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

BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF SOCIAL WORKERS
INCLUDING ITS OHIO CHAPTER

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INTEREST OF AMICUS CURIAE

The National Association of Social Workers ("NASW"), established in 1955, is the largest association of professional social workers in the world, with approximately 110,000 members and chapters throughout the United States. The Ohio Chapter of NASW has more than 4,700 members. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the profession as a whole, NASW provides continuing education, enforces the NASW Code of Ethics, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession. Consistent with its policy statements on women's issues and on reproductive justice, NASW, including its Ohio Chapter, advocates for access to the full range of reproductive health services, including unrestricted access to abortion, and supports protecting reproductive rights and freedoms. NASW's professional members have significant knowledge and experience with the issues presented in this case. Social workers regularly engage with clients regarding their personal lives and provide counseling on topics such as pregnancy, reproductive health, parenthood, and adoption.

INTRODUCTION

For decades, courts across the nation, including Ohio courts, have recognized reproductive healthcare providers' standing to assert the rights of their patients and challenge government restrictions on individual medical decisions. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2nd 510 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Singleton v. Wulff*, 428 U.S. 106, 118, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1396 (6th Cir. 1987); *Preterm Cleveland v. Voinovich*, 89 Ohio App.3d 684, 705, 627 N.E.2d 570 (Ohio Ct. App. 1993);

Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health, Hamilton C.P. No. A 2101148 at 5 (Apr. 19, 2021); *Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A 2100870 at 3 (Jan. 31, 2022). In doing so, courts have acknowledged the obvious barriers that patients face in filing their own lawsuits challenging restrictive abortion laws—namely, their need for privacy and a swift resolution—while third-party healthcare providers are uniquely positioned to advocate to protect rights on their behalf. *See Singleton,* 428 U.S. at 117-18 ("the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against," a person's decision to have an abortion); *June Med. Servs. LLC v. Russo*, 140 S.Ct. 2103, 2118-19 (2020) (abortion providers had standing to challenge abortion restrictions where "'enforcement of the challenged restriction against the litigant would result indirectly in the violation of *third parties*' rights.'") (emphasis in original), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. __, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022).

Indeed, privacy and mootness concerns remain significant obstacles for individuals in need of abortion care who wish to vindicate their rights. But these difficulties represent only some of the hindrances that prevent patients from filing their own lawsuits. This brief addresses the pervasive, complex, and interlaced obstacles that stand in the way of patients bringing their own lawsuits to challenge government interference in their decision to seek an abortion. Simply put, a decision by this Court to strip providers of their long-recognized standing to challenge restrictive abortion laws will force many patients to make an impossible choice: bring an individual lawsuit and risk harm to their privacy interests, safety, financial stability, and mental and physical health, or forgo the ability to vindicate one's rights through a trusted medical provider.

ARGUMENT

I. Proposition of Law 1: Reproductive Healthcare Providers Have Third-Party Standing to Challenge Abortion Laws Because There Are Multiple, Significant Hindrances that Deter Individual Patients from Filing Suit.

The standing of healthcare providers to assert the rights of their patients is supported by the myriad, real-world, significant obstacles that individual patients must face when attempting to assert their own rights. Under Ohio Supreme Court law, third-party standing is available whenever "a claimant (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." *Util. Serv. Partners, Inc.*, 124 Ohio St.3d 284, 294, 2009-Ohio-6764, 921 N.E.2d 1038 (citations omitted); *see Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). The third prong of this test, "some hindrance," does not require an absolute bar; instead, the Supreme Court has clarified that "some" hindrance will suffice. *See Powers*, 499 U.S. at 411 ("there must exist some hindrance to the third party's ability to protect his or her own interests"). Other courts have held that "this factor presents a relatively low threshold." *See, e.g., Exodus Refugee Immigr., Inc. v. Pence*, 165 F.Supp.3d 718, 732 (S.D. Ind.), *aff'd*, 838 F.3d 902 (7th Cir. 2016); *S. Poverty L. Ctr. v. U.S. Dept. of Homeland Sec.*, No. CV 18-760 (CKK), 2020 WL 3265533 at *14 (D.D.C. June 17, 2020).

Courts have found a hindrance in a wide variety of circumstances. *Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 290 (3d Cir. 2002) (finding a hindrance in a stigma associated with the choice to bring suit); *Riverside v. State*, 2d Dist. Montgomery No. 26024, 2014-Ohio-1974, ¶2, (finding hindrances when there are expenses of litigation and a lack of a direct financial stake in the outcome); *Aid for Women v. Foulston*, 441 F.3d 1101, 1114 (10th Cir. 2006) (discussing minors' hindrances to filing suit); *S. Poverty L. Ctr.*, 2020 WL 3265533 at *14 (finding hindrances when a case will be imminently moot); *see also*

Griswold, 381 U.S. at 481 (finding third-party standing when "[t]he rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them."); *Craig v. Boren*, 429 U.S. 190, 195, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (finding third-party standing when the "rights of third parties [] would be 'diluted or adversely affected' should her constitutional challenge fail and the statutes remain in force.") (internal quotations omitted). In reproductive rights cases, individual patients face more than just "some hindrance" to seeking relief; as discussed below, multiple interrelated obstacles prevent individual patients from seeking to litigate their rights on their own behalf.

A. Privacy Concerns Hinder Patients from Filing Suit to Challenge Ohio's Abortion Laws.

There are several different privacy concerns regarding the data that individuals need to reveal to establish themselves as pregnant or potentially pregnant (i.e., having an injury in fact under abortion laws). Specifically, such data is likely to concern both an individual's health and sex life. Data related to individuals' health and sex lives is sensitive and at the heart of the privacy concerns that courts, federal agencies, and states have recognized, as discussed below. Forcing patients to forgo their privacy in order to assert their rights in court will dissuade people from filing suit. Importantly, permitting such patients to file suit anonymously would not change this outcome.

