No. 2023-0004

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS, FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO, CASE NO. C-220504

PRETERM-CLEVELAND, et al.,
Plaintiffs-Appellees,

v.

DAVE YOST, ATTORNEY GENERAL OF OHIO, et al.,
Defendants-Appellants.

BRIEF OF AMICUS CURIAE ACADEMY OF MEDICINE OF CLEVELAND & NORTHERN OHIO IN SUPPORT OF APPELLEES 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.

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I. Statement of Interest of Amicus Curiae

The Academy of Medicine of Cleveland & Northern Ohio (AMCNO) is a nonprofit § 501(c)(6) professional medical association serving the northern Ohio medical community. It has been in existence since 1824 and became known as The Academy of Medicine in 1902. Now known as AMCNO, it has a membership of over 6,000 physicians, making it one of the largest regional medical associations in the United States.

AMCNO provides legislative advocacy for its physician members before the Ohio General Assembly, and also advocates on behalf of its members before the state medical board, other state and federal regulatory boards, and Ohio courts. AMCNO sponsors numerous community initiatives and works collaboratively with hospitals, chiefs of staff, and other related organizations on a myriad of different projects of interest and concern to its members. Put simply, AMCNO is the voice of physicians in northern Ohio—and has been so for almost 200 years.

Statutory law enacted by the Ohio General Assembly that *directly* impacts Ohio physicians and their relationship with their patients—affecting both their medical judgment and confidential physician-patient relationship—are of particular interest to Ohio physicians. Thus, it is appropriate that AMCNO weigh in on important legislation and policy matters that directly affect its physician members; and implicates not only their own rights and interests, but also those of their patients as well. The far-reaching impact of Sub. S.B. No. 23—Human Rights and Heartbeat Protection Act (S.B. 23)—invades the physician-patient relationship and imposes civil and criminal penalties on Ohio physicians simply for practicing medicine within the dictates of their medical training and in the best interests of their patients. To be sure, the General Assembly has a legitimate role in regulating the

provision of healthcare and promoting the health and safety of its citizens, but its increasing political interference and misaligned ideological priorities on the pretextual basis of "regulation," infringes the rights of physicians and their patients. AMCNO's physician members are entitled to be free from intrusive government oversight and coercion in the practice of their profession. Ohio legislators are not licensed to act as practicing physicians in their role as legislators. Yet, through S.B. 23, these legislators dictate how physicians practice medicine and dictate the course of treatment. And while ostensibly enacted under the guise of "protecting the health of the woman" (Am.Sub.S.B. 23, Section 3(G)), S.B. 23 does precisely the opposite, ultimately harming patients and the provision of healthcare in Ohio.

For these reasons, AMCNO has a strong interest in the outcome of this matter. It urges, on behalf of its entire membership, that the decision of the First District Court of Appeals be upheld and that the case return to the Hamilton County Court of Common Pleas for permanent-injunction proceedings.

II. Statement of the Case and Facts

Amicus defers to the Statement of Facts set forth in the Merit Brief of Appellees 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.

III. Argument

Counterproposition of Law No. 1:

> Absent statutory authority, there is no exception under R.C. 2505.02 for the State to bypass R.C. 2505.02(B)(4)(b) and fast track appellate review of an order granting a preliminary injunction enjoining a state law.

A. Statutory framework for provisional remedies under R.C. 2505.02

Under Ohio law, an order or judgment is not immediately appealable unless it is a final judgment. R.C. 2505.02, however, defines certain otherwise interlocutory orders as "final," immediately appealable orders. Relevant here, R.C. 2505.02(B)(4) governs when a provisional remedy is final and appealable. A preliminary injunction is a provisional remedy. R.C. 2505.02(A)(3) ("'Provisional remedy' means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, * * * .''); *E. Cleveland Firefighters, IAFF Local 500 v. E. Cleveland*, 8th Dist. Cuyahoga No. 88273, 2007-Ohio-1447, ¶ 2. Therefore, an order granting or denying a preliminary injunction will be a final, appealable order only when:

> (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; and
>
> (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); *AIDS Taskforce of Greater Cleveland v. Ohio Dept. of Health*, 2018-Ohio-2727, 116 N.E.3d 874, ¶ 12 (8th Dist.). The party seeking to appeal must satisfy both subsections. The issue here is the second prong: whether the State would be deprived of a

meaningful or effective remedy if it cannot appeal the trial court's order granting the preliminary injunction enjoining S.B. 23. As discussed below, the First District correctly applied well-established principles of Ohio law when it held the State did not meet its burden under R.C. 2505.02(B)(4)(b).

B. Longstanding *neutral* principles of Ohio appellate law make clear that an order granting a preliminary injunction does not satisfy R.C. 2505.02(B)(4)(b) when a permanent-injunction is sought.

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). A "meaningful or effective remedy" is unavailable if "[t]he proverbial bell cannot be unrung and an appeal after final judgment on the merits will not rectify the damage." *Katherine's Collection, Inc. v. Kleski*, 9th Dist. Summit No. 26477, 2013-Ohio-1530, ¶ 14, quoting *Gibson-Myers & Associates v. Pearce*, 9th Dist. Summit No. 19358, 1999 WL 980562, *2 (Oct. 27, 1999). Thus, to be final under R.C. 2505.02(B)(4)(b), "relief after an appeal from a final judgment would be rendered ineffective or a delay in appealing would render appellate review moot." *Empower Aviation, LLC v. Butler Cty. Bd. of Commrs.*, 185 Ohio App.3d 477, 2009-Ohio-6331, 924 N.E.2d 862, ¶ 21 (1st Dist.); *see also In re Grand Jury Proceeding of John Doe*, 150 Ohio St.3d 398, 2016-Ohio-8001, 82 N.E.3d 1115, ¶ 22 (finding R.C. 2505.02(B)(4)(b), allows for appeals "when the need for immediate review outweighs the substantial interest in avoiding piecemeal litigation").

