a member of the American Association of Pro-Life Obstetricians and Gynecologists, and testified in support of the

passage of S.B. 23. (Parker Cross). Dr. Parker initially opined that the exceptions in S.B. 23 were easy to apply, but under questioning, he admitted that he himself was confused as to whether many scenarios fell within the scope of the exceptions. (Parker Direct; Parker Cross; Parker Responses to Court Questions). While he expressed the view that abortion was a risky procedure, Dr. Parker acknowledged that he did not review the National Academies of Sciences, Engineering, and Medicine ("National Academies") report on the safety of abortion until after his deposition in this case, and his testimony did not identify any persuasive reason to question the accuracy of the conclusions of the National Academies. (Parker Cross); *see also* PX-19 at 74-76 (National Academies of Sciences, Engineering, and Medicine, *The Safety & Quality of Abortion Care in the United States* (2018))). Dr. Parker also acknowledged that terminating a pregnancy could help relieve medical conditions exacerbated by that pregnancy. (PX-29 129:13-17 (Parker Deposition Tr.); Parker Direct; Parker Cross; Parker Responses to Court Questions). Dr. Ralston testified credibly and persuasively that there is extensive and reliable research on the relative safety of abortion as compared to pregnancy, and that the exceptions under S.B. 23 are extremely unclear and difficult to apply. (Ralston Direct). The Court does not view the testimony of Dr. Parker on safety as sufficient to rebut the testimony of Dr. Ralston and the ample research supporting Dr. Ralston's testimony. The Court further finds that Dr. Parker's testimony regarding application of the exceptions to S.B. 23's limits on abortion provides strong support to Plaintiffs' claims that S.B. 23 effectively bans all or almost all abortions after six weeks LMP.

Abortion Is Safe Healthcare

24. Abortion is a medical procedure and a component of health care. (PX-9 ¶¶ 16-20 (Ralston Decl.); Liner Direct; Ralston Direct).[3] Healthcare encompasses social, emotional, economic, and familial health. (Ralston Direct).

25. Abortion is a safe medical procedure. (PX-1 ¶ 16 (Liner Decl.); PX-9 ¶¶ 24-28, 31 (Ralston Decl.); Liner Direct; Ralston Direct). Approximately one in four women in this country will have an abortion by the age of forty-five. (PX-1 ¶ 16 (Liner Decl.); Compl. ¶ 27).

26. Abortion is substantially safer than continuing a pregnancy through childbirth. (PX-1 ¶ 19 (Liner Decl.); PX-9 ¶¶ 32-40 (Ralston Decl.); Liner Direct; Ralston Direct). The National Academies found that childbirth is approximately thirteen times more likely than abortion to result in death. (Liner Direct; PX-19 at 74-76 (National Academies of Sciences, Engineering, and Medicine, *The Safety & Quality of Abortion Care in the United States* (2018)); *see also* PX-39 at 57 (Caitlin Gerdts, Loren Dobkin, Diana Greene Foster, and Eleanor Bimla Schwarz, *Side Effects, Physical Health Consequences, and Mortality Associated with Abortion and Birth after an Unwanted Pregnancy*, 26 Women's Health Issues 55 (2016))). These findings are supported by Plaintiffs' experts' clinical observations. (Liner Direct; Ralston Direct).

27. Denying women access to abortion care subjects them to potentially significant risks and consequences. (PX-16 ¶ 36 (Affidavit of Dr. Sharon Liner in Support of Plaintiff's Motion for Temporary Restraining Order Followed by Preliminary Injunction) ("Liner Aff."); PX-1 ¶ 22 (Liner Decl.); Liner Direct). For healthy patients, pregnancy can pose dangers to their health. Pregnancy stresses most major organs. (*Id.*). Mid-pregnancy, a woman's body needs to pump 50 percent more blood than usual, resulting in an increased heart rate. (*Id.*). The increased blood

[3] Indeed, the State's expert witnesses acknowledged that health care encompasses many procedures beyond those solely intended to cure disease, such as preventative care, diagnostic care, and mental health care. (Sullivan Cross; PX-30 60:18 (Sullivan Deposition Tr.)).

flow, in turn, enlarges the kidneys, and the liver must produce more clotting factors to prevent hemorrhage when the placenta separates from the uterus. (*Id.*). These changes increase the chances of blood clots or thrombosis. (*Id.*).

28. Pregnancy also affects a woman's lungs: they must work harder to clear not only the carbon dioxide created by her own body, but also the carbon dioxide produced by the fetus. (PX-16 ¶ 23 (Liner Aff.); PX-1 ¶ 23 (Liner Decl.); Liner Direct). As the pregnancy progresses, the lungs are compressed by the growing fetus, leaving most pregnant women feeling chronically short of breath. (*Id.*). Every organ in the abdomen—*e.g.*, intestines, liver, spleen—is increasingly compressed throughout pregnancy by the expanding uterus. (*Id.*).

29. Pregnancy can exacerbate pre-existing conditions such as high blood pressure, hypertension, and diabetes. (PX-16 ¶ 37 (Liner Aff.); PX-1 ¶ 24 (Liner Decl.); Liner Direct). Pregnancy can also introduce new health conditions such as new onset high blood pressure, gestational diabetes, preeclampsia, and eclampsia. (*Id.*).

30. Labor and delivery also carry risks of negative physical health outcomes both during and after childbirth. (PX-1 ¶ 26 (Liner Decl.)). For example, during labor, increased blood flow to the uterus places the patient at risk of hemorrhage and potentially death. (*Id.*). Other potential adverse events include unexpected hysterectomy, ruptured uterus or liver, stroke, respiratory failure, kidney failure, hypoxia (an absence of sufficient oxygen in bodily tissue to sustain function), and amniotic fluid embolism (a condition in which the fluid surrounding a fetus during pregnancy enters the patient's bloodstream). (*Id.*).

31. Many Ohioans deliver via cesarean section ("C-section") rather than vaginally. (Liner Expert Decl. ¶ 27; Liner Direct). A C-section is an open abdominal surgery that requires hospitalization for 3-4 days on average, and carries greater risk of hemorrhage, infection, blood

clots, and injury to internal organs, including major blood vessels, the bowel, ureter, and bladder, as compared to vaginal delivery. (*Id.*). It can also have long-term risks, including an increased risk of placenta accreta in later pregnancies (when the placenta grows into and possibly through the uterine wall causing a need for complicated surgical interventions, massive blood transfusions, hysterectomy, and risk of maternal death), placenta previa in later pregnancies (when the placenta covers the cervix, resulting in vaginal bleeding and requiring bed rest), and bowel or bladder injury in future deliveries. (*Id.*). Individuals with a history of C-sections are also more likely to need C-Sections with subsequent births. (*Id.*).

32. The starkest risk of carrying a pregnancy to term is death. In Ohio, women died from pregnancy related causes at a ratio of 14.7 per 100,000 live births from 2008 through 2016. (Compl. ¶ 38; PX-1 ¶ 28 (Liner Decl.)). In 2018, the maternal mortality rate was 14.1 per 100,000 live births. (*Id.*).

33. The maternal mortality rate in Ohio is significantly higher for Black women. In Ohio, Black women are two-and-a-half times more likely to die from a cause related to pregnancy than white women. (Compl. ¶ 39; PX-1 ¶ 29 (Liner Decl.)).