1. Data Related to Sex and Pregnancy Status Is Sensitive and Subject to Privacy Protections.

The Pew Research Center noted that the majority of adults consider the state of their health and the medications they take to be very sensitive. Pew Research Center, *Americans Consider Certain Kinds of Data to be More Sensitive than Others*, (Nov. 12, 2014), available at https://www.pewresearch.org/internet/2014/11/12/americans-consider-certain-kinds-of-data-to-be-more-sensitive-than-others/ (accessed June 20, 2023). It is well established in American culture

that there is an expectation of privacy in sex. For example, 73 percent of participants reported discomfort with the unauthorized sharing of sexual messages beyond intended recipients. Justin Garcia, *IU study finds despite expectations of privacy, one in four share sexts*, Indiana University Bloomington (Aug. 4, 2016), available at https://archive.news.indiana.edu/releases /iu/2016/08/sexting-research.shtml (accessed June 20, 2023). Not only do people consider this data to be sensitive; courts, federal agencies, and states have recognized that this data should be private.

The U.S. Supreme Court has recognized privacy interests over individuals' sexual lives and pregnancy. In *Lawrence v. Texas*, the Court considered the constitutionality of a law criminalizing the intimate sexual conduct of homosexual couples. 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). The Court found that law to be unconstitutional, as applied to adult males who had engaged in consensual sodomy in the privacy of their home. Specifically, the Court explained: "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." *Id.* at 578. Thus, the Court explicitly recognized that individuals' decisions with respect to sexual conduct were entitled to privacy. That recognition logically extends to protect conditions that result from sex: pregnancy and potential pregnancy.

Similarly, in *Eisenstadt v. Baird*, a professor challenged a Massachusetts law that forbade giving a woman a contraceptive foam, unless the distributor was a doctor administering it to a married person or a registered pharmacist doing the same. 405 U.S. at 441. The Court found the law violated the Equal Protection Clause of the U.S. Constitution. *Id.* In supporting that finding, the Court explained: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so

fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453. The U.S. Supreme Court thus has recognized that individuals have a right to privacy over pregnancy-related decisions.

Like the courts, federal agencies recognize that individuals have privacy interests over their health data, including sexual and reproductive health. For example, the Federal Trade Commission ("FTC") explained that sensitive data includes health data specifically and even issued guidance that "intimate facts about… sexual and reproductive health issues are about as personal as personal information can get." Lesley Fair, *FTC says Premom shared users' highly sensitive reproductive health data: Can it get more personal than that?*, Fed. Trade Comm. (May 17, 2023), available at https://www.ftc.gov/business-guidance/blog/2023/05/ftc-says-premom-shared-users-highly-sensitive-reproductive-health-data-can-it-get-more-personal (accessed June 20, 2023). The FTC advised that consumers should give affirmative express consent before having their sensitive data collected. Fed. Trade Comm., *Protecting Consumer Privacy in an Era of Rapid Change*, p. 59, (Mar. 2012), available at https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf (accessed June 20, 2023). ("Given the general consensus regarding … health information … the Commission agrees that these categories of information are sensitive. Accordingly, before collecting such data, companies should first obtain affirmative express consent from consumers."). That consent must be freely-given and specific. Stip. Order for Permanent Injunction, Civ. Penalty, Judgment, and Other Relief, *United States v. Easy Healthcare Corp.*, No. 1:23-cv-3107 (N.D. Ill. May, 17, 2023), ECF 3-1 at 2. ("Affirmative Express Consent means any freely-given, specific, informed, and unambiguous indication of an individual's wishes demonstrating agreement … Acceptance of a general or broad terms of use or

similar document that contains descriptions of agreement by the individual along with other, unrelated information, does not constitute Affirmative Express Consent.") (internal quotations omitted); Agreement Containing Consent Order, In the Matter of BetterHelp, Inc., FTC Docket No. 2023169 (Nov. 21, 2022); Stip. Order for Permanent Injunction, Civ. Penalty Judgment, and Other Relief, *United States v. GoodRX Holdings, Inc.*, No. 3:23-cv-460 (N.D. Cal. Feb. 2, 2023) ECF 3-1 (similar).

Several states also recognize that individuals have privacy rights over their health and sexual information and are entitled to control their data. Of the states that have passed comprehensive privacy legislation, all recognize that consumers deserve enhanced control over "sensitive" data. Sensitive data includes health information as well as information related to an individual's sex life. *E.g.*, Cal.Civ.Code 1798.140(ae)(2)(B), (C); Colo.Rev.Stat.Ann. 6-1-1303(24)(a); Va.Code.Ann. 59.1-575; Sub. S.B. 6, 2022 Leg. (Conn. 2022) at 1(27); H.B. 1181, 2023 Leg., 113th Sess. (Tenn. 2023) at 47-18-3201(26)(A); S.B. 384, 2023 Leg., 68th Sess. (Mont. 2023) at 2(24)(a); H.B. 4, 2023 Leg., 88th Sess. (Tex. 2023) at 541.001(29).

Many states give consumers the right to opt in to the collection of health and sex data but otherwise protect such information from disclosure. *E.g.*, Colo.Rev.Stat.Ann. 6-1-1303(24)(a); Va.Code.Ann. 59.1-575; Sub. S.B. 6, 2022 Leg., (Conn. 2022) at 1(6); H.B. 1181, 2023 Leg., 113th Sess. (Tenn. 2023) at 47-18-3201(6); S.B. 384, 2023 Leg., 68th Sess. (Mont. 2023) at 2(5); H.B. 4, 2023 Leg., 88th Sess. (Tex. 2023) at 541.001(6). Like the FTC, these state laws set a high standard for this choice. It is valid only if it is freely-given and specific. *See* Colo.Rev.Stat.Ann. 6-1-1303(5); Va.Code.Ann. 59.1-575; Sub. S.B. 6, 2022 Leg. (Conn. 2022) at 1(6); H.B. 1181, 2023 Leg., 113th Sess. (Tenn. 2023) at 47-18-3201(6); S.B. 384, 2023 Leg., 68th Sess. (Mont. 2023) (5); H.B. 4, 2023 Leg., 88th Sess. (Tex. 2023) 541.001(6); *see also* Cal.Civ.Code 1798.121

(limiting use and disclosure to information "necessary" to execute the individual's request). In sum, there is no question that individuals have the right to protect their private sexual and health data from disclosure.