Applying this standard, many Ohio courts, including the First District here, have correctly held, "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." *Preterm-Cleveland v. Yost*, 1st Dist. Hamilton No. C-220504, 2022-Ohio-4540, ¶ 18, *appeal allowed,* 169 Ohio St.3d 1457, 2023-Ohio-758, 204 N.E.3d 564 (Table). In fact, nearly every appellate district in Ohio agrees with the First District. For instance:

- **Third District Court of Appeals**: *Obringer v. Wheeling & Lake Erie Ry. Co.*, 3d Dist. No. 3–09–08, 2010-Ohio-601, ¶ 18, quoting *Hootman v. Zock,* 11th Dist. No.2007-A-0063, 2007-Ohio-5619, ¶ 15 (finding it "well established that the granting of a temporary or preliminary injunction, in a suit in which the ultimate relief sought is a permanent injunction, is generally not a final appealable order'");

- **Sixth District Court of Appeals**: *Taxiputinbay, LLC v. Put-In-Bay*, 6th Dist. Ottawa No. OT-20-021, 2021-Ohio-191, ¶ 12 (stating that "[i]t is well established that the granting of a temporary or preliminary injunction, in a suit in which the ultimate relief sought is a permanent injunction, is generally not a final appealable order");

- **Seventh District Court of Appeals**: *Jacob v. Youngstown Ohio Hosp. Co. LLC*, 7th Dist. Mahoning No. 11 MA 193, 2012-Ohio-1302, ¶ 24, quoting *Obringer v. Wheeling & Lake Erie Ry. Co.,* 3d Dist. No. 3-09-08, 2010-Ohio-601, ¶ 18 (noting "that courts have found that '[i]t is well established that the granting of a temporary or preliminary injunction, in a suit in which the ultimate relief sought is a permanent injunction, is generally not a final appealable order'");

- **Eighth District Court of Appeals**: *Modesty v. Michael H. Peterson & Assoc.*, 8th Dist. Cuyahoga No. 85653, 2005-Ohio-6022, 2005 WL 3030995, *3 ("Courts have held that a preliminary injunction which acts to maintain the status quo pending a ruling on a permanent injunction is not a final appealable order under R.C. 2505.02.");

- **Ninth District Court of Appeals**: *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.");

- **Tenth District Court of Appeals**: *Columbus v. State*, 10th Dist. Franklin, No. 22AP-676, 2023-Ohio-195, ¶ 12 ("Where the ultimate relief sought is a permanent injunction, courts have held that an appeal at the conclusion of the proceedings will ordinarily provide a meaningful and effective remedy."); and

- **Eleventh District Court of Appeals**: *Clean Energy Future, LLC v. Clean Energy Future-Lordstown, LLC*, 11th Dist. Trumbull No. 2017-T-0110, 2017-Ohio-9350, ¶ 7 ("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."); *Hootman*, 2007-Ohio-5619 at ¶ 15 (same).

The reason for this rule is simple: appealing a preliminary injunction does not eliminate a meaningful remedy. Instead, the ultimate remedy sought—appellate review—remains available to the litigant after a ruling is issued on the permanent injunction.

The trial court's decision to grant the preliminary injunction, and the First District's denial of jurisdiction, illustrates this rule. The State can appeal the decision following a full hearing on the permanent injunction. Waiting to appeal, rather than allowing an appeal of the preliminary injunction, ensures there is a full record to consider. The trial court even noted it decided the preliminary injunction on an incomplete record. *See* 10/12/22 Prelim. Inj. Order at 1, fn. 1 ("The Court's findings at this stage are based on a limited record before the Court."). Waiting to appeal until *all* evidence has been heard and a decision rendered on the permanent injunction, ensures there are not piecemeal appeals that serve only to leave this issue undecided longer. This is the very outcome R.C. 2502.02(B)(4)(b) sought to prevent. Thus, the First District correctly found that, like numerous other Ohio courts, a preliminary injunction is not final and immediately appealable under R.C. 2505.02(B)(4)(b).

In addition, it is well established that "'an order granting a preliminary injunction is generally not a final appealable order where the preliminary injunction acts to maintain the status quo pending a final determination on the merits.'" *Columbus,* 2023-Ohio-195 at ¶ 13 (collecting cases). Ohio courts have defined "status quo" in the context of a preliminary injunction as "'the last, actual, peaceable, uncontested status which preceded the pending controversy.'" *Id.,* quoting *Obringer*, 2010-Ohio-601 at ¶ 18.

Again, the trial court and First District correctly found that before *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 213 L.Ed.2d 545 (2022), women had a constitutionally protected right to an abortion in Ohio under *Roe v. Wade*, 410 U.S. 113, 153-54, 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). This was settled law, and the status quo, in Ohio for more than 50 years. S.B. 23, on the other hand, has been challenged repeatedly since it was enacted in 2019. *See, e.g.*, *Preterm-Cleveland v. Yost*, 394 F.Supp.3d 796 (S.D.Ohio 2019) (challenging S.B. 23 and obtaining an injunction prohibiting the law from taking effect); *State ex rel. Preterm-Cleveland v. Yost*, 167 Ohio St.3d 1510, 2022-Ohio-3174, 194 N.E.3d 375 (filing a writ of mandamus with the Supreme Court of Ohio three days after the *Dobbs* decision seeking a determination that S.B. 23 violates the Ohio Constitution; writ dismissed in September 2022); *Preterm-Cleveland*, 2022-Ohio-4540 at ¶ 6 (noting the Preterm plaintiffs, on September 2, 2022, "filed a complaint in the Hamilton County Court of Common Pleas seeking declaratory relief and a permanent injunction."). Put simply, with the exception of a few days, there has not been a time where S.B. 23 has not faced a challenge. It has never been the status quo in Ohio.

In sum, the First District applied longstanding neutral principles of Ohio appellate law, which make clear that an order continuing the status quo and granting a preliminary injunction when the ultimate relief sought is a permanent injunction, does not satisfy R.C. 2505.02(B)(4)(b). Thus, this Court should affirm the First District's holding that the trial court's order was not final and immediately appealable under R.C. 2505.02(B).

C. No exception exists for the state to bypass the requirements of R.C. 2505.02(B)(4)(b); the legislature knows how to create an exception by statute but did not.

Despite these well-established principles of Ohio law, the State asks this Court to create an exception to R.C. 2505.02(B)(4)(b) by holding *any* provisional remedy that enjoins the State from enforcing a law is a final appealable order. State Merit Br. at 16-19. No such exception exists, and asking this Court to create one contradicts Ohio law.

The "primary goal of statutory construction is to give effect to the legislature's intent, and in determining the legislature's intent," it is necessary to first look to "the plain language of the statute." *Ayers v. Cleveland*, 160 Ohio St.3d 288, 2020-Ohio-1047, 156 N.E.3d 848, ¶ 17, citing *State v. Gordon*, 153 Ohio St.3d 601, 2018-Ohio-1975, ¶ 8. Put simply, if the statute is clear and unambiguous, the court must apply it as written.