34. Pregnancy may also induce or exacerbate mental health conditions. Those with histories of mental illness may experience a return of their illness during pregnancy. (PX-1 ¶ 25 (Liner Decl.); PX-37 (M. Antonia Biggs, Ushma D. Upadhyay, and Charles E. McCulloch, *Women's Mental Health and Well-Being 5 Years After Receiving or Being Denied an Abortion: A Cohort Study*, 74 JAMA Psychiatry 169 (Feb. 2017))). These risks can be higher for patients with unintended pregnancies, who may face physical and emotional changes and risks that they did not choose to take on. (*Id.*). Pregnant people with a prior history of mental health conditions also face a heightened risk of postpartum illness, which may go undiagnosed for months or even years. (*Id.*).

35. Women experiencing intimate partner violence also face increased risk of harm from being denied abortion care under S.B. 23. (Liner Direct; *see also* Affidavit of Dr. Adarsh Krishen in Support of Plaintiff's Motion for Temporary Restraining Order Followed by Preliminary Injunction ("Krishen Aff.") ¶ 13; Affidavit of Dr. David Burkons in Support of Plaintiff's Motion for Temporary Restraining Order Followed by Preliminary Injunction ("Burkons Aff.") ¶ 16). These women are more likely to be tied to perpetrators of intimate partner violence when they are denied abortion care. (Liner Direct).

36. Denying women access to abortion services can create or exacerbate a number of economic and social harms. Due to structural barriers that limit access to contraceptives, people with lower incomes experience disproportionately high rates of unintended pregnancy. (PX-1 ¶ 31 (Liner Decl.); Liner Direct). For patients already facing an array of economic hardships, the cost of pregnancy can have especially long-term and severe impacts on their family's financial security. For some patients, the side-effects of pregnancy render them unable to work, or unable to work the same number of hours as they otherwise would. (PX-1 ¶ 31 (Liner Decl.)). For example, some patients have hyperemesis gravidarum causing them to vomit throughout the day. (*Id.*). Others with preeclampsia must severely limit activity for a significant amount of time. (*Id.*).

37. Pregnancy-related health care and childbirth are expensive hospital-based health services, especially for complicated or at-risk pregnancies. (PX-1 ¶ 32 (Liner Decl.)). This financial burden can weigh most heavily on patients without insurance. (*Id.*). Even insured pregnant patients must often still pay for considerable labor and delivery costs out of pocket. (*Id.*).

38. Almost 60% of patients who seek abortion already have at least one child, so many pregnant women and families must consider how another child will impact their ability to care for the children they already have. (Compl. ¶ 29 n.3). Beyond childbirth, raising a child is expensive,

both in terms of direct costs and due to lost wages. On average, women experience a large and persistent decline in earnings following the birth of a child, an economic loss that compounds the additional costs associated with raising a child. (PX-1 ¶ 33 (Liner Decl.)). Women who were denied abortions had higher odds of poverty six months after denial compared to those who received abortions, and their children were more likely to suffer measurable reductions in achievement of child developmental milestones. (PX-33 (Diana G. Foster, M. Antonia Biggs, Lauren Ralph et. al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*)).

39. Pregnancy, childbirth, and additional children can also exacerbate an already difficult situation for those who have suffered trauma, such as sexual assault or domestic violence. (Krishen Aff. ¶¶ 21-22; PX-41 (Advancing New Standards in Reproductive Health, *Introduction to the Turnaway Study* (March 2020))).

S.B. 23 Effectively Bans Virtually All Abortions

40. Before S.B. 23 went into effect, almost 90% of abortions in Ohio took place after six weeks LMP. (Compl. ¶ 55; Liner Direct).

41. Because embryonic cardiac activity can be detected starting at approximately six weeks LMP—and sometimes as early as the fifth week of pregnancy LMP—S.B. 23 effectively bans abortion before many patients are aware that they are pregnant. (PX-1 ¶ 11 (Liner Decl.); Liner Direct). Some people have irregular menstrual cycles for a variety of reasons, including certain medical conditions, contraceptive use, obesity, and age, all of which could result in them taking longer to realize they have missed a period and might be pregnant. (PX-1 ¶ 12 (Liner Decl.)). And even those with highly regular cycles are four weeks LMP by the time of a missed period, and

before that time, most over-the-counter pregnancy tests are not sensitive enough to detect a pregnancy. (*Id.*).

42. For patients who are aware they are pregnant prior to six weeks LMP, there are a number of obstacles that frequently prevent them from receiving abortion care within six weeks LMP. Many patients must secure funds for the abortion and/or travel, obtain leave from work, and arrange for child care and transportation to an abortion provider. (PX-1 ¶ 14 (Liner Decl.); Krishen Aff. ¶ 11). These delays can result in the denial of abortion care under S.B. 23.

43. These difficulties are compounded by Ohio's other abortion regulations, such as Ohio's requirement that patients make an in-person trip to a clinic for mandated counseling and consent procedures at least 24 hours before obtaining an abortion. (PX-16 ¶ 6 (Liner Aff.); PX-1 ¶ 24 (Liner Decl.); Liner Direct). Some patients return for their second appointment after waiting the required 24 hours and discover that embryonic cardiac activity has appeared and they cannot obtain in-state abortion care. (PX-16 ¶ 6 (Liner Aff.); Liner Direct). As an example, in July 2022, 16% of PPSWO's patients who returned for a second visit had to be turned away because cardiac activity had developed in the 24 hours between their first appointment and return visit. (PX-16 ¶ 6 (Liner Aff.); Liner Direct).

44. Since S.B. 23 went into effect, numerous patients have been unable to obtain abortions in Ohio because cardiac activity was detected. In July 2022, 60% of PPSWO's patients were turned away after an initial ultrasound because cardiac activity was detected. (PX-16 ¶ 6 (Liner Aff.); Liner Direct). WMGPC's Dayton clinic performed 77 abortions in July, a 79 percent decrease in the number performed prior to S.B. 23 going into effect. (Affidavit of W.M. Martin Haskell, M.D., in Support of Plaintiffs' Motion for Temporary Restraining Order Followed by Preliminary

Injunction ("Haskell Aff.") ¶ 10; Affidavit of Aeran Trick in Support of Plaintiffs' Motion for Temporary Restraining Order Followed by Preliminary Injunction ("Trick Aff.") ¶ 5).

S.B. 23's Exceptions Provide Insufficient Guidance to Providers

45. S.B. 23 has limited exceptions that allow a physician to perform an abortion after the detection of cardiac activity to (1) to prevent the woman's death, or (2) to prevent a "serious risk of the substantial and irreversible impairment of a major bodily function." *See supra* ¶ 3.

46. These limited exceptions include vague and imprecise language regarding when an abortion may be provided after the detection of cardiac activity. (PX-9 ¶ 44 (Ralston Decl.)). For example, the terms "substantial" and "serious" are not medically defined and leave open to debate exactly how sick a patient must be before the physician can act. (*Id.*; Liner Direct).

47. Plaintiffs' witnesses credibly testified that physicians and abortion care providers cannot clearly understand which conditions are covered by the exceptions or how the exceptions will apply to any particular circumstance. (PX-1 ¶ 39 (Liner Decl.); Liner Direct; Ralston Direct).

48. One of the State's expert witnesses, Dr. Parker, was called by the State in part to opine on the clarity of the law. (Parker Direct). He testified that whether a specified condition like preeclampsia was severe enough to fall into one of the exceptions was a complicated decision that required a team approach, extensive discussion, the consideration of many factors and potentially legal advice. (Parker Cross).