2. Requiring Patients to File Individual Lawsuits Would Force Them to Act Contrary to These Significant Privacy Interests.

A patient who wishes to file a lawsuit to enforce their[1] right to an abortion necessarily must disclose their private health data and sexual information to their own attorney, to a court and to opposing counsel, as well as potential additional parties (e.g., other witnesses). Such information is likely to become the subject of discovery, both to establish standing and to address the merits of the case. The discovery process could force patients to respond to invasive questions about intimate details of their personal lives from parties they have never met and to whom they are adverse. This process may entail responding to personal questions about fertility, pregnancy, and miscarriages, as well as about parental status and sexual partners. Accordingly, a necessary part of the discovery process will require patients to repeatedly surrender their privacy interests.

Limiting the class of plaintiffs with standing to only those patients who relinquish their privacy rights is incongruous with previous U.S. Supreme Court precedent, which has found that privacy interests can support a finding of third-party standing. In *Eisenstadt v. Baird*, the Supreme Court found that a professor had standing to assert the rights of unmarried people seeking contraception. 405 U.S. at 443-44. The Court justified its finding by recognizing that "the relationship between [the appellee] and those whose rights he seeks to assert is … that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so." *Id.* at

[1] While much of the research on abortion care focuses on women, NASW acknowledges that women are not the only individuals who can get pregnant. As such, this brief refers to individuals with the singular pronouns "they," "them," and "their," unless their gender is specified in source material or otherwise essential.

445. In summarizing *Eisenstadt* in another case, the Court explained, "the Court [in *Eisenstadt*] fully recognized his standing to defend the privacy interests of third parties." *Craig*, 429 U.S. at 196. Like the professor advocating for unmarried people in *Eisenstadt*, the appellee reproductive healthcare providers here are advocates of the rights of patients who seek abortions. And, like the unmarried people in *Eisenstadt*, abortion patients have significant privacy interests.

Similarly, in *Griswold*, the executive director of the Planned Parenthood League of Connecticut as well as a doctor challenged the constitutionality of a statute forbidding the use of contraceptives. *Griswold*, 381 U.S. at 481. The Court found the director and doctor had standing, explaining that "[t]he rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them." *Id*. Likewise, abortion patients' rights to control their sensitive health and sexual data will be diluted, unless those rights are considered in a suit brought by healthcare providers or other third parties.

3. Filing Suit Anonymously Will Not Eliminate Privacy-Related Concerns.

Contrary to the State's assertions, filing suit anonymously will not alleviate these privacy concerns. In reality, even when an individual files suit anonymously, it is still possible to discover who they are. For example, a patient could be spotted repeatedly visiting the office of the attorney who is listed as counsel of record, or a patient's family members or roommates could overhear their telephone conversations or intercept their mail. After a suit is filed, a reporter could infer who the plaintiff is from the record, or a party could violate a gag order. These risks are not speculative; indeed, they have occurred often enough to be the subject of litigation. *See e.g.*, *Gedeon v. Frenchko*, No. 4:22CV441, 2022 WL 4356209 at *1 (N.D. Ohio Sept. 19, 2022) (finding Frenchko, a commissioner on the Trumbull County Board of Commissioners, violated a gag order

by repeatedly engaging members of the public on Facebook about, commenting during a radio interview on, and publicly addressing at a board meeting, the allegations against her); *United States v. Hill*, 420 F. App'x 407, 414 (5th Cir. 2011) (affirming conviction of criminal contempt for violating a gag order in which a Dallas public official violated a gag order that was in place with respect to his case by giving a television interview); *Pedini v. Bowles*, 940 F.Supp. 1020, 1025 (N.D. Tex. 1996) (denying petition for habeas relief after witness in a highly-publicized drug case violated a gag order, was interviewed by a television program, and provided a hidden-camera videotape which purportedly showed one of the defendants purchasing cocaine and talking about his drug habits); *see also* Madeleine O'Neill, *Mosby fined $1,500 for 'willful violation' of gag order in Davis case*, Daily Record (Aug. 12, 2022), available at https://bit.ly/43Wf5XK (accessed June 20, 2023) (a government attorney allegedly willfully violated a gag order by commenting on a controversial homicide case on Instagram).

Filing a suit from which individuals can infer a patient's health and sex data will further erode that individual's privacy rights. Several states provide that individuals do not have rights over information that was made "publicly available." *E.g.*, Cal.Civ.Code 1798.140(v)(1); Colo.Rev.Stat.Ann. 6-1-1303(17)(b); Va.Code.Ann. 59.1-575; Sub. S.B. 6, 2022 Leg., (Conn. 2022) at 1(18); H.B. 1181, 2023 Leg., 113th Sess. (Tenn. 2023) at 47-18-3201(17)(B); S.B. 384, 2023 Leg., 68th Sess. (Mont. 2023) at 15(b); H.B. 4, 2023 Leg., 88th Sess. (Tex. 2023) at 541.001(19). This includes information that is in government records or that a business has reason to believe was made available through "widely distributed media." Cal,Civ.Code 1798.140(v)(2); Colo.Rev.Stat.Ann. 6-1-1303(17)(b); Va.Code.Ann. 59.1-575; Sub. S.B. 6, 2022 Leg., (Conn. 2022) at 1(25); H.B. 1181, 2023 Leg., 113th Sess. (Tenn. 2023) at 47-18-3201(24); S.B. 384, 2023 Leg., 68th Sess. (Mont. 2023) at 22; H.B. 4, 2023 Leg., 88th Sess. (Tex. 2023) at 541.001(27).