R.C. 2505.02(B)(4)(b) is clear and unambiguous—and it does not create an exception for the State to immediately appeal an order preliminarily enjoining state law. While a provisional remedy includes a *preliminary* injunction, it is only a final appealable order when the challenging party shows two things: (1) the action was determined as related to the provisional remedy, and (2) the appealing party was denied "meaningful or effective remedy by an appeal." R.C. 2505.02(B)(4)(b). Nothing in this statutory provision, nor any other, creates an exception for orders enjoining the State from enforcing a statute. *See Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 39-40, 741 N.E.2d 121 (2001), citing *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105, 304 N.E.2d 378 (1973) (finding effect must be given to the statutory language without deleting or inserting words). Thus, because R.C. 2505.02(B)(4)(b) is clear and does not include the sought-after carve-out, it must be applied as written. *Id*.

Not only is this plain language clear, R.C. 2505.02(B)(4)(b) shows the General Assembly knows how to create a carve-out exception for constitutional challenges. To be sure, R.C. 2505.02(B)(6) deems "[a]n order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. No. 281 of the 124th general assembly," a final appealable order. In other words, it carved out constitutional challenges for certain statutes. It did not, however, create a carve-out for orders enjoining *all* state laws, nor did the General Assembly, in enacting S.B. 23, amend R.C. 2505.02(B)(6) to include any challenge to S.B. 23. The fact that it did not, coupled with the clear statutory language is dispositive.

And the State cannot overcome this straightforward application of Ohio law by relying on inapposite, nonbinding, federal authorities to support its contention that "orders enjoining state laws *always* inflict irreparable harm[.]" (Emphasis added.) State Merit Br. at 16. The reason is simple: under federal law, the grant, or denial of an injunction is immediately appealable under 28 U.S.C. 1292(a)(1).[1] Given this, federal courts have not, nor would they have reason to consider, whether granting a preliminary injunction enjoining a state law deprives a state of a "meaningful or effective remedy by an appeal" under Ohio law. Given this, Ohio courts find that federal law is not "binding, analogous, or persuasive [,]"

[1] 28 U.S.C. 1292(a)(1) states:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

because "[i]t does not govern whether this state court has jurisdiction over [an Ohio] appeal." *Dayton Childrens Hosp. v. Garrett Day LLC*, 2018-Ohio-5466, 131 N.E.3d 304, ¶ 8 (2d Dist.), citing *Walters v. Enrichment Ctr. of Wishing Well, Inc.*, 78 Ohio St.3d 118, 123, fn. 2, 676 N.E.2d 890 (1997) (distinguishing between R.C. 2505.02 and the "federal model, as set forth in Sections 1291-1292, Title 28, U.S.Code"); *Celebrezze v. Netzley*, 51 Ohio St.3d 89, 91, 554 N.E.2d 1292 (1990) (declining to rely on federal authority that considered "judicial construction of the federal final order statute"). Thus, as the First District noted, federal cases analyzing preliminary injunctions are neither instructive nor persuasive. *Preterm-Cleveland*, 2022-Ohio-4540 at ¶ 16.

But even if this Court considered these federal authorities—and it should not—they are not dispositive because they are distinguishable, factually and procedurally. First, the federal authorities cited by the State analyze separate procedural postures under federal law. *See, e.g.*, *Abbott v. Perez*, 138 S.Ct. 2305, 201 L.Ed.2d 714 (2018) (Roberts, C.J., in chambers) (finding the "practical effect" rule applied to determine whether an order is effectively an injunction under 18 U.S.C. 1253); *Maryland v. King*, 567 U.S. 1301, 1302, 133 S.Ct. 1, 183 L.Ed.2d 667 (2012) (Roberts, C.J., in chambers) (granting appellants' motion to stay a judgment overturning a criminal conviction and finding its DNA Collection Act violated the Fourth Amendment pending a decision on its petition for a writ of certiorari); *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977) (Roberts, C.J., in chambers) (granting a stay pending appeal of a judgment enjoining enforcement of the California Automobile Franchise Act). None of these federal authorities discuss whether a preliminary injunction is final and immediately appealable.

Second, although these decisions[2] make conclusory statements that a state can suffer "ongoing irreparable harm" when a state law is enjoined, no authority analyzes the assertion any further. And even if they had, these cases do not turn on this point alone. *See, e.g.*, *Abbott*, 138 S.Ct. at 2324 (finding Texas could immediately appeal an order finding its redistricting plan unlawful because the order had the "practical effect" of an injunction under 18 U.S.C. 1253); *King*, 567 U.S. at 1302 (noting "there was also ongoing and concrete harm to Maryland's law enforcement and public safety interests" because the collection of DNA is a valuable law enforcement tool that helps "remove violent offenders from the general population"); *New Motor Vehicle*, 434 U.S. at 1351 (noting the injunction prohibited the state from investigating or examining applications to relocate or establish car dealerships, and it is unclear that this can be undone if the injunction is lifted). In other words, each case considered whether the state suffered another concrete harm that was irreparable.

But none of these cases support a finding that R.C. 2505.02(B)(4)(b) creates an exception for orders enjoining the State from enforcing a statute. Given this, reliance on conclusory statements in cases involving federal court procedure and judicial construction of the federal final-order statute should not be enough for this Court to override well-established principles of statutory construction and carve out an exception to R.C. 2505.02(B) that does not exist and is not supported by Ohio provisional-remedy law.

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[2] All three opinions are by Justices Roberts and Rehnquist "in chambers." "An in-chambers opinion is written by an individual Justice to dispose of an application by a party for interim relief—e.g., for a stay of the judgment of the court below, for vacation of a stay, or for a temporary injunction. *See* Supreme Court of the United States, *In-Chambers*, available at https://www.supremecourt.gov/opinions/in-chambers.aspx#:~:text=An%20in%2Dchambers%20opinion%20is,or%20for%20a%20temporary%20injunction (accessed June 16, 2023).

Equally flawed is the State's contention that a carve-out exists because a court of appeals is required to presume the constitutionality of a law to determine jurisdiction. State Merit Br. at 18 ("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."); *see also id.* at 19 ("[W]hen the State argues (as it has here) that the law *is* constitutional, courts must assume the validity of that argument when assessing their jurisdiction."). Although it is true that "[s]tatutory enactments are presumed constitutional," *N. Olmsted v. N. Olmsted Land Holdings, Ltd.*, 137 Ohio App.3d 1, 7, 738 N.E.2d 1 (8th Dist. 2000) (collecting cases), no Ohio case holds that a court of appeals must continue that presumption to determine appellate jurisdiction under R.C. 2505.02(B).