49. Dr. Parker also changed his opinion several times during his testimony regarding whether a "one-percent" chance of death could provide sufficient justification to perform an abortion under S.B. 23. (Parker Cross). Dr. Parker stated that medicine is not "black and white" and that it was difficult to make decisions involving life and death situations. (Parker Cross). He also offered an opinion that a hysterectomy did not constitute an abortion because it was not a "direct act." (PX-

3 ¶ 29 (Parker Decl.); Parker Cross). But this testimony did not accord with the statutory definition of abortion: "the purposeful termination of a human pregnancy by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead fetus or embryo." RC. 2919.11. Ultimately, Dr. Parker acknowledged that there is significant confusion as to how to apply the law, when an abortion is permissible and when it is a felony. (Parker Cross; Parker Responses to Court Questions).

50. Plaintiffs' expert witnesses, Dr. Sharon Liner and Dr. Steven Ralston, testified that the consequences of violating S.B. 23—which includes the loss of a physician's medical license and potential jail time—will deter physicians from performing abortions even in cases where the medical exception may apply, for fear that their medical judgment will be second-guessed by the State. (Liner Direct; Ralston Direct). Indeed, when S.B. 23 was in effect, physicians delayed or denied care to women potentially suffering from ectopic pregnancies (which are specifically excluded by the language of the statute) because of a fear that—if wrong about the diagnosis—they would be punished under S.B. 23. (Affidavit of David Burkons, M.D., in Support of Plaintiffs' Motion for Temporary Restraining Order Followed by Preliminary Injunction ("Burkons Aff.") ¶ 17).

51. Dr. Liner further testified that she was not aware of any medical procedure—including medical procedures which are only available to men—that carry the potential for criminal penalties, as S.B. 23 does. (Liner Responses to Court Questions).

52. Even the State's own witness agreed that no doctor should have to fear going to jail if their medical judgment was questioned. (Parker Cross). Dr. Parker also acknowledged that a doctor could go to jail under S.B. 23 if a prosecutor and jury disagreed with that doctor's judgment, and that the fear of going to jail could make doctors rethink their medical decision. (Parker Cross).

53. Dr. Liner testified that the exceptions to S.B. 23 will actually encourage physicians to delay care until their patients get sicker, in order to avoid potentially being second-guessed on their medical judgment by the State. (Liner Direct).

54. Moreover, S.B. 23's limited exceptions do not cover many significant health issues associated with pregnancy. For example, Dr. Liner testified that one of her clinic's patients was undergoing chemotherapy and was unable to obtain cancer treatment while pregnant. (Liner Direct; PX-16 ¶ 14 (Liner Aff.)). Dr. Liner said that her clinic was unable to provide abortion care to this patient because they could not confirm whether S.B. 23's exceptions applied. (Liner Direct; *see also* Trick Aff. ¶ 6 (describing another patient who was denied cancer treatment until she was able to receive an abortion—which she could not do in Ohio because of S.B. 23)).

55. Dr. Parker, the State's expert witness, testified that although there are conditions that he would consider to be a "substantial and irreversible impairment of a major bodily function," it is not clear whether the State Attorney General, State prosecutors, or Ohio juries would agree with his assessment. (Parker Cross).

56. Finally, S.B. 23's exceptions are insufficient to protect the health and wellbeing of pregnant women. S.B. 23 does not contain exceptions for rape, incest, fetal anomalies (including lethal fetal anomalies), mental health conditions, or the myriad of other complicated reasons that pregnant women seek abortion care. *See supra* ¶ 3.

57. As one example that illustrates the insufficiencies of S.B. 23's exceptions, most fetal anomalies are diagnosed well after six weeks LMP. (Liner Responses to Court Questions). Many patients who receive diagnoses of fetal anomalies choose not to continue their pregnancies. (PX-9 ¶ 51 (Ralston Report)). Under S.B. 23, women faced with a lethal fetal condition will be forced to carry their pregnancies to term, and will suffer the discomfort and risks of complications

associated with pregnancy and childbirth. (*Id.*). Dr. Liner testified about a patient who had a desired pregnancy, but the fetus was diagnosed with severe fetal anomalies that resulted in a lack of lower extremities and the contents of the fetus's abdomen protruding through its abdominal wall. (Liner Direct; PX-16 ¶ 15 (Liner Aff.)). Dr. Liner confirmed this diagnosis, but was unable to perform an abortion because the diagnosis did not fall within the scope of S.B. 23's exceptions. (Liner Direct).

58. S.B. 23's failure to include an exception for fetal anomalies places a great burden on pregnant women, increases the risk to their health, and—if the anomaly will result in the eventual death of the child during or shortly after birth—subjects them to the grief of carrying that pregnancy to term. (Court Note after Liner Testimony).

Travel to Another State Is Not an Option for Many Ohioans and Causes Numerous Hardships

59. Once embryonic cardiac activity has been detected, traveling out of state is the only option to obtain an abortion under SB 23. But facilities in other states are experiencing an influx of patients from Ohio and neighboring states that have enacted abortion bans. (PX-16 ¶ 7 (Liner Aff.); Affidavit of Allegra Pierce in Support of Plaintiff's Motion for Temporary Restraining Order Followed by Preliminary Injunction ("Pierce Aff.") ¶ 6). As a result, Ohioans who are able to travel have struggled to schedule appointments with out-of-state providers. (*Id.*). Many patients have traveled to Michigan and Illinois to obtain care, and encountered wait times of two to four weeks. (PX-16 ¶ 7 (Liner Aff.)). For patients enduring physical side effects of pregnancy, the wait times and forced travel prolong their suffering and make travel more difficult; for one patient, Dr. Liner had to prescribe anti-nausea medication so that the patient would be able to make the drive to an out-of-state location. (Liner Direct). Wait times can sometimes stretch long enough that they push patients outside the window in which they are able to obtain an abortion. (*Id.*).

60. Traveling out of state can be challenging for many patients due to time and expense constraints. Patients often need to take time away from work, arrange for childcare, obtain the necessary funds to pay for transportation and hotel costs, as well as find a support person with availability to travel with them. (Liner Direct; PX-16 ¶ 8 (Liner Aff.)). Making these arrangements can compromise the confidentiality of patients' pregnancies and abortion decisions. (*Id.*). When faced with these barriers, many patients feel that they have no choice but to continue with their pregnancy. (Pierce Aff. ¶ 5).

61. Forcing patients to travel out of state also delays their ability to obtain timely abortion care and subjects them to further risk of complications. (Liner Direct; PX-16 ¶ 8 (Liner Aff.)). Some patients are pushed so late into their pregnancies that they become unable to obtain abortions out of state. Under S.B. 23, they will either be forced to carry unwanted pregnancies to term or resort to trying to terminate their pregnancies outside the medical system. (Liner Direct; PX-16 ¶ 8 (Liner Aff.)).

62. These delays subject patients to greater distress and emotional trauma. (Liner Direct; PX-16 ¶¶ 8-9 (Liner Aff.); Krishen Aff. ¶ 14). This is particularly true for those who are forced to carry a pregnancy with severe fetal anomalies. The patient who received a diagnosis of severe fetal anomalies had to be referred outside of Ohio for care, but was delayed due to the lack of access in many states and the fact that she was in her second trimester. (*See supra* ¶ 57; Liner Direct; PX-16 ¶ 15 (Liner Aff.)).

S.B. 23 Imposed Significant Harm on Providers and Their Patients When It Was in Effect

63. The harms caused by S.B. 23 are not hypothetical. S.B. 23 was in place for over two months and, during that time, pregnant women in Ohio experienced significant physical, economic, emotional, and psychological harms.