Accordingly, a patient that becomes a plaintiff might not be able to maintain their statutory rights over their health and sex data, precisely because they became a plaintiff.

B. Safety Concerns Hinder Patients from Pursuing Litigation.

Abortion patients also face threats to their safety from anti-abortion activists and, in some cases, from their own intimate partners and families. Bringing suit increases these safety risks by making plaintiffs' personal experiences a matter of public record, which in turn may make them a target for anti-abortion violence. This is particularly true as abortion is a contentious topic that garners significant public attention. *See* Deidre McPhillips, *Abortion is a key motivator for US voters in midterm elections, new survey finds*, CNN, (Oct. 12, 2022), available at https://www.cnn.com/2022/10/12/health/abortion-rights-motivate-voters-kff/index.html (accessed June 20, 2023). Stated otherwise, to the extent that pursuing litigation sacrifices privacy, it also puts some plaintiffs in a position of increased risk of violence and harm at the hands of anti-abortion extremists, abusive intimate partners, and family members who do not want them to seek abortions.

1. Abortion Patients Face Threats to Their Safety from Anti-Abortion Extremists.

Being a plaintiff in litigation seeking the right to an abortion may turn abortion patients into prominent targets for anti-abortion violence. Violence against abortion patients and abortion providers at the hands of anti-abortion extremists dates back to the 1970s, after the U.S. Supreme Court's decision in *Roe v. Wade*, and continues to this day, notwithstanding the passage of laws meant to curtail such violence.

The National Abortion Federation reported that since 1977, they have recorded "11 murders, 42 bombings, 200 arsons, 531 assaults, 492 clinic invasions, 375 burglaries, and thousands of other incidents of criminal activities directed at patients, providers, and volunteers."

National Abortion Federation, *2022 Violence & Disruption Statistics* (2022), available at https://prochoice.org/wp-content/uploads/2022-VD-Report-FINAL.pdf at 2 (accessed June 20, 2023). In 1993, for example, abortion provider Dr. David Gunn was killed by an anti-abortion protestor outside his clinic. Liam Stack, *A Brief History of Deadly Attacks on Abortion Providers*, The New York Times (Nov. 29, 2015), available at https://www.nytimes.com/interactive/2015/11/29/us/30abortion-clinic-violence.html (accessed June 20, 2023).

In 1994, in response to increased violence against providers and patients of reproductive health services, Congress passed the Freedom of Access to Clinic Entrances (FACE) Act, prohibiting "violent, threatening, damaging and obstructive conduct intended to injure, intimidate, or interfere with the right to seek, obtain or provide reproductive health services." U.S. Dept. of Justice, *Protecting Patients and Health Care Providers,* available at https://www.justice.gov/crt/protecting-patients-and-health-care-providers (accessed June 20, 2023). The FACE Act allows the federal government to bring criminal charges for violations, and penalties range from a monetary fine to imprisonment for any term of years or for life, depending on the severity and result of the offense. 18 U.S.C. 248(b).

Nevertheless, despite the passage of the FACE Act in May of 1994, at least 10 people have been killed in attacks by violent opponents of abortion in the United States since then. In July 1994, an anti-abortion extremist killed abortion provider Dr. John Bayard Britton, killed clinic volunteer James H. Barrett, and non-fatally wounded his wife June. Stack, *A Brief History of Deadly Attacks on Abortion Providers*, *supra*. After surviving being shot by an anti-abortion activist in 1993, abortion provider Dr. George Tiller was fatally shot by another such extremist in 2009. *Id*. Shannon Lowney and Leanne Nichols, receptionists at two different Boston Planned

Parenthood clinics, were shot and killed by the same anti-abortion extremist in December 1994. *Id*. Five other people were injured in the attacks. *Id*. Anti-abortion violence is not limited to attacks at clinics. In December 1998, Dr. Barnett Slepian, an abortion provider in the Buffalo, New York area, was shot and killed through the kitchen window of his home. *Id*.

A 2019 survey of people who shared their abortion stories in a public setting found that 60 percent of respondents experienced harassment or other negative incidents as a result. Steph Herold, *Abortion storytellers and the harassment they face*, The Hill (Feb. 18, 2020), available at https://thehill.com/opinion/judiciary/483433-abortion-storytellers-and-the-harassment-they-face/ (accessed June 20, 2023); Katie Woodruff et al., *Experiences of harassment and empowerment after sharing personal abortion stories publicly*, Contraception (Feb. 14, 2020). Following the U.S. Supreme Court's June 2022 decision in *Dobbs*, which overturned the 1973 decision in *Roe v. Wade* recognizing federal constitutional right to an abortion, anti-abortion extremists have become emboldened, and risks to the safety of abortion providers and patients have only increased. For example, according to the National Abortion Federation's 2022 Violence and Disruption Statistics report, there was a 229 percent increase of incidents of stalking of abortion providers and patients between 2021 and 2022. National Abortion Federation, *2022 Violence & Disruption Statistics*, (2022), available at https://prochoice.org/wp-content/uploads/2022-VD-Report-FINAL.pdf at 7 (accessed June 20, 2023).

