Supreme Court of Ohio Clerk of Court - Filed June 29, 2022 - Case No. 2022-0803

IN THE SUPREME COURT OF OHIO

STATE EX REL. PRETERM-CLEVELAND C/O B. Jessie Hill ACLU of Ohio 4506 Chester Avenue Cleveland, OH 44103	:	
STATE EX REL. PLANNED PARENTHOOD SOUTHWEST OHIO REGION C/O WilmerHale LLP 7 World Trade Center 250 Greenwich Street New York, NY 10007	:	Case No.___________ Original Action in Mandamus
STATE EX REL. SHARON LINER, M.D. C/O WilmerHale LLP 7 World Trade Center 250 Greenwich Street New York, NY 10007	:	Peremptory and Alternative Writs Requested
STATE EX REL. PLANNED PARENTHOOD GREATER OHIO C/O WilmerHale LLP 7 World Trade Center 250 Greenwich Street New York, NY 10007	:	
STATE EX REL. WOMEN'S MED GROUP PROFESSIONAL CORPORATION C/O B. Jessie Hill ACLU of Ohio 4506 Chester Avenue Cleveland, OH 44103	:	
STATE EX REL. NORTHEAST OHIO WOMEN'S CENTER, LLC C/O B. Jessie Hill ACLU of Ohio 4506 Chester Avenue Cleveland, OH 44103	:	

STATE EX REL. TOLEDO WOMEN'S CENTER :
CENTER
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Relators,

v.

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Respondents. :

RELATORS' VERIFIED COMPLAINT IN ORIGINAL ACTION FOR WRIT OF MANDAMUS

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This action is brought by Preterm-Cleveland; Planned Parenthood Southwest Ohio Region; Sharon Liner, M.D.; Planned Parenthood Greater Ohio; Women's Med Group Professional Corporation; Northeast Ohio Women's Center, LLC; and Toledo Women's Center ("Relators"), who petition this Court for a writ of mandamus on behalf of themselves and women of Ohio, directing David Yost, the Attorney General of the State of Ohio; Bruce. T. Vanderhoff, M.D., M.B.A., the Director of the Ohio Department of Health ("ODH"); Kim G. Rothermel, M.D., the Secretary of the State Medical Board of Ohio; Bruce R. Saferin, D.P.M., the Supervising Member of the State Medical Board of Ohio; and the County Prosecutor for each county where a Relator is located (Michael C. O'Malley, Cuyahoga County; Joseph T. Deters, Hamilton County; G. Gary Tyack, Franklin County; Mathias H. Heck, Jr., Montgomery County; and Julia R. Bates, Lucas County) ("Respondents") ordering Respondents to abide by Ohio's former gestational age limit of 22 weeks from the first day of a woman's last menstrual period, *see* R.C. 2919.201, and not enforce Senate Bill 23 ("S.B. 23"). Relators aver as follows:

EXECUTIVE SUMMARY

1. Relators bring this action to protect Ohioans' fundamental rights under the Ohio Constitution, including the fundamental right to abortion, as guaranteed by the Ohio

Constitution's broad protections for individual liberties under Article I, Sections 1, 16, and 21, and the equal protection guarantee under Article I, Section 2.

2. Until June 24, 2022, when S.B. 23 took effect, abortion was legal and available in Ohio until 22 weeks from the first day of a patient's last menstrual period ("LMP") pursuant to R.C. 2919.201.

3. S.B. 23 has now decimated abortion access in Ohio by banning abortion after detection of embryonic cardiac activity, which occurs at approximately six weeks LMP—before many women even know they are pregnant. 2019 Am.Sub.S.B. No. 23. This near-total ban on abortion denies Ohioans their fundamental rights guaranteed by the Ohio Constitution, including the right to abortion.

4. Relators, therefore, seek an Order, Judgment, and/or Writ from this Court declaring S.B. 23 unconstitutional.

5. Because Respondents have taken oaths of office to uphold the Ohio Constitution, Relators also seek an Order, Judgment, and/or Writ from this Court commanding the Attorney General, the named County prosecuting attorneys, the ODH Director, the Secretary and Supervising Members of the State Medical Board of Ohio, and their employees, agents, and successors in office, to abide by Ohio's pre-existing gestational age restriction—which prohibits abortion beginning at 22 weeks LMP—