On the contrary, requiring courts to make this presumption is like telling a court to presume—not just that an appeal *has* merit—but that the trial court's decision was incorrect. The State cites no legal authority that supports creating such a rule.[3] Rather, jurisdiction is a *threshold* question that must be decided *before* determining the merits. *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, 861 N.E.2d 519, ¶ 15. The State's argument is meritless.

[3] Instead, the State cites two cases discussing whether determining standing is a decision on the merits. State Merit Br. at 19, citing *Barrow v. New Miami*, 2016-Ohio-340, 58 N.E.3d 532, ¶ 16 (12th Dist.), and *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 23. And while the State also cites *Premier Health Care Servs., Inc. v. Schneiderman*, this case simply confirms that jurisdiction is a threshold question to be decided before the merits. 2d Dist. No. 18795, 2001 WL 1479241, *2 (Aug. 21, 2001) ("Whether an order from which an appeal has been taken is immediately appealable is a threshold issue that must be determined, conceptually at least, before the determination of the appeal on its merits."). None of these cases hold that a court of appeals must presume a decision against the state finding a statute unconstitutional is incorrect to determine if an order is final under R.C. 2505.02(B).

In sum, Ohio law is clear: under R.C. 2505.02(B) an order granting or denying a preliminary injunction is a final appealable order only if it meets the requirements of R.C. 2505.02(B)(4)(b). Absent statutory authority—and there is none—there is no carve-out or exception for orders that enjoin the State from enforcing a statute that is challenged as unconstitutional. The General Assembly, not this Court, must create such an exception.

Counterproposition of Law No. 2:

> Ohio physicians, who are subject to civil and criminal liability under S.B. 23, are directly affected by its enforcement and thus have standing to challenge its constitutionality.

A. Longstanding *neutral* principles of third-party standing under Ohio law support that physicians have standing to challenge S.B. 23.

It has long been the law in Ohio that a party may assert the claims of another under certain circumstances, including when the plaintiff (1) suffers his or her own injury in fact, giving the plaintiff a "sufficiently concrete interest" in the outcome of the case; (2) has a "close relationship" with the third party; and (3) shows there is "some hindrance" to the third party's ability to assert or protect her own rights. *See Utility Serv. Partners, Inc. v. Pub. Util. Comm. of Ohio*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 49, *quoting E. Liverpool v. Columbiana Cty. Budget Comm.*, 114 Ohio St.3d 133, 2007-Ohio-3759, 870 N.E.2d 705, ¶ 22; *see also Powers v. Ohio*, 499 U.S. 400, 410-11, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

All three requirements are satisfied here.

1. Ohio physicians suffer concrete injury-in-fact because they are one of the targets of S.B. 23.

Under Ohio law, abortion constitutes "the practice of medicine or surgery" for Ohio licensure purposes. R.C. 2919.11. Yet, S.B. 23 targets Ohio physicians—like Plaintiff Sharon Liner, M.D. here—by subjecting them to criminal penalties, civil lawsuits, and disciplinary action for practicing medicine and surgery within the dictates of their medical training and medical judgment to protect the health of safety of their pregnant female patients. These include:

- **R.C. 2919.193.** Performing or inducing an abortion before determining whether there is a detectable fetal heartbeat is a fifth-degree felony. R.C. 2919.193(A). Physicians can also be sued civilly for compensatory and punitive damages (R.C. 2919.193(A)(1)), and be subject to disciplinary action (R.C. 2919.193(A)(2));

- **R.C. 2919.194.** Intending to perform or induce an abortion without written informed consent when there is a detectable fetal heartbeat is a first-degree misdemeanor on first offense and a fourth-degree felony on each subsequent offense (R.C. 2919.194(E));

- **R.C. 2919.195.** Performing or inducing an abortion with the intent of "causing and abetting" the abortion when there is a detectable fetal heartbeat is a fifth-degree felony;

- **R.C. 2919.199.** Physicians violating R.C. 2919.193, 2919.194, or 2919.195 may be sued civilly for wrongful death, and liable for money damages, court costs, and reasonable attorney fees (R.C. 2919.199(A), (B));

- **R.C. 2919.1912.** Physicians violating R.C. 2919.192, 2919.193, 2919.194, 2919.195, or 2919.196 can be sued for forfeiture of up to $20,000 for each separate violation; and

- **R.C. 4731.22.** Physicians violating R.C. 2319.192(A), 2919.193(C), 2919.195(B), or 2919.196(A) are subject to discipline, including loss of their medical licenses (R.C. 4731.22(A)(47)).

Each one of these provisions targets Ohio physicians by subjecting them to criminal, civil, and disciplinary penalties for specific acts the General Assembly has deemed

proscribed conduct, but is, in actuality, the practice of medicine. These penalties are "concrete injuries in fact" because Ohio physicians will suffer actual criminal, civil, and disciplinary injury if, in the practice of their profession, they provide abortion care and treatment. As one of the targeted groups of S.B. 23, they therefore have a "sufficiently concrete interest" in the outcome of this case, and thus satisfy the injury-in-fact requirement for third-party standing.

It makes no difference that no Ohio physician has yet been prosecuted for violating S.B. 23. A *direct threat* of prosecution is sufficient.

> The physician is the one against whom these criminal statutes directly operate in the event [the physician] procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

Doe v. Bolton, 410 U.S. 179, 188, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), *abrogated on other grounds*, *Dobbs*, 142 S.Ct. at 2233.

These are direct, concrete injuries to Ohio physicians. *See Powers*, 499 U.S. at 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (recognizing that the Supreme Court has "permitted litigants to raise third-party rights in order to prevent possible future prosecution," relying on *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201).

Even the State concedes that the Preterm plaintiffs satisfy the injury-in-fact requirement for third-party standing. *See* State Merit Br. at 30.

2. It has long been recognized that the relationship between physician and patient is a close one—in all contexts—because it is a relationship based on trust.

A relationship is a close one "if the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue" such that the litigant "is fully, or very nearly as effective" in challenging the rights as the third party. *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). It includes those who take on an "advocate" role to protect third-party interests. *Eisenstadt v. Baird*, 405 U.S. 438, 445, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

Under this analysis, the professional relationship between a doctor and the doctor's patient has been consistently found to be a close one. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 480, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (finding physician prescribing contraceptives had standing to asserts rights of patients with whom the physician had a "professional relationship," looking to the "intimate relation of husband and wife and their physician's role in one aspect of that relation"); *see also Singleton*, 428 U.S. at 114-15, 96 S.Ct. 2868, 49 L.Ed.2d 826 (finding two physicians challenging the constitutionality of a Missouri statute excluding abortions that were not medically indicated to have a sufficiently close relationship with their patients to have third-party standing); *Doe v. Bolton*, 410 U.S. at 188-89, 93 S.Ct. 739, 35 L.Ed.2d 201 (permitting physicians to assert the rights of their patients), *abrogated on other grounds, Dobbs*, 142 S.Ct. at 2233, 213 L.Ed.2d 545 (recognizing, even if indirectly, that a physician has standing to assert the rights of a third party because the Supreme Court addressed the merits of the case).