2. Abortion Patients Face Threats to Their Safety from Intimate Partners and Family Members.

While privacy concerns are undeniable for all patients, they come with additional consequences for those in abusive relationships. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 US 833, 888-92 (1992) (listing findings of fact and multiple studies regarding the nature and prevalence of domestic abuse in context of abortion notification law), *rev'd on other*

grounds by Dobbs, 142 S.Ct. 2228. It is well-established that stalking is a form of domestic violence. *See,* National Network to End Domestic Violence, *Connecting the Dots: Stalking and Domestic Violence* (Feb. 7, 2020), available at https://nnedv.org/latest_update/connecting-dots-stalking-domestic-violence/ (accessed June 20, 2023) ("Stalking often encompasses unwanted, repeated behaviors that are intended to surveil, monitor, threaten, and ultimately scare someone…"); The Friendship Center, *Domestic Violence & Stalking*, available at https://www.thefriendshipcenter.org/domestic-violence-stalking (accessed June 20, 2023) ("Although it is not always easy to immediately recognize an abusive relationship, knowing some of the signs of domestic violence can help save a life… controlling and/or monitoring the victim's behavior, controlling with whom the victim talks…"); The American College of Obstetricians and Gynecologists, *Intimate Partner Violence* (Reaffirmed 2022), available at https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2012/02/intimate-partner-violence (accessed June 20, 2023) ("Intimate partner violence (IPV) is a pattern of assaultive behavior and coercive behavior that may include physical injury, psychologic abuse, sexual assault, progressive isolation, stalking, deprivation, intimidation, and reproductive coercion…). An abuser who, in an effort to monitor and control their partner, reads the patient's mail or eavesdrops on their conversations, or otherwise discovers what the patient is doing, may respond with further abuse. Lisa Fontes, *The Mind Control Tactics of Domestic Abusers*, Psychology Today (May 27, 2021), available at https://www.psychologytoday.com/us/blog/invisible-chains/202105/the-mind-control-tactics-domestic-abusers (accessed June 20, 2023) ("In workshops and support groups, abuse survivors have named the following tactics: Enforcing rules with punishments for 'disobedience'").

Disclosing one's pregnancy status has resulted in significant, physical consequences for many persons, including clients of NASW members; specifically clients who are in abusive relationships or abusive family environments. It is not uncommon for individuals in abusive relationships to become patients seeking abortion. Between 6 and 22 percent of people having abortions report violence from an intimate partner. Sarah CM Roberts et al., *Risk of violence from the man involved in the pregnancy after receiving or being denied an abortion*, BMC Medicine (Sep. 29, 2014) 1. Abusive intimate partners are known to sabotage family planning and contraception efforts and to express "the desire to impregnate their partners without concern for the partner's desire for pregnancy." Gretchen Ely & Nadine Murshid, *The Association Between Intimate Partner Violence and Distance Traveled to Access Abortion in a Nationally Representative Sample of Abortion Patients*, Journal of Interpersonal Violence (Oct. 12, 2017) NP664. At least one study has found that "[t]erminating an unwanted pregnancy may allow women to avoid physical violence from the MIP [man involved in the pregnancy], while having a baby from an unwanted pregnancy appears to result in sustained physical violence over time." Jill Filipovic, *Abortion Access May Enable Women to Leave Their Abusive Partners*, Cosmopolitan (Sep. 30, 2014), available at https://www.cosmopolitan.com/politics/news/a31625/abortion-access-women-abusive-partners/ (accessed June 20, 2023). In one study, eight percent of women reported abusive partners as a reason for seeking an abortion. Ely & Murshid, *The Association Between Intimate Partner Violence and Distance Traveled to Access Abortion in a Nationally Representative Sample of Abortion Patients* at NP666.

People in abusive relationships may pursue abortion services without their partner's knowledge, seeking to disentangle themselves from the relationship or prevent becoming further enmeshed with the abusive partner through a child. If an abusive partner were to find out about an

abortion they did not support, the partner may threaten the patient with violence or even death. One recent example of this tragic reality is the murder of twenty-six year-old Texas resident and mother of three, Gabriella Gonzalez. Mary Tuma, *What the Brutal Death of Gabriella Gonzalez Tells Us About Domestic Violence Post-Roe*, The Nation (May 26, 2023), available at https://www.thenation.com/article/society/texas-abortion-gun-laws-killing/ (accessed June 20, 2023). After returning home from seeking an abortion in Colorado, Gonzalez was killed by her ex-boyfriend who allegedly had a history of abuse towards her and did not approve of her abortion. *Id*. This is a cautionary tale: filing suit to enforce one's right to an abortion can only add to the risk of antagonizing an abusive partner, further risking the patient's safety.

Limiting standing to individual patients could have similarly disastrous consequences for minors. Research shows that minors who choose not to disclose their pregnancy often base the decision on fear of physical consequences. One study showed that of teens who did not tell a parent about their abortion decision, 30 percent feared that, if they told their parents, violence would occur between them or their parents would bar them from their home. Stanley K. Henshaw & Kathryn Kost, *Parental involvement in Minors' Abortion Decisions*, 24 Family Planning Perspectives 196, 196 (1992). Consistent with these findings, at least one federal court of appeals has found that a minor's "fear of reprisal from parents should information about their sexual activity be disclosed" is a hindrance that supports standing for third-party medical providers. *Aid for Women*, 441 F.3d at 1114. Limiting the class of potential plaintiffs to patients would leave such vulnerable minors to risk their own safety in order to challenge abortion laws.[2]

[2] The State, in support of its argument that patients do not face hindrances filing suit, notes that "for decades, juveniles have pseudonymously sought court orders allowing them to obtain abortions." Merits Brief of Appellants at 32 (May 1, 2023). The judicial bypass cases the State cites, however, involve minors seeking abortions without parental involvement *within the confines of state abortion law*. These are often informal, ex-parte proceedings,

In sum, filing suit increases the likelihood that an abortion patient's abusive partner, family, or the general public would find out about their personal sexual and health information, including their pursuit of an abortion, which in turn could put the patient at an increased risk of violence and even death at the hands of an abusive partner, family member, or violent anti-abortion activists. As discussed in Section I.A.3, above, filing under a pseudonym does not mitigate this risk. Such an increased threat to a patient's safety is an obvious hindrance to the pursuit of litigation.