64. When S.B. 23 went into effect, providers were forced to turn away patients seeking abortion care. (*See, e.g.*, Liner Direct; PX-16 ¶ 5 (Liner Aff.) (PPSWO has "had to cancel over 600 patient appointments"); Krishen Aff. ¶ 9; Burkons Aff. ¶ 9; Pierce Aff. ¶ 4; Haskell Aff. ¶¶ 8, 10).

65. The harms of being turned away were inflicted on some of Ohio's most vulnerable and innocent citizens. As one example, a ten-year-old rape victim was denied an abortion in Ohio and forced to travel to Indiana to receive an abortion. (*See* Compl. ¶ 57). Plaintiffs' affiants recounted the stories of other minors and victims of sexual assault whom they were forced to turn away. (Trick Aff. ¶¶ 6, 9, 14; Krishen Aff. ¶¶ 16, 21). Dr. Sullivan acknowledged that these patients do not fall within an exception to S.B. 23, and was unable to provide a response when asked whether the autonomy of a rape victim should be given less value than fetal life. (Sullivan Responses to Court Questions).

66. Plaintiffs submitted supporting affidavits detailing the physical consequences of denying patients access to abortion. (Krishen Aff. ¶ 15 ("Patients who had previous high-risk pregnancies, or patients with chronic illness ... cannot physically or emotionally endure another pregnancy or a delay in obtaining abortion care."); Pierce Aff. ¶ 5 ("Many patients, upon learning that they will be denied care because of S.B. 23 fear for their physical and mental health if they remain pregnant.")). This includes patients who were forced to travel out of state despite medical conditions caused by pregnancy. (Krishen Aff. ¶ 23 (patient who had major orthopedic surgery faced worsened chronic physical pain as a result of pregnancy but was forced to endure the physical toll of traveling out of state for care); Trick Aff. ¶ 9 (patient with severe vomiting who had lost more than 20 pounds was forced to seek care out of state, necessitating hours of travel); *id.* at ¶ 13 (woman with severe vomiting was denied an abortion and had to travel out of state despite her

medical condition)). It also includes patients who were unable to obtain cancer treatment until they were able to receive an abortion—which they could not do in Ohio because of S.B. 23. (Trick Aff. ¶ 6; PX-1 ¶ 14 (Liner Decl.)).

67. Denying patients access to abortion also subjected them to significant emotional, mental and psychological harms. (Liner Direct; *see also* PX-37 (M. Antonia Biggs, Ushma D. Upadhyay, and Charles E. McCulloch, *Women's Mental Health and Well-Being 5 Years After Receiving or Being Denied an Abortion: A Cohort Study* (finding that a week after seeking an abortion, women turned away because of gestational age limits are significantly more likely to report symptoms of anxiety than women who receive an abortion, and that anxiety in women who had abortions declined following the abortion but remained in women who were forced to carry to term))).

68. During the time when S.B. 23 was in effect, Plaintiffs witnessed their patients experience serious distress when told they could not access abortion in Ohio. (PX-16 ¶ 5 (Liner Aff.); Krishen Aff. ¶¶ 14, 19; Burkons Aff. ¶ 9). For those who have suffered trauma, such as sexual assault, domestic violence, or difficult prior pregnancies, being denied an abortion increases risk of re-traumatization. (*See* Krishen Aff. ¶ 16; Trick Aff. ¶¶ 12, 14). One patient who was experiencing homelessness and was in between shelters began to experience panic and stress when she was informed she could not obtain an abortion in-state due to S.B. 23 because she did not know how she would travel out of state given the barriers she was experiencing in her life. (Krishen Aff. ¶ 19). Dr. Liner testified that she could hear wailing outside of ultrasound rooms when patients learned that cardiac activity has been detected and they would be unable to obtain an abortion. (Liner Direct; *see also* PX-16 ¶¶ 9-10 (Liner Aff.)). Even the State's expert witness, Dr. Sullivan, recognized that being denied abortion access is agonizing for women. (Sullivan Cross).

69. When denied access to abortion care, Plaintiffs' patients considered resorting to unsafe abortion methods or self-harm. (Liner Direct; PX-16 ¶ 11 (Liner Aff.); Burkons Aff. ¶ 10; *see also* Haskell Aff. ¶ 13 (describing the "devastating infections, complications, sterility, and even death that resulted from illegal abortions and self-induced abortions prior to" *Roe*)). When S.B. 23 was in effect, three of PPSWO's patients threatened to commit suicide when they were told they could not obtain an abortion. (PX-16 ¶ 11 (Liner Aff.)). Another patient said she would attempt to terminate her pregnancy by drinking bleach. (*Id.*). Another asked how much Vitamin C she would need to take to terminate her pregnancy. (*Id.*).

70. Beyond the physical and emotional harms, S.B. 23 inflicted significant economic hardship on Ohioans. (*See supra* ¶¶ 36, 38; *see also* Pierce Aff. ¶ 5 (patients reported that they felt that they have no choice but to go through with their pregnancy, despite fears they may lose their jobs and struggle to support their families or children); Trick Aff. ¶ 8 (patient struggled to find abortion care in a location to which she could afford to travel); *id.* at ¶ 13 (patient who feared that she would lose her job if she took time off was forced to travel to and rent a hotel room in Indianapolis)).

71. All of these harms were felt disproportionately by women of color and women in low-income communities. (PX-1 ¶ 31 (Liner Decl.); Compl. ¶ 65).

CONCLUSIONS OF LAW

72. Plaintiffs are entitled to preliminary injunctive relief enjoining Defendants, their agents, employees, and successors in interest, from enforcing S.B. 23 in its entirety and from taking any later enforcement action premised on a violation of S.B. 23 that occurred while this Court's preliminary injunctive relief was in effect.[4]

[4] The Court also enjoins emergency regulation O.A.C. 3701-47-07 (requiring a second ultrasound immediately before an abortion procedure to determine whether fetal or embryonic cardiac activity is present). This regulation was promulgated by ODH pursuant to R.C. 2919.192, but with the enjoining of S.B. 23, there is no longer statutory authority for it.

Plaintiffs Have Standing to Challenge S.B. 23

73. It is settled law that Plaintiffs have standing to raise claims on behalf of their clients and patients. *See, e.g., Preterm-Cleveland v. Voinovich*, 89 Ohio App. 3d 684, 627 N.E.2d 570 (10th Dist. July 27, 1993); *Planned Parenthood Southwest Ohio Region v. Ohio Dep't of Health*, Hamilton C.P. No. A 2101148 at 5 (Apr. 19, 2021) ("*Planned Parenthood Southwest Ohio I*"); *Planned Parenthood Southwest Ohio Region v. Ohio Dep't of Health*, Hamilton C.P. No. A. 2100870 at 3 (Jan. 31, 2022) ("*Planned Parenthood Southwest Ohio II*").

74. Ohio courts follow their federal counterparts when assessing standing. *See Brinkman v. Miami Univ.*, 12th Dist. Butler No. CA2006-12-313, 2007-Ohio-4372 ¶ 43. And the U.S. Supreme Court has "long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations." *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2118 (2020) (citing nine Supreme Court cases dating back to 1973 in which providers challenged abortion restrictions).

75. Ohio law recognizes that there are circumstances where third-party standing is appropriate. *See Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 49 (citations omitted); *City of E. Liverpool v. Columbiana County Budget Comm'n*, 114 Ohio St.3d 133, 2007-Ohio-3759, 870 N.E.2d 705, ¶ 25; *Cincinnati City Sch. Dist. V. State Bd. of Educ.*, 113 Ohio App.3d 305, 314, 680 N.E.2d 1061 (10th Dist.1996); *Akron Ctr. for Reproductive Health v. N. Coast Christian Community*, 9th Dist. Summit No. 12414, 1986 Ohio App. LEXIS 7534, *7 (July 9, 1986).