This is as it should be. The physician-patient relationship, contrary to the State and its amici, is a professional relationship based on trust. A patient entrusts the physician with

his or her life. This is evidenced by the open dissent letter prepared by Ohio Physicians for Reproductive Rights (OPRR). There, 1,000 Ohio physicians voiced their concern for their patients' "access to life-saving medical care," their loss of "bodily autonomy," and loss of "basic human rights." *See* OPRR Dissent Letter.[4] They made clear that "withholding treatment until a preventable medical emergency occurs is antithetical" to their roles as healthcare workers. Acknowledging that the reasons for needing or seeking an abortion are "nuanced," the physicians nonetheless emphasized that the decision to perform an abortion "should be left solely to a woman and her physician." *Id*. They emphasized that physicians "are guided by evidence-based medicine and are bound by the commitment to do no harm." *Id*. Yet, S.B. 23 allows the government to intrude on the relationship between the physician and patient, and ultimately harms women, especially women of color and impoverished women. *Id*.; *see also* Ferreri, *Doctors on an Abortion Ban: Unnecessary Health Risks, Stress on Safety Nets*, Medicine (May 10, 2022).[5]

a. Even S.B. 23's exceptions support the close relationship between physician and patient.

The close relationship between physician and patient is further evidenced by the impact of the *Dobbs* decision itself and its impact on the practice of medicine. Physicians are hamstringed by laws that seek to proscribe medical care and treatment that are written by legislators with little or no medical training and experience, while women across the country with life-threatening pregnancy-related conditions are desperate for care of their conditions.

[4] Available at https://ohioreprorights.org/dissent-letter (accessed June 16, 2023).

[5] Available at https://today.duke.edu/2022/05/doctors-abortion-ban-unnecessary-health-risks-stress-safety-nets (accessed June 16, 2023).

And while Ohio legislators tout that S.B. 23 contains exceptions to save the life of the pregnant woman, those "exceptions" only underscore the closeness of the relationship between physicians and patients.

R.C. 2919.193(B), for example, permits a physician to perform an abortion "if the physician believes that a medical emergency * * * exists. R.C. 2919.16 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. (Emphasis added.)

R.C. 2919.16(F).

R.C. 2919.195(B) likewise permits a physician to perform an abortion 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."

S.B. 23 defines "serious risk of the substantial and irreversible impairment of a major bodily function" as:

> [A]ny 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, may include, but is not limited to, diabetes and multiple sclerosis, and does not include a condition related to the woman's mental health. (Emphasis added.)

R.C. 2919.16(K).

These "exceptions" underscore the close relationship a physician has with the patient needing abortion care. If the relationship was not a close one, there would be no need to use terms that are dependent on a physician's judgment, however unclear they may be. What *is* clear is that the physician is entrusted with deciding life and death issues facing a pregnant patient. There can be no closer relationship than being entrusted with the life of another. The Ohio Attorney General's "Explainer" about these exceptions only supports this close relationship. *See* Ohio Attorney General, *Explainer Regarding Ohio's Heartbeat Law Exceptions* (July 14, 2022).[6] Although the Explainer notes that the list of conditions in the statute is merely "an illustration," it makes no attempt to explain "so complicates," "substantial and irreversible impairment," or "major bodily function," leaving that judgment instead to the physician.

b. The dilemmas physicians face under laws like S.B. 23 also underscore the closeness of the relationship between physician and patient.

As noted by leading news organizations and medical journals, physicians are faced with competing and often irreconcilable dilemmas. They are now forced to delay an abortion until the woman's condition becomes life-threatening or a fetal heartbeat is no longer detectable. *See, e.g.*, Arey, et al., *A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8*, New Engl. J. Med. 387;5 (Aug. 4, 2022), 389;[7] Ferreri, *Doctors on an Abortion*

[6] Available at https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Heartbeat-Law-Explainer.aspx (accessed June 16, 2023).

[7] Available at https://www.nejm.org/doi/full/10.1056/NEJMp2207423 (accessed June 16, 2023).

Ban: Unnecessary Health Risks, Stress on Safety Nets, Medicine (May 10, 2022).[8] They are faced with life-threatening conditions in their patients yet are bound by new legal restrictions, some that conflict with federal legislation like the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. 1395dd. McDonald, et al., *The Challenge of Emergency Abortion Care Following the* Dobbs *Ruling*, JAMA, Vol. 328, No. 17 (Nov. 1, 2022) ("Offering evidence-based abortion care in anticipation of an emergency prioritizes a patient's safety but risks criminal litigation in states with restrictive abortion laws. On the other hand, waiting to offer an abortion until a related medical emergency occurs increases health risks for the patient and exposes the physician and hospital to civil monetary penalties for violating the federal EMTALA mandate.").[9] For sure, practitioners have warned of the extreme difficulty treating patients "with lethal anomalies," "many of whom will suffer and some of whom could very well die" because of abortion laws like S.B. 23. Hackney, *I'm a High-Risk Obstetrician, and I'm Terrified for My Patients*, The New York Times (July 5, 2022).[10] And they are subject to ridicule and professional censure simply for "delivering comprehensive, safe and evidenced-based health care." Wilkinson, *Dr. Caitlin Bernard Was Meant to Write This With Me Before She Was Attacked for Doing Her Job*, The New York Times (July 15, 2022)

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[8] Available at https://today.duke.edu/2022/05/doctors-abortion-ban-unnecessary-health-risks-stress-safety-nets accessed June 16, 2023).

[9] Available at https://jamanetwork.com/journals/jama/article-abstract/2797866 (accessed June 16, 2023).

[10] Available at https://www.nytimes.com/2022/07/05/opinion/ob-gyn-roe-v-wade-pregnancy.html?action=click&module=RelatedLinks&pgtype=Article (accessed June 16, 2023).