C. Litigation Generally Lasts Longer Than Pregnancy, Rendering Individual Claims Imminently Moot and Giving Individual Claimants Little Incentive to Litigate.

The relatively short duration of pregnancy represents yet another hindrance for patients bringing individual lawsuits. Courts have recognized a practical disincentive to pursue abortion litigation once pregnancy is over and a plaintiff no longer has a personal stake in the outcome. *Singleton*, 428 U.S. at 177; *see also Riverside*, 2014-Ohio-1974, at ¶¶ 11, 24-25 (recognizing plaintiffs who alleged "lack of incentive due to the high cost of litigation and the lack of a direct financial stake on the part of each individual plaintiff" faced hindrances in filing suit); *S. Poverty L. Ctr.*, 2020 WL 3265533 at *14 (finding hindrances when a case will be imminently moot). Because pregnancy usually lasts no longer than nine months, an individual's pregnancy will generally be over—and with it the live controversy that gives a patient standing—long before the resolution of any lawsuit they bring to challenge a restriction on their pregnancy. Consequently, even if a patient succeeds in their lawsuit, they may not be able to exercise their right to terminate their pregnancy—the very reason they came to court in the first place.

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which are distinguishable. The present case, in contrast, involves a challenge to a state abortion law—hardly the same type of proceeding.

This Court need look no further than the present case for proof that timing is a barrier. By the time the Court considers the parties' briefs on the ripeness and standing issues, more than nine months will have passed since the plaintiff-appellees' initial filing in the court of common pleas. *See* Pls.' Mot. for TRO Followed by Prelim. Inj.; Req. for Hr'g, Preterm Cleveland v. Yost, Hamilton C.P. No. A2203203 (Sep. 2, 2022). Even more time will pass before the Court considers the parties' arguments on the constitutionality of Senate Bill 23. If reproductive health providers did not have standing to vindicate their patients' rights, an individual plaintiff's pregnancy would long be over and their claim moot by the time the Court reviewed the case.

To be sure, this Court has recognized an exception to the mootness doctrine for claims, such as those involving pregnancy, that are capable of repetition yet evading review. *See Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho*, 52 Ohio St.3d 56, 61, 556 N.E.2d 157 (1990) (finding that an abortion clinic's claim against anti-abortion protestors was not rendered moot when clinic closed because the clinic's claim was capable of repetition, yet evading review). Once an individual's pregnancy is over, however, there remains little incentive to continue litigation, even if a court is willing to hear the case under this exception. A court's decision to stay an abortion restriction would not practically benefit an individual who is no longer pregnant. Further, unlike many plaintiffs, a patient seeking to enjoin an abortion restriction typically will not receive monetary damages upon resolution of the lawsuit. *See Powers*, 499 U.S. at 415 (finding that "the small financial stake" involved in a lawsuit is a practical barrier for an individual filing suit for purposes of third party standing analysis).[3] For an individual without a live claim who will

[3] Moreover, even if a patient sought money damages in addition to equitable relief, Ohio has only waived its sovereign immunity to allow plaintiffs to sue the state for damages in the Court of Claims. *See San Allen, Inc. v. Buehrer*, 2014-Ohio 2071, 11 N.E.3d 739, 763 (Ohio Ct. App. 2014). Many cases seeking to enjoin abortion laws, including the present case, are brought in the Court of Common Pleas, where the doctrine of sovereign immunity bars a plaintiff from recovering money damages from the state. *See id.*

not personally benefit from injunctive relief or a financial reward, the privacy, health, and financial burdens of litigation are likely to outweigh any intangible benefit of proceeding with a lawsuit. *See Riverside*, 2014-Ohio-1974 at ¶¶ 11, 24-25 (recognizing plaintiffs who alleged "lack of incentive due to the high cost of litigation and the lack of a direct financial stake on the part of each individual plaintiff" faced hindrances in filing suit).

Given the mismatch between the timeline of pregnancy and the timeline of litigation, the imminent mootness of a patient's claim and the lack of incentive to continue with litigation erect a substantial obstacle to individual patients filing suit.

D. Significant Inexperience, Financial Hurdles, and Time Constraints Hinder Patients from Pursuing Litigation to Assert Their Rights.

Filing a lawsuit requires significant time, resources, and knowledge of the legal system, even if pro bono representation is available. Layered on top of the already-existing financial, physical, and emotional strains associated with pregnancy and abortion, the high financial cost and practical demands of litigation create significant obstacles for patients to assert their own rights in court. And, while there is no typical abortion patient—one study estimates nearly one in four women in the United States will have an abortion by age 45—a closer look at the population seeking abortion care demonstrates the great difficulty many of these individuals would face if forced to file individual lawsuits to challenge restrictive abortion laws. *See* Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 112 Am. J. Pub. Health 1284, 1287 (2022).

1. Patients May Lack Access to Legal Resources.

At the outset, individuals who wish to obtain abortion care but who are prevented from doing so by restrictive laws must both know they have potential legal recourse and know how to obtain legal representation. Wide variation in state laws and pervasive misinformation about

abortion may lead to confusion among the general public about their rights. This lack of knowledge is illustrated in a 2020 survey of women aged 18 to 49 who were asked 12 questions about abortion regulations in their states. Jonas J. Swartz et al., *Women's knowledge of their state's abortion regulations*, Contraception (Nov. 2020) 319. The results revealed most women had limited knowledge of abortion regulations, with participants answering an average of only 18 percent of questions correctly. *Id.* at 321. In Ohio, a similar study in 2021 analyzed women's understanding of the legality of abortion in the state after the legislature passed two separate six-week abortion bans—the first was vetoed by Governor Kasich and the second, which is at issue in this case, was enjoined by a federal court before it went into effect. *See* Maria F. Gallo et al., *Passage of abortion ban and women's accurate understanding of abortion legality*, 225 Am. J. of Obstetrics and Gynecology 63.e1 (2021). Even though abortion in Ohio remained legal up to 20 weeks, nearly 10 percent of women mistakenly believed it to be illegal while 26.2 percent of women were unsure whether the procedure was legal. *Id.* at 63.e2. While a similar analysis has not been conducted since the U.S. Supreme Court's 2022 holding in *Dobbs*, it is not a stretch to conclude that the *Dobbs* decision has likely created further confusion among patients about their rights under rapidly changing state laws.