76. Third-party standing is appropriate where the asserting party "(i) suffers its own injury in fact, (ii) possesses a sufficiently 'close' relationship with the person who possesses the right,' and (iii) shows some 'hindrance' that stands in the way of the claimant seeking relief." *E. Liverpool*

v. Columbiana Cnty. Budget Comm., 114 Ohio St. 3d 133, 2007-Ohio-3759, 860 N.E.2d 705, ¶ 25, citing *Craig v. Boren*, 429 U.S. 190, 196-197 (1976). Each of those factors is met here.

77. Plaintiffs were injured by S.B. 23, which had a significantly negative impact on their financial stability. (*See* Haskell Aff. ¶¶ 9-12; Krishen Aff. ¶¶ 5-6).

78. Plaintiffs were also threatened with criminal and civil penalties. *See supra* ¶¶ 45-58. This threat is heightened by S.B. 23's unconstitutional vagueness.[5] In particular, S.B. 23 fails to give providers adequate notice of the circumstances under which they can perform abortions after the detection of cardiac activity. (PX-9 ¶ 44 (Ralston Decl.); PX-1 ¶ 39 (Liner Decl.); Liner Direct).

79. *Second*, Plaintiffs are in a "sufficiently 'close' relationship with the person who possesses the right to abortion being infringed by S.B. 23. *E. Liverpool*, 2007-Ohio-3759, ¶ 25; *see also Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (holding that the "closeness of the relationship" between a patient and doctor "is patent," as "[a] woman cannot safely secure an abortion without the aid of a physician.").

80. *Third*, there is "some 'hindrance' that stands in the way of" individual patients seeking relief. Precedent has long held that women seeking abortions face "several obstacles" to asserting their own rights, including that they "may be chilled from such assertion by a desire to protect the very privacy of [their] decision from the publicity of a court suit" and that an individual woman's claims face "imminent mootness," with any ability to obtain an abortion "irrevocably lost" within months, if not weeks or days, of the need arising. *Singleton*, 428 U.S. at 117. All of these hindrances are present here. Plaintiffs' affidavits and testimony recount numerous obstacles that

[5] Plaintiffs have also brought a claim that S.B. 23 is unconstitutionally void for vagueness. Compl. ¶¶ 80-82. Although Plaintiffs did not move for a preliminary injunction on this claim, Defendants proffered expert witnesses that disputed the vagueness of S.B. 23's exceptions, Plaintiffs' expert witnesses responded to those assertions, and the Court heard testimony on the matter at the October 7, 2022 preliminary injunction hearing.

hinder patients from advancing the claims brought by Plaintiffs. (*See, e.g.*, PX-16 ¶ 14 (Liner Aff.); Krishen Aff. ¶¶ 9-13, 16, 19; Burkons Aff. ¶¶ 9, 17; Trick Aff. ¶¶ 6-7, 9, 13, 15; Pierce Aff. ¶¶ 4-5). Moreover, because the "enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights," abortion providers are "the obvious claimant" and "the least awkward challenger" to S.B. 23. *June Medical Servs.*, 140 S. Ct. at 2118-2119.

S.B. 23 Violates Ohioans' Substantive Due Process Rights Under the Ohio Constitution

Likelihood of Success on the Merits

81. Plaintiffs have a substantial likelihood of success on the merits of their claim that S.B. 23 violates Ohioans' substantive due process rights, as protected by Article 1, Sections 1, 16, and 21 of the Ohio Constitution.

The Ohio Constitution Provides Broader Protections for Individual Liberties Than the U.S. Constitution

82. Ohio courts interpret the Ohio Constitution more broadly than its federal counterpart. *See Arnold v. Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993) ("[T]he Ohio Constitution is a document of independent force."); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982) ("[A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution[.]"); *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 21 ("Federal opinions do not control [the Court's] independent analyses in interpreting the Ohio Constitution, even when [it looks] to federal precedent for guidance.").

83. The Ohio Supreme Court has held that the Ohio Constitution is more protective of individual rights than the federal Constitution in various respects. *Humphrey v. Lane*, 89 Ohio St.3d 62, 728 N.E.2d 1039 (2000) (free exercise of religion); *State v. Bode*, 144 Ohio St.3d 155,

2015-Ohio-1519, 41 N.E.3d 1156 (juveniles' right to counsel); *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (government appropriation of private property); *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985 (exclusion of physical evidence obtained due to unmirandized statements); *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175 (warrantless arrests for minor misdemeanors); *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280-82, 649 N.E.2d 182 (1995) (expressions of opinion by the press).

The Ohio Constitution Protects the Substantive Due Process Right to Abortion

84. The Ohio Constitution's substantive due process protections encompass the fundamental right to abortion. Indeed, an Ohio Court of Appeals concluded that:

> In light of the broad scope of "liberty" as used in the Ohio Constitution, it would seem almost axiomatic that the right of a woman to choose whether to bear a child is a liberty within the constitutional protection. This necessarily includes the right of a woman to choose to have an abortion so long as there is no valid and constitutional statute restricting or limiting that right.

Preterm Cleveland v. Voinovich, 89 Ohio App.3d 684, 691-92, 627 N.E.2d 570, 575 (10th Dist.1993).

85. This interpretation of the Ohio Constitution is supported by several distinctive provisions. Article 1, Section 16 of the Ohio Constitution (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 a 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.

(Emphasis added).

86. This provision protects substantive as well as procedural due process rights. *See Stolz v. J.&B Erectors, Inc.*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, at ¶ 13, citing *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶¶ 48-49.

87. Under Ohio's substantive due process jurisprudence, governmental action that limits the exercise of a fundamental constitutional right is subject to the highest level of judicial scrutiny. *See Sorrell v. Thevenir*, 69 Ohio St. 3d 415, 423, 633 N.E.2d 504 (1994).

88. Ohio courts have found that the Ohio Constitution's substantive due process protections extend to "matters involving privacy, procreation, bodily autonomy, and freedom of choice in health care decision making." *Planned Parenthood Southwest I* at 8, citing *Stone v. City of Stow*, 64 Ohio St.3d 156, 160-63, 593 N.E.2d 294 (1992) (referencing a right to privacy protected by the Ohio Constitution); *see also State v. Boeddeker*, 1st Dist. Hamilton No. C-970471, 1998 WL 57234, *2 (Feb. 13, 1998) (substantive due process under the Ohio Constitution includes a right to privacy that, in the context of "sexual and reproductive matters," is "fundamental"); *Planned Parenthood Southwest II* at 6 (recognizing the "breadth of the Ohio Constitution's guarantees of bodily autonomy, privacy, and freedom of choice in health care," including the right to abortion).