(noting that "patients will suffer" if "providing care results in threats to professional and personal safety").[11]

These are weighty considerations for the physician practicing medicine in Ohio. The contours of "abetting the termination of life" as written in R.C. 2919.195(A), and the parameters of "so complicates" and "substantial" as written in the exceptions, are all terms dependent upon a physician's judgment, which can only be exercised within the parameters of a close relationship with the patient. The dilemmas physicians face under S.B. 23 require a careful balancing of compliance with S.B. 23 and the physician's commitment "to do no harm" when treating patients exhibiting increased maternal risks and poor fetal prognosis. These dilemmas only underscore the close relationship between a physician and patient needing abortion care.

c. The State and amici are mistaken about the patient-physician relationship.

Despite this unparalleled professional relationship, the State and amici claim that there is no close relationship between a physician performing an abortion and the woman needing or seeking an abortion. *See* State Merit Br. at 30; Attorneys General Amicus Br. at 7; Organizations Amicus Br. at 5-7. They rely on dissenting opinions in *June Med. Serv. LLC v. Russo*, 140 S.Ct. 2103, 207 L.Ed.2d 566 (2020), *abrogated on other grounds*, *Dobbs*, 142 S.Ct. 2228, 213 L.Ed2d 545. But those opinions rested on one-sided, out-of-context "evidence" that is not representative of the relationship between a physician and his or her patient. And even though *Dobbs* overruled *June Medical*, it did not do so on standing grounds. The

[11] Available at https://www.nytimes.com/2022/07/15/opinion/doctors-roe-v-wade-ohio-10-year-old-.html (accessed June 16, 2023).

dissenting opinions upon which the State and amici rely provide no support that an Ohio physician challenging S.B. 23 lacks a close relationship with his or her patient that would foreclose third-party standing.

Nor do those dissenting opinions align with what physicians are taught in medical school, in their medical training, or in their medical residencies. A physician must gain the trust of a patient sufficient to allow the physician to diagnose, treat, and care for the patient, surgically or nonsurgically. And the physician can only do so by developing a sufficiently close relationship with his or her patients. Johnson, *The Importance of Physician-Patient Relationships Communication and Trust in Health Care, Duke Center for Personalized Health Care* (May 19, 2019);[12] *see also* Birkhäuer, et al., *Trust in the health care professional and health outcome: A meta-analysis* (Feb. 7, 2017) ("Patients' trust in their health care professional is central to clinical practice * * * 'patients must be able to trust doctors with their lives and health, and that maintaining trust is one core guidance for physicians'").[13]

Yet the State and its amici nonetheless attempt to minimize the relationship between a physician and the physician's patient. They claim it is riddled with conflict, self-interest, and motivated by financial gain merely because S.B. 23 permits a patient to sue a physician for wrongful death and because a physician is ordinarily paid for his or her services. *See* State Merit Br. at 31-32; Attorneys General Amicus Br. at 7; Organizations Amicus Br. at 7. Again relying on dissenting opinions in *June Medical* that were not followed in *Dobbs*,[14] this

[12] Available at https://dukepersonalizedhealth.org/2019/03/the-importance-of-physician-patient-relationship-communicatoin-and-trust-in-health-care/ (accessed June 16, 2023).

[13] Available at https://doi.org/10.1371/journal.pone.0170988 (accessed June 16, 2023).

[14] The Supreme Court in *Dobbs* only briefly mentioned third-party standing, saying merely that the Court's abortion cases have "ignored the Court's third-party standing doctrine,"

argument misses the mark. Physicians are entitled to be paid for their services just as any other professional who provides a professional service—lawyers, accountants, real estate agents, and any other professional who provides a service to another based on their training and experience. *See also* Nassirinia, *Third Party Standing and Abortion Providers: The Hidden Dangers of* June Medical Services, 16 Northwestern J. L. & Social Policy 214, 218-22 (2021) (noting that research has shown that "providers place patient care above their own interests," suggesting that that the true conflict of interest is between the "combined interest of patients and providers against laws that jeopardize care and safety"). Thus, without more, merely because a professional is paid for services does not give rise to a conflict of interest that would question the close relationship between the professional and those receiving services.

Nor does the fact that that S.B. 23 would, by statute (R.C. 2919.199(A)), permit a woman to bring a wrongful-death lawsuit against the physician performing the abortion, as the State contends. *See* Merit Br. at 31-32. But physicians have been sued for wrongful death in other medical contexts without undermining the close relationship between the physician and patient at the time professional medical services were rendered. The State's argument is nothing but fiction.

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footnoting the dissenting opinions of Justices Alito and Gorsuch in *June Medical* that the State cites in its brief. *Dobbs*, 142 S. Ct. at 2275, 213 L.Ed2d 545; *see also id*. at fn. 61; State Merit Br. at 33. While Justice Alito writing for the majority in *Dobbs* criticized the Court's third-party standing jurisprudence, those criticisms went unheeded in *Dobbs* because both he and Justice Gorsuch as the earlier dissenters apparently "ignored" their earlier criticisms and proceeded to hear a challenge to a counterpart Missouri law that was brought by an abortion clinic and a physician. *See id*. at 2234. If "principled application of third-party standing principles" were followed, as the State claims *Dobbs* noted (State Merit Br. at 33), then the *Dobbs* court would have resolved the issue in *Dobbs* on standing and likely dismissed. But, as we know, it did not.

In sum, patients entrust the care of their body to a physician for medical care and treatment. The physician's commitment to "do no harm" is the foundation of that relationship, the foundation of the physician's education and training, and the foundation of the course of treatment ultimately rendered. There is no closer professional relationship than one who entrusts their body to the care of another. Medical schools and the medical community have long recognized the closeness of the relationship between physician and patient, as have courts. This Court should be no different.

3. There is *some* hindrance to patients, which is all the law requires to give physician healthcare providers standing.

The "some hindrance" requirement is satisfied if "there is some genuine obstacle" that prevents the third party from asserting his or her own rights such that the "intimately involved" litigant "becomes by default the right's best available proponent." *Singleton*, 428 U.S. at 116-17, 106, 96 S.Ct. 2868, 49 L.Ed.2d 826. If, as a practical matter, the third-party is unable or unwilling to bring suit on his or her own behalf, whether because of the economic burden or the extinguished necessity, then courts have found the "some hindrance" requirement satisfied. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 414-15, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (finding "some hindrance" satisfied where individual jurors subject to racial exclusion could have brought suit on their own, but as a practical matter they rarely did because the economic burdens of litigation were too great and the incentive to do so extinguished once dismissed; criminal defendant therefore could sue to assert violation of those rights).