Further, even if patients understand their rights and wish to challenge a restrictive abortion law, they may not know how to contact a lawyer and seek recourse. Abortion patients are overwhelmingly young—individuals aged 20 to 24 accounted for over one-third of those who received abortions in 2014—and are slightly underrepresented among college graduates compared to the general population, suggesting abortion patients may have less legal sophistication to navigate the legal system to affirmatively assert their rights. Rachel K. Jones et al, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Institute (May 2016),

available at https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014?TB_iframe=true&width=921.6&height=921.6 (accessed June 20, 2023) 5, 7; *see also Aid for Women v. Foulston*, 441 F.3d 1101, 1114 (10th Cir. 2006) (recognizing that minors' lack of legal sophistication constitutes an obstacle to filing suit).

2. Patients May Be Reluctant to Engage With The Legal System.

Indeed, many abortion patients are part of groups that have historically had adverse experiences with the legal system. For instance, as demonstrated by extensive research cataloguing the adverse experiences of Black women, girls, and non-binary individuals within the legal system, Black individuals regularly encounter structural bias and racism within the court system. *See, e.g.*, Maya Finoh & Jasmine Sankofa, *The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence*, ACLU (Jan. 28, 2019), available at https://www.aclu.org/news/racial-justice/legal-system-has-failed-black-girls-women-and-non (accessed June 20, 2023). Black women also are nearly five times more likely to have an abortion than their white counterparts. Michelle Oberman, *Motherhood, Abortion, and the Medicalization of Poverty*, 46 J.L. Med. & Ethics 665, 666 (2018). Fear of risk associated with the legal system may further deter these patients from filing litigation, especially in abortion litigation, where the patient filing the lawsuit may not receive any personal benefit—in the form of an ability to obtain an abortion or financial compensation for their time, efforts, or expense—upon a successful outcome. *See* Section I.C., above.

Relatedly, it is also important to note that, while Ohio law and the legislation at issue in this case currently protect patients who obtain abortion from criminal prosecution, R.C. 2901.01(B)(2)(a); 2019 Am.Sub.S.B. No. 23, (amending R.C. 2919.198), jurisdictions across the country are increasingly prosecuting individuals for actions leading to pregnancy loss. *See* Patricia Hurtado & Francesca Maglion, *In a post-Roe world, more miscarriage and stillbirth prosecutions*

await women, Fortune (July 5, 2022), available at https://fortune.com/2022/07/05/roe-v-wade-miscarriage-abortion-prosecution-charge/ (accessed June 20, 2023). Ohio might not be far behind: Ohio legislators have repeatedly introduced fetal personhood legislation—most recently 2022 Am.H.B. No. 704—that could open the door to prosecution of individuals who obtain abortions. Fear of criminal sanctions thus creates yet another hindrance to patients bringing their own suit.

3. Limited Time and Financial Resources Create Obstacles to Litigation.

Ohio courts have recognized that the high cost of litigation creates an obstacle to individuals asserting their own claims in court. *See Riverside*, 2014-Ohio-1974, at ¶¶ 11, 24-25. Even if an attorney represents an individual pro bono, eliminating legal fees, plaintiffs often incur other costs, for example, expenses associated with transportation, childcare, and lost wages. In addition, filing a lawsuit requires a plaintiff to spend time meeting with their lawyer and potentially giving interviews and making statements under oath. *See* Larry J. Cohen & Joyce H. Vesper, *Forensic Stress Disorder*, 25 L. & Psych. Rev. 1, 6, 10 (2001). The time required to participate in litigation can translate to missed work, time away from family, and delayed or forgone medical care.

The costs associated with abortion exacerbate financial strain on patients. A 2011 survey of patients from across geographic regions revealed that at least 69 percent of patients paid for abortion care out of pocket. Rachel K. Jones et al, *At what cost? Payment for abortion care by U.S. women*, Women's Health Issues (May 2013) e177. While the cost of an abortion varies widely depending on geography and how far along a patient is in their pregnancy, individuals can expect to pay several hundreds of dollars out of pocket for the procedure. *Id*.; Ushma D. Upadhyay et al., *Trends In Self-Pay Charges And Insurance Acceptance For Abortion In The United States*, Health Affairs (Apr. 2022) 512. In Ohio's census region, the median cost for a first trimester surgical abortion in 2020 was $545, while a second trimester abortion cost a median of $745. *Id*. Forty-one

percent of patients reported difficulty paying for the procedure, a number that increased to 52 percent among those patients who did not use health insurance. Jones, *At what cost? Payment for abortion care by U.S. women, supra*, at e175.

Patients also incur indirect costs associated with the procedure. *Id*. at e174. In the 2011[4] abortion costs survey, two-thirds of patients reported transportation expenses and one-fourth reported lost wages. *Id*. at e176. Some respondents also indicated they incurred childcare and hotel costs. *Id*. One in three patients surveyed had to delay or forgo paying bills, including electricity, rent, car payments, and food expenses, illustrating the immense financial strain obtaining an abortion creates for many patients. *Id*. Ohio mandates a twenty-four hour waiting period between abortion counseling and the procedure itself, necessitating at least two trips to a clinic, further exacerbating the indirect costs of the procedure. R.C. 317.56(B)(1).