89. The Due Course of Law Clause affirmatively guarantees "remedy by due course of law" to "every person, for an injury done him in his land, goods, *person*, or reputation." (Emphasis added.) Ohio Constitution, Article I, Section 16. As one court in this county observed in analyzing this language, "[d]eprivation of reproductive autonomy falls squarely within the meaning of an injury done to one's person under the Ohio Constitution." *Planned Parenthood Southwest Ohio I* at 10, citing *Stone v. City of Stow*, 64 Ohio St. 3d 156, 160-163, 593 N.E.2d 294 (1992); *see also Steele v. Hamilton County Community Mental Health Bd.*, 90 Ohio St.3d 176, 180, 736 N.E.2d 10 (2000) ("personal security, bodily integrity, and autonomy are cherished liberties"); *Preterm-Cleveland v. Voinovich*, 89 Ohio App. 3d 684, 712, 627 N.E.2d 570 (10th Dist. July 27, 1993) (Petree, J. concurring in part and dissenting in part) ("Manifestly, a fundamental right to bodily integrity must be acknowledged as a necessary precondition to the

enjoyment of our express guarantees of freedom in the Ohio Bill of Rights"); *Biddle v. Warren General Hospital*, 86 Ohio St.3d 395, 399-402, 1999-Ohio-115, 715 N.E.2d 518 (1999) (recognizing fundamental privacy interest in physician-patient relationship sufficient to support creation of entirely new species of tort claim for disclosure of confidential medical information).

90. Other distinctive provisions in the Ohio Constitution, when considered together with the Due Course of Law Clause,[6] make clear that the Ohio Constitution's protections extend to the fundamental right to abortion.

91. Article 1, Section 1 of the Ohio Constitution provides that "[a]ll men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." This is a statement of fundamental rights that is given practical effect by other constitutional provisions, including the Due Course of Law Clause. *See, e.g.*, *Steele v. Hamilton Cty. Community Mental Health Bd.*, 90 Ohio St.3d 176, 180-81, 736 N.E.2d 10 (2000). Ohio courts have explained that Article I, Section 1 recognizes inherent and inalienable rights, and therefore provides broader protection for rights than the United States Constitution. *Preterm Cleveland*, 89 Ohio App.3d at 691, 627 N.E.2d 570 ("In that sense, the Ohio Constitution confers greater rights than are conferred by the United States Constitution[.]").[7]

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[6] The provisions of the Ohio Constitution are not considered independently and in a void; Ohio courts are directed to "give a construction to the Constitution as will make it consistent with itself, and will harmonize and give effect to all its various provisions." *See Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶ 59 (citation omitted); *Toledo Edison Co. v. City of Bryan*, 90 Ohio St.3d 288, 292, 2000-Ohio-169, 737 N.E.2d 529 ("Where provisions of the Constitution address the same subject matter, they must be read in pari materia and harmonized if possible."); *see also Steele v. Hamilton Cnty. Cmty. Mental Health Bd.*, 90 Ohio St.3d 176, 181, 736 N.E.2d 10, 15 (2000) (reading Section 1 and Section 16 as providing the basis for the "fundamental right" to refuse medical treatment).

[7] Article I, Section 1 also protects the right to "seek[] and obtain[] happiness and safety." Such a right is squarely at odds with S.B. 23, which prevents patients from exercising autonomy and making decisions about their own healthcare, at great risk to their physical, mental, and emotional wellbeing. *See supra* ¶¶ 27-39; 63-71.

92. Article 1, Section 7 of the Ohio Constitution provides that:

> No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; *nor shall any interference with the rights of conscience be permitted.*

(Emphasis added). This provision provides further support for the finding that the Ohio Constitution protects against governmental interference in private decisions, particularly where there is a wide diversity of views on the issue, as there is with abortion. (Joffe Direct).

93. Sections 1, 7 and 16 must be read in light of Article I, Section 21 of the Ohio Constitution—the Health Care Freedom Amendment ("HCFA")—which has no analogue in the United States Constitution. The HCFA, which was adopted as part of Ohio's Bill of Rights in 2011 by popular referendum, provides in pertinent part:

> (B) No federal, state, or local law or rule shall prohibit the purchase or sale of health care or health insurance.
>
> (C) No federal, state, or local law or rule shall impose a penalty or fine for the sale or purchase of health care or health insurance.

Ohio Constitution, Article I, Section 21; *see also* Ohio Sec'y of State, *State Issue 3: November 8, 2011 Official Results*, https://www.ohiosos.gov/elections/election-resultsand-data/2011-elections-results/state-issue-3-november-8-2011/.

94. In so doing, the HCFA "[p]reserv[es] [Ohioans'] freedom to choose health care and health care coverage." *See id.* Abortion clearly constitutes health care "within the ordinary meaning of that term." TRO Decision at 13; *see also Adams v. DeWine,* __ Ohio St. 3d __, 2022-Ohio-89, ¶ 28 ("'It is emphatically the province and duty of the judicial department to say what the law is.' Our function here is to determine whether the act transcends the limits of legislative power."). Abortion is a medical procedure that is an essential component of health care. (PX-9 ¶¶ 16-20 (Ralston Decl.); Liner Direct; Ralston Direct; *see also supra* ¶¶ 50, 54, 65-66)). Patients may seek

abortion for a wide variety of reasons related to their physical, mental, emotional and economic health. *See supra* ¶¶ 27-39; 63-71.

95. When read together with the provisions discussed above,[8] the HCFA further bolsters the Ohio Constitution's protection of liberty and personal autonomy and reinforces that these protections extend to Ohioans' the right to make decisions about their own bodies—including the fundamental right to make a decision as private and as central to a person's bodily integrity as the decision to have an abortion.

96. That the right to abortion is not specifically named in the Ohio's Constitution is of no import. Article I, Section 20 of the Ohio Constitution confirms that the "enumeration of rights" in Article I "shall not be construed to impair or deny others retained by the people."

S.B. 23 Violates the Fundamental Right to Abortion and Fails Strict Scrutiny

97. S.B. 23 infringes upon the fundamental rights to bodily integrity and abortion by effectively banning abortions beginning at approximately six weeks LMP—a point at which many women do not know they are pregnant and before which the overwhelming majority of pregnant Ohioans are unable to access abortion. *See supra* ¶¶ 40-44.

98. Laws implicating fundamental rights are subject to strict scrutiny and are constitutional only if they are narrowly tailored to serve a compelling state interest. *See State v. Weber*, 163 Ohio St.3d 125, 2020-Ohio-6832, 168 N.E.3d 468, ¶ 17.

99. Strict scrutiny places a "heavy" burden of proof on the state. *Crowe v. Owens Corning Fiberglas*, 8th Dist. Cuyahoga No. 732206, 1998 WL 767622, *4 (Oct. 29, 1998), *aff'd*, 87 Ohio St.3d 204, 718 N.E.2d 923 (Mem) (1999); *see also Beatty v. Akron City Hospital*, 67 Ohio St.2d 483, 492, 424 N.E.2d 586 (1981). The State has not met that burden here.

[8] *See supra* n.6.

100. The text of S.B. 23 asserts an "interest in protecting the health of the woman" and an interest in protecting potential life. *See* 2019 Am.Sub.S.B. No. 23, Section 3(G). Neither purported interest can justify banning abortion as early as six weeks LMP.

S.B. 23 Serves No Compelling Interest

101. S.B. 23 does not protect Ohioans' health. As discussed above, abortion is a common and safe medical procedure. *See supra* ¶¶ 24-26. Legal abortion is one of the safest medical procedures in the United States, and is substantially safer than childbirth. (PX-19 at 55, 60 (National Academies of Sciences, Engineering, and Medicine, *The Safety & Quality of Abortion Care in the United States* (2018)); *see also* PX-9 ¶¶ 24-32 (Ralston Decl.)).

102. In Ohio, legal abortion is safer than childbirth. *See supra* ¶¶ 32-33. In contrast, the denial of abortion care actively harms women's physical health. (PX-41 at 3 (*Introduction to the Turnaway Study*) ("In the short term, women giving birth after being denied an abortion experience more potentially life-threatening complications such as preeclampsia and postpartum hemorrhage. Over five years, women denied abortions who give birth report more chronic pain and rate their overall as health as worse.")); *see also supra* ¶¶ 26-33.