The positions of the parties in *Powers* are not much different than those at issue here. Yes, a pregnant woman could sue to challenge S.B. 23, but she is facing what seems at the

time insurmountable obstacles to obtaining a safe and legal abortion. With the increasing number of states burdening a woman's right to choose at earlier stages in a pregnancy, both women who simply choose to have an abortion and those whose physical and mental health is at risk have greater needs than pursuing litigation to vindicate their rights. Time is not on their side. Their continued health and safety is at risk. Pursuing litigation is not foremost in their minds.

Nor is it once the exigency passes. Either the woman's health or safety is permanently imperiled or the incentive to pursue a lost right has passed. This result is even more attenuated in low-income women or those in rural areas. They have little incentive to pursue litigation that no longer can protect them or would create further economic burdens than they already encounter in their daily lives. This is especially true with laws like S.B. 23, which subjects Ohio physicians—not the women receiving an abortion—to criminal prosecution, making the physician the obvious litigant. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Eisenstadt,* 405 U.S. at 446, 92 S.Ct. 1029, 31 L.Ed.2d 349.

Yet the State and its amici overlook these obstacles and claim the law requires the woman to be "unable" or "incapable" of suing to protect their own rights. State Merit Br. at 32-33; Attorneys General Amicus Br. at 7-8; Organizations Amicus Br. at 11-12. But the standard is "some hindrance" not an "insurmountable obstacle." *Powers*, 499 U.S. at 411, 111 S.Ct. 1364, 113 L.Ed.2d 411. While the individual jurors dismissed in *Powers* were certainly capable of bringing suit, as practical matter, they did not. Yet their interests were aligned with the criminal defendant's such that the criminal defendant could sue to protect the right against racial discrimination.

So too here. The interests of Ohio physicians—including Plaintiff Sharon Liner, M.D. here—are aligned with those of their patients. As physicians, they are intimately involved with the treatment options available to their patients and, as shown, are deeply committed to their patient's health, welfare, and safety. And physicians, as recurring players in the care and treatment of pregnant women, have a common interest with their pregnant patients in ensuring that their patients have access to all treatment options available for the medical condition presented. They are in the best position to assert the rights of their patients.

And Ohio physicians are in the best position to assert those rights for another reason as well—the far-reaching impact of S.B. 23 on the provision of healthcare in Ohio. Recent research conducted by the Association of American Medical Colleges (AAMC) shows a decrease in residency applications to healthcare institutions in states with abortion bans in place, suggesting that residency applicants "may be selectively reducing their likelihood of applying to states with more state-imposed restrictions on health care regardless of the number of available residency programs." Orgera, et al., *Training Location Preferences of U.S. Medical School Graduates Post* Dobbs v. Jackson Women's Health Organization *Decision* (Apr. 23, 2023).[15] The largest decrease was seen in emergency medicine and obstetrics/gynecology. *Id*. at 3. This preliminary data suggests that states with abortion bans are likely to have difficulty attracting qualified trainees and physicians in the future. *Id*. at 6.

And to what extent do abortion bans affect medical school training itself? For sure, medical students in states with abortion bans in place will not receive training comparable to those in states where abortion is legal, and thus will not be sufficiently trained when an

[15] Available at https://www.aamc.org/advocacy-policy/aamc-research-and-action-institute/training-location-preferences (accessed June 16, 2023).

Ohio-defined "medical emergency" arises. In the end, there will be dual tracks for medical education, leading to disparate and unequal medical training that, in the long run, will negatively impact the provision of healthcare, not only in Ohio, but across the country. This unequal field of medical training will result in a lack of providers available to provide any type of OB/GYN care for patients in Ohio.

But the greatest impact of the decline in residency applications and insufficient abortion-care training is the impact of trained physicians leaving states with abortion bans in place. Ollstein, *Abortion doctors' post*-Roe *dilemma: Move, stay or straddle state lines?* Politico (June 29, 2022).[16] Ohio physicians are already feeling the impact of the crisis in women's reproductive rights in filling maternal care positions in Ohio hospitals. Candidates are holding off on making a career in maternal-health care fields in Ohio hospitals and positions are going unfilled. This is the ultimate tragedy for healthcare in Ohio. At-risk women will go untreated and maternal deaths will increase, and there will not be enough (or any) physicians to care for them and their families. Ohio physicians recognizing this are in the best position to challenge the impact S.B. 23 and its negative impact on the provision of healthcare in Ohio.

In sum, all three requirements for third-party standing have been established. Even the United States Supreme Court in *Dobbs* recognized, even if indirectly, that a physician challenging a state's abortion law has standing to bring a challenge to a state's abortion law. 142 S.Ct. 2228, 213 L.Ed2d 545 (noting that the respondents were "an abortion clinic * * * and one of its doctors"—both whom challenged a Mississippi law restricting abortions

[16] Available at https://www.politico.com/news/2022/06/29/abortion-doctors-post-roe-dilemma-move-stay-or-straddle-state-lines-00040660 (accessed June 16, 2023).

beyond 15 weeks gestational age). This Court should similarly recognize that the Preterm plaintiffs here—abortion clinics and one of their doctors—can assert a challenge to S.B. 23.

B. Alternatively, longstanding *neutral* principles of traditional standing under Ohio law support that physicians also have direct standing to challenge S.B. 23.

The United States Supreme Court in *Lujan v. Defenders of Wildlife* reiterated that traditional principles of standing require a plaintiff to show three things: First, an "injury in fact"—i.e., "an invasion of a legally protected interest which is (a) concrete and particularized * * * and (b) 'actual or imminent, not "conjectural" or "hypothetical."' Second, there must be a causal connection and the injury complained of—i.e., the injury must be "fairly traceable" to the defendant's conduct. And lastly, the plaintiff must show redressability—i.e., that the injury will be redressed by the relief sought. 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

This Court has followed these principles—and *Lujan* in particular. Restated, traditional standing requires a plaintiff to show "(1) an injury that is (2) fairly traceable to the defendant's unlawful conduct, and (3) likely to be redressed by the requested relief.'" *State ex rel. Food and Water Watch v. State*, 153 Ohio St.3d 1, 2018-Ohio-555, 100 N.E.3d 391, ¶ 19, quoting *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22, citing *Lujan* at 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 35; *accord ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 7. And just as in *Lujan*, this Court likewise requires that the injury be "concrete" and not speculative to establish standing. *State ex rel. Food and Water Watch* at ¶ 20, quoting *Ohio Contractors Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994); *see also ProgressOhio.org* at ¶ 21, quoting *Ohio Trucking Assn. v. Charles*, 134 Ohio St.3d 502, 2012-Ohio-5679, 983 N.E.2d 1262, ¶ 5

(requiring a plaintiff "to show that he or she has suffered or is threatened with direct and concrete injury * * *"). And it further must be demonstrated that the relief sought will redress the injury claimed. *State ex rel. Food and Water Watch* at ¶ 21.