The financial burden is particularly acute for abortion patients, who are more likely than not to be poor. Poor people in the United States have higher rates of unwanted pregnancy and abortion than their wealthier counterparts. Oberman, *Motherhood, Abortion, and the Medicalization of Poverty*, *supra*, at 3. Three-fourths of abortion patients in 2014 had incomes below 200 percent of the federal poverty level.[5] Jones, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, *supra*, at 7. In Ohio and across the United States, most abortion patients already have at least one child, further restricting the time and resources available for this

[4] A similar study has not been conducted since the U.S. Supreme Court's decision in *Dobbs* to assess whether and how much these costs have increased.

[5] According to the 2014 federal poverty guidelines, an annual income of $15,730 or less for a family of two fell below the federal poverty level. U.S. Dep't of Health and Hum. Servs., 2*014 Poverty Guidelines* (2014), available at https://aspe.hhs.gov/2014-poverty-guidelines (accessed June 20, 2023). The figure is $23,850 for a family of four. *Id.*

population to pursue litigation. Katherine Kortsmit et al., *Abortion Surveillance — United States, 2018*, National Center for Biotechnology Information (2020) Table 8.

In short, abortion patients in the United States are disproportionately low-income, may not have the knowledge and wherewithal to navigate the legal system, and already face steep costs associated with obtaining the medical care they need. These factors combine to create significant and, for many, prohibitive financial and practical obstacles for patients to assert their own rights in litigation.

E. The Detrimental Health Effects of the Litigation Process Itself Hinders Patients from Pursuing Litigation.

In addition to the practical and monetary barriers to bringing an individual lawsuit, the litigation process itself is harmful to the health of litigants, which poses an additional barrier to prospective individual plaintiffs in reproductive-rights cases who may already be grappling with the physical and emotional stress of pregnancy.

Psychologists have identified specific emotional harms that result from participation in the legal process. Michaela Keet et al., *Anticipating and Managing the Psychological Cost of Civil Litigation*, Windsor Y.B. Access Just. 73, 76 (2017). Critogenic harm is defined as the "intrinsic and often inescapable harms caused by the litigation process itself, even when the process is working exactly as it should." *Id*. at 77 (citing Thomas G. Gutheil et al., *Preventing 'Critogenic' Harms: Minimizing Emotional Injury from Civil Litigation*, 28 J. of Psychiatry & L. 5, 6 (2000)). Litigation Response Syndrome, or LRS, is "a group of stress problems caused by the process of litigation" and "made up of complaints that arise solely from the experience of being personally involved in a lawsuit, rather than from the events that precipitated the litigation." Paul R. Lees-Haley, *Litigation Response Syndrome: How Stress Confuses the Issues*, 56 Def. Counsel J. 110,

110 (1989). The burden of stress that comes with being involved in litigation has also been referred to as "forensic stress" which can develop into "forensic stress disorder." Keet, *supra,* at 77.

These harms are not limited to defendants who are sued; they apply equally to plaintiffs. As observed by Dr. Larry Strasburger, M.D., a prominent psychiatrist and past president of the American Academy of Psychiatry and the Law, litigants often feel isolated and helpless, and the stress of litigation can give rise to sleeplessness, headaches, difficulty concentrating, anxiety, despondency, and other symptoms of Post-Traumatic Stress Disorder (PTSD). Larry H. Strasburger, M.D., *The Litigant-Patient: Mental Health Consequences of Civil Litigation*, 27 J. of Am. Psychiatry L. 203, 204 (1999). Dr. Strasburger noted with regard to plaintiffs in particular that "[t]here is an inherent irony in the judicial system in that individuals who bring suit may endure injury from the very process through which they seek redress." *Id*.

Multiple aspects of the litigation process are stressful and contribute to the emotional harms noted above. First, the process is adversarial in nature, which can create "a damaging aura of combat." Keet, *supra,* at 87. For most lay people, the litigation process is full of complex concepts and unfamiliar language, which is stressful to navigate. *Id*. Litigation proceedings can often involve significant delays, which is identified as "a major stressor in litigation." *Id*. at 88. For some litigants, though, the process is too fast, as a statute of limitations (or an impending cut-off date to obtain an abortion) may push people into the litigation process "before they are psychologically ready to face the stress of litigation." *Id*. Further, the litigation process strips participants of a sense of control, which is important for maintaining psychological well-being. *Id*. The process of being examined and having to discuss personal and often difficult experiences in order to prove injury can be distressing for litigants as well. *Id*.

Pregnant people seeking to enforce their reproductive rights are particularly vulnerable to these adverse health effects, given the multiplicity of psychological, physiological, and emotional stressors already impacting the lives of most abortion patients. As discussed above, abortion patients tend to be a multiply marginalized population, their privacy and safety are in jeopardy, and they face significant economic and practical barriers to filing suit. The potential for the litigation process to worsen their emotional and psychological well-being is unquestionably an added barrier to filing suit.

CONCLUSION

Reproductive healthcare providers should be granted third-party standing to assert the rights of their patients because abortion patients face multiple, significant hindrances that prevent them from filing suit on their own behalf. Filing suit in abortion-related litigation can jeopardize important privacy rights and interests of patients. It can result in increased threats to their safety by making them a potential target of violence by anti-abortion activists or abusive partners or family. The mismatch between the timeline of litigation and the timeline of pregnancy render individual claims imminently moot, removing practical incentives to file suit. Additionally, abortion patients face significant knowledge barriers, financial hurdles, and time constraints that hinder their ability to access legal services. Further, the litigation process is in itself stressful and potentially traumatic for litigants already sustaining the physical and emotional stress of pregnancy. In short, patients experiencing an unwanted pregnancy face powerful disincentives to litigate their rights, with no realistic chance of improving their own situation even if successful. Denying third-party standing in these circumstances would effectively preclude any but the most idealistic and privileged individuals from pursuing their constitutional rights. For all of these

reasons, NASW respectfully asks this Court to find that plaintiffs have third-party standing to assert the rights of their patients.

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Respectfully submitted,

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