103. Denying abortion care also has adverse effects on patients' mental health. *See supra* ¶ 67. Plaintiffs' patients experienced severe panic and stress upon being denied an abortion, and in some cases threatened to resort to unsafe abortion methods or self-harm. *See supra* ¶¶ 67-69.

104. Statutes that "harm patients' health by reducing access to abortion," as S.B. 23 so, do not further an interest in protecting women's health. *See Planned Parenthood Southwest Ohio I* at 8-9.

105. With respect to the other state interest asserted by S.B. 23 — protecting potential life — the State does not have a compelling interest in protecting potential life as early as six weeks LMP. *See* 2019 Am.Sub.S.B. No. 23, Section 3(G). Indeed, numerous state courts have recognized that the state's interest in protecting fetal life is weaker early in pregnancy. *See Preterm Cleveland*, 89 Ohio App.3d at 692-93, 627 N.E.2d 570 (analyzing legislation regarding abortion under the Ohio Constitution and concluding that any state interest in protecting fetal life is not equally compelling at all points in pregnancy); *see also In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) (recognizing that under the Florida Constitution the state's interest in "the potentiality of life in the fetus" is less compelling early in pregnancy); *Comm. To Defend Reprod. Rts. v. Myers*, 625 P.2d 779, 795 (Cal. 1981) ("[D]uring the first two trimesters of pregnancy, when the fetus is not viable, the state's interest in protecting the fetus is not of compelling character").

106. Moreover, asserting an absolute interest in protecting potential life places no value on the rights of the pregnant person and fails to take into account the wide diversity of views on the issue–an issue for which the principles of medical ethics demand we look to the views of each specific patient to help resolve. (PX-11 (Joffe Decl.); Joffe Direct).

S.B. 23 Is Not Narrowly Tailored

107. S.B. 23 is also not narrowly tailored to address any purported state interest. Narrow tailoring requires that the state adopt "the *least* restrictive means of achieving the [state's] compelling interest." (Emphasis added.) *Bartell v. Lohiser*, 215 F.3d 550, 558 (6th Cir.2000); *see also Crowe*, 8th Dist. Cuyahoga No. 73206, 1998 WL 767622, at *5.

108. S.B. 23, which effectively bans nearly all abortions after six weeks LMP, is not narrowly tailored to advance women's health or to protect fetal life. (Compl. ¶ 55 (before S.B. 23

went into effect, 89 percent of abortions in Ohio took place after six weeks LMP); *see also* PX-16 ¶ 8 (Liner Aff.); Burkons Aff. ¶ 15); *supra* ¶¶ 40-44.

109. Patients have been denied abortion even when doing so could have potentially devastating consequences for their health. *See supra* ¶¶ 27-39; 63-71. S.B. 23's limited exceptions fail to provide clarity as to when abortion may be performed, and are insufficient to protect pregnant patients' lives, health and well-being. (PX-9 ¶¶ 24-32 (Ralston Decl.)).

110. Moreover, there are numerous alternative and less restrictive means to advance the State's interest in promoting women's health and protecting fetal life. (*See* Emily E. Petersen et al., *Vital Signs: Pregnancy-Related Deaths, United States, 2011-2015, and Strategies/or Prevention, 13 States, 2013-2017*, 68 Morbidity & Mortality Weekly Report 423 (May 10, 2019) (finding that up to 60 percent of pregnancy-related deaths could be prevented through strategies including better access to clinical care and early prenatal treatment); Office on Women's Health, U.S. Dept. of Health & Human Servs., *Prenatal Care*, https://www.womenshealth.gov/a-ztopics/prenatal-care (newborns whose mothers had no early prenatal care were five times more likely to die)).

111. For example, as noted by the State's own expert, the State could further any goal of reducing the number of abortions by instead providing comprehensive sex education and increasing access to contraception. (Sullivan Cross).

S.B. 23 Violates Ohio's Equal Protection and Benefit Guarantee

Likelihood of Success on the Merits

112. Plaintiffs have a substantial likelihood of success on the merits of their claim that S.B. 23 violates the Ohio Constitution's guarantee of equal protection.

Ohio's Equal Protection and Benefit Clause Is More Protective of Individual Rights Than Its Federal Counterpart

113. While the Ohio Supreme Court has in the past followed federal decisions in the equal protection area, "there is no mandate to that effect." *Preterm-Cleveland* at 713 (Petree, J. concurring in part and dissenting in part)). And in recent decisions, Ohio Supreme Court justices have indicated that Ohio's Equal Protection and Benefit Clause conveys broader protections than its federal counterpart. *See State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 23; *State v. Noling*, 149 Ohio St.3d 327, 2016-Ohio-8252, 75 N.E.3d 141, ¶ 11; *League of Women Voters of Ohio*, 2022-Ohio-65, ¶ 151 (Brunner, J. concurring).

114. That interpretation is confirmed by the text of the Equal Protection and Benefit Clause, which frames equal protection as an affirmative mandate for the government: "Government is instituted for [the people's] equal protection and benefit[.]" Ohio Constitution, Article 1, Section 2. In contrast, the Fourteenth Amendment of the United States Constitution merely frames the right to equal protection as a check against government action: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Ohio Constitution thus elevates equal protection to one of the "foundational reasons for the existence of state government," whereas the federal Constitution views it only as a limitation on the government, focused (at least textually) on "proscriptions against taking or denying benefits." *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 2022-Ohio-65, 2022 WL 110261, ¶ 151 (Brunner, J., concurring).

S.B. 23 Discriminates Against Women, a Suspect Class

115. Under Ohio law, laws that "infringe[] upon a fundamental constitutional right *or* the rights of a suspect class" are subject to strict scrutiny review. (Emphasis added). *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 64. S.B. 23 discriminates against women

with respect to the protection of a fundamental constitutional right, and is thus subject to strict scrutiny.

116. Ohio courts hold that sex is a suspect class. *See, e.g., Adamsky v. Buckeye Loc. School Dist.*, 73 Ohio St.3d 360, 362, 1995-Ohio-298, 653 N.E.2d 212 ("[A] suspect class . . . has been traditionally defined as one involving race, national origin, religion, or sex.").

117. S.B. 23 expressly targets "pregnant wom[e]n." *See, e.g.*, 2019 Am.Sub.S.B. No. 23, Section 1, amending R.C. 2919.192(A) (requiring "[a] person who intends to perform or induce an abortion on a pregnant woman" to determine "whether there is a detectable fetal heartbeat"); *id.*, Section 3(H) (asserting that "the pregnant woman" has a purported "valid interest in knowing the likelihood of the fetus surviving to full-term birth based upon the presence of cardiac activity").

118. S.B. 23 discriminates against women by restricting their bodily autonomy and health care choices. *See Preterm Cleveland*, 89 Ohio App.3d at 714, 627 N.E.2d 570 (Petree, J., concurring in part and dissenting in part) (observing that abortion law's "special waiting periods, informed consent protections, and counseling mandates will never apply in like measure to a man getting a vasectomy or making other important reproductive decisions affecting society"); *Planned Parenthood Southwest Ohio I* at 8 (concluding that fetal tissue disposal law triggered strict scrutiny because it discriminates against women). As a result of S.B. 23, Plaintiffs have been forced to turn away and cancel the appointments of patients seeking abortion care. (*See* PX-16 ¶¶ 5-6 (Liner Aff.); Burkons Aff. ¶ 12; Trick Aff. ¶¶ 3-5; Pierce Aff. ¶ 3; Krishen Aff. ¶ 7; Haskell Aff. ¶ 10).

119. It would be inconsistent for the Court to find that the Ohio Constitution protects the fundamental right to privacy, procreation, bodily integrity and freedom of choice in health care decision making, but hold that a law that limits only pregnant women in the exercise of such rights by effectively outlawing abortion does not discriminate against them based on the rationale that

there is no one else who seeks or needs abortion services. *See* TRO Decision at 17; *see also Obergefell v. Hodges*, 576 U.S. 644, 671, 135 S.Ct. 2584, 2602, 192 L.Ed.2d 609 (2015) ("It is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a 'right to interracial marriage'; *Turner* did not ask about a 'right of inmates to marry'; and *Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry.' Rather each case asked about the right to marry in its comprehensive sense . . ."). Here, women, and specifically pregnant women, are denied these rights by S.B. 23, which denies them the right to abortion care.

S.B. 23 Fails Under Both Strict Scrutiny and Intermediate Scrutiny

120. For the reasons discussed above, S.B. 23 fails strict scrutiny. The State can identify no compelling interest served by the law, nor demonstrate that the statute is narrowly tailored to further any purported compelling interest. *See supra* ¶¶ 97-111.

121. Even were the Court to apply intermediate scrutiny,[9] S.B. 23 would fail to survive. Intermediate scrutiny requires that "the classification be substantially related to an important governmental objective." *Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, at ¶ 13.

122. S.B. 23 is not "substantially related" to the purported interest of protecting the health of pregnant women. As detailed above, it prevents women from seeking healthcare necessary for their physical, emotional and mental wellbeing, and moreover, relies on a "baggage of sexual stereotypes." *See Cintron v. Nader*, 8th Dist. Cuyahoga No. 39564, 1980 WL 354341,

[9] Courts in Ohio have, at times, applied intermediate scrutiny to discriminatory classifications based on sex, *see State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, ¶ 13 (employing "heightened or intermediate scrutiny" to "a discriminatory classification based on sex"), but doing so runs afoul of settled precedent that strict scrutiny applies to laws that discriminate against suspect classes.

*7 (June 26, 1980) (gender classification was not substantially related to any "important" goals in part because it relied on the "baggage of sexual stereotypes"); *Crawford Cty. Child Support Enforcement Agency v. Sprague*, 3rd Dist. Crawford No. 3-97-13, 1997 WL 746770, *4 (Dec. 5, 1997) (statute that undermined the state's purported interest was not substantially related to that interest).

123. S.B. 23 is also not substantially related to the State's purported interest in protecting potential life. There are obvious non-restrictive alternatives to advance the State's purported interest in protecting potential life at six weeks, and thus the State cannot meet its burden under intermediate scrutiny review. *See supra* ¶¶ 97-111; *see also State v. Wheatley*, 2018-Ohio-464, 94 N.E.3d 578, ¶ 16 (4th Dist.), quoting *Tyler v. Hillsdale Cty. Sheriff's Dept.*, 837 F.3d 678, 685-686 (6th Cir.2016) ("[T]he government bears the burden of justifying the constitutionality of the law under a heightened form of scrutiny.").

S.B. 23 Subjects Both Patients and Providers to Irreparable Harm

124. Plaintiffs have demonstrated that they and their patients will suffer irreparable harm under S.B. 23.

125. A finding that a constitutional right has been threatened or impaired mandates a finding of irreparable injury. *See Magda v. Ohio Elections Comm'n*, 2016-Ohio-5043, 58 N.E.3d 1188, ¶ 38 (10th Dist.); citing *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir.2001); *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976); *see also Ohio Democratic Party v. LaRose*, 2020-Ohio-4664, 159 N.E.3d 852, ¶ 61.

126. Beyond denying patients their fundamental rights, if S.B. 23 is permitted to take effect again, it will have an immediate and irreversible effect on patient health and wellbeing. When S.B. 23 was in effect, patients were turned away, and faced difficulties securing

appointments in other states, due to appointment wait times and barriers to travel. (*See* PX-16 ¶¶ 6-8 (Liner Aff.); Krishen Aff. ¶¶ 7-13; Trick Aff. ¶¶ 3-5, 15; Pierce Aff. ¶¶ 3-6).

127. Patients will experience significant emotional distress as a result of being denied abortion care under S.B. 23, especially those who are particularly vulnerable, including minors, those who are housing insecure, and survivors of incest, sexual assault and emotionally abusive relationships. *See supra* ¶¶ 35, 67-69.

128. Patients will suffer devastating physical consequences as a result of being denied abortion. *See supra* ¶ 66.

129. Patients who cannot afford to travel may be forced to carry their pregnancies to term, with attendant physical, economic, emotional and psychological consequences. (*See* Pierce Aff. ¶¶ 5-6). While S.B. 23 was in effect, patients who were turned away threatened to resort to self-harm and potentially unsafe methods of terminating their pregnancies. (PX-16 ¶ 11 (Liner Aff.); Burkons Aff. ¶ 10). Other patients expressed concerns that they did not have enough time to consider their options, as if they waited, they would no longer be able to obtain an abortion in Ohio. (*See* Pierce Aff. ¶¶ 7-8; Burkons Aff. ¶ 14).

130. Dr. Liner and providers employed or engaged by the other Plaintiffs are threatened with criminal penalties, loss of their medical licenses, civil forfeiture, and civil suits if they provide care in violation of S.B. 23. (*See supra* ¶¶ 4-7; PX-9 ¶¶ 15, 43-45, 49-50 (Ralston Decl.)).

Plaintiffs Satisfy All Other Preliminary Injunction Factors

131. Enjoining S.B. 23 will not cause any harm to third parties, as it will preserve the status quo of legal and safe abortion access that has been in place in Ohio for nearly five decades.

132. The public interest is served by stopping S.B. 23's violation of Ohioans' fundamental rights and the concrete harms of denying women access to abortion.

Bond Requirement Waived

133. The Court has broad discretion to waive the bond requirement of Rule 65(C) of the Federal Rules of Civil Procedure. *See Vanguard Transp. Sys. Inc. v. Edwards Transfer & Storage Co., Gen Commodities Div.*, 109 Ohio App.3d 786, 793, 673 N.E.2d 182 (10th Dist.1996). *See also Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir.1995). Because the relief sought by Plaintiffs will result in no monetary loss to Defendants, the Court shall waive this requirement.

Scope of Injunctive Relief

134. This Order enjoins the enforcement of SB 23 in its entirety except the provisions thereof relating only to adoption and foster care (R.C. 2919.1910 and R.C. 5103.11), section 2919.193 naming the Act, and R.C. 2317.56(C)(2) regarding the internal Ohio Department of Health process for producing informed consent materials for the Department of Health. Otherwise, enforcement of S.B. 23 is enjoined in its entirety during the pendency of this matter, and Defendants are further enjoined from later taking any enforcement action premised on a violation of S.B. 23 that occurred while such relief was in effect. Consistent with the Court's Order enjoining enforcement of SB 23, while this Order is in effect prior law(s) modified by SB 23 shall be effective in their pre-SB 23 form. Other provisions of Ohio law respecting abortion are unaffected by this Order. This Court's Order shall not be construed to affect any other orders respecting abortion in Ohio in effect from any other court of competent jurisdiction.

135. This Order is binding upon the parties to this action, their officers, agents, employees, attorneys and those persons in active concert or participation with them who receive actual notice of the Order whether by personal service or otherwise.

So ordered.

Date: 10/12/22

Judge Christian A. Jenkins