In showing a concrete injury in fact, it is enough to show that the plaintiff is the "object of the action (or forgone action) at issue." *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130, 119 L.Ed.2d 351. Stated differently, the plaintiff must be "among the injured"—actual or imminent—to satisfy the concrete, injury-in-fact requirement. *Id*. at 560, 563, 564; *see also ProgressOhio.org*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 7 ("[S]tanding depends on whether the plaintiffs have alleged such a personal stake in the outcome of the controversy that they are entitled to have a court hear their case."); *N. Canton v. Canton*, 114 Ohio St.3d 253, 2007-Ohio-4005, 871 N.E.2d 586, ¶ 11 ("In order to have standing to be entitled 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."); *accord Preterm-Cleveland, Inc. v. Kasich*, 153 Ohio St.3d 157, 2018-Ohio-441, 102 N.E.3d 461, ¶ 21.

Ohio-licensed physicians—like Plaintiff Sharon Liner, M.D. here—satisfy all three requirements for traditional standing sufficient to challenge S.B. 23. Ohio physicians are one of the targets of S.B. 23 because it subjects them to criminal and civil penalties, and loss of their medical license for violating its various provisions. It goes without saying then that the redressability requirement is satisfied by injunctive relief enjoining enforcement of S.B. 23 because physicians are spared these penalties, their liberty interests are protected, and they can continue to practice medicine according to their medical judgment for the health and safety of their patients without risk of losing their medical licenses.

1. S.B. 23 targets physicians, among others, who will suffer concrete, injury in fact with the Act's enforcement and that injury is "actual or imminent"—not conjectural or hypothetical.

As shown, S.B. 23 targets Ohio physicians, among others, by subjecting them to criminal penalties, civil lawsuits, and disciplinary action for practicing medicine and surgery within the dictates of their medical training and exercise of medical judgment to protect the health of safety of their pregnant female patients. These are "concrete injuries" that are "imminent" because Ohio physicians will suffer actual criminal, civil, and disciplinary injury if, in the practice of medicine, they provide abortion care and treatment. They, therefore, satisfy the concrete-injury requirement for traditional standing because they have a "direct interest" in this legislation and a "personal stake" in the outcome of this case.

Even so, the State sidesteps a traditional standing argument, claiming that the Preterm plaintiffs did not move for an injunction based on their own right to due process, citing the trial court's opinion as support. *See* State Merit Br. at 26 (referencing 10/12/22 Prelim. Inj. Order, ¶ 78, fn. 5). While that may be true at this interrupted stage of the proceedings, it is of no consequence for three reasons. First, both the Verified Complaint and Amended Verified Complaint are replete with allegations of the fundamental rights and liberty interests at stake for all plaintiffs—Plaintiff Sharon Liner, M.D. included—as well as the direct injury Ohio physicians will suffer if they provide abortion care and treatment that does not align with S.B. 23. *See* Compl., ¶¶ 4, 9-14, 41, 43-46, 48, 64, 80-82, 83-86; Am. Compl., ¶¶ 4, 9-14, 41, 43-46, 48, 65, 81-83, 87-90.

Second, the State incompletely references the footnote cited as support. While the trial court said, in a footnote, that the Preterm plaintiffs did not move for preliminary injunction on their claim that S.B. 23 is unconstitutionally void for vagueness, the court

nonetheless noted that both parties presented evidence on this claim, which the trial court heard. *See* 10/12/22 Prelim. Inj. Order, ¶ 78, fn. 5 (noting that the State "proffered expert evidence that disputed the vagueness of S.B. 23's exceptions" and the Preterm plaintiffs' "expert witnesses responded to those assertions, and the Court heard testimony on the matter at the October 7, 2022 preliminary injunction hearing").

And lastly, and perhaps more importantly, the proceedings in the trial court were not finished. Indeed, the trial court specifically noted that its "findings at this stage are based on a limited record before the Court" and that it would give the parties "adequate time to conduct full discover[y]" to prepare for the permanent-injunction hearing. *Id*. at 1, n.1. But the State prematurely filed an appeal and is now in this Court. To say now that it would have been error to enjoin S.B. 23 on a theory the State "was never given a chance to brief" is a veiled attempt to take advantage of an error it invited by seeking to bypass a permanent-injunction hearing with an appeal that has historically not been immediately appealable under Ohio provisional-remedy jurisprudence.

2. This injury is traceable to the State's conduct in enforcing S.B. 23; finding it unenforceable would redress the injury to Ohio physicians.

If the plaintiff is the "object" or the target of the legislation, then "there is ordinarily little question that the action or inaction has caused [the plaintiff] injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62, 112 S.Ct. 2130, 119 L.Ed2d 351; *see also e.g., State v. Grevious*, Slip Opinion No. 2022-Ohio-4361, ¶ 15 (finding criminal defendant "adversely affected" by enforcement of criminal sentencing statute sufficient to establish standing to challenge it).

These last two requirements are satisfied here. The history of litigation in both state and federal courts since the enactment of S.B. 23 shows that the State has vigorously worked to enforce its provisions. The State's attempt to fast track this appeal by bypassing the permanent-injunction proceedings in the trial court is testament to its intent on enforcing S.B. 23 at whatever cost, including infringing the liberty interests and constitutional rights of the targeted Ohio physicians, as well as the constitutional rights, health, safety, and welfare of those patients needing abortion care and treatment. Only by finding S.B. 23 unenforceable would these constitutional rights, and liberty and safety interests be protected.

IV. Conclusion

Both of the State's Propositions of Law should be rejected. Absent statutory authority—and there is none—there is no exception for provisional-remedy orders that enjoin the State from enforcing a statute that is challenged as unconstitutional unless the requirements of R.C. 2505.02 are satisfied. They are not here. The State's attempt to carve out such an exception should be rejected.

Equally wrong is the State's proposition that Ohio physicians lack standing to challenge S.B. 23. Ohio physicians are one of the direct targets of S.B. 23 because their personal and professional lives at stake, as are the lives of the pregnant women they treat. They are the obvious litigants in this challenge and in the best position to advocate for themselves, and for the health and welfare of their patients.

For these reasons, AMCNO urges this Court, on behalf of its entire membership, to affirm the decision of the First District Court of Appeals and return the case to the Hamilton County Court of Common Pleas for permanent-injunction proceedings.

Respectfully submitted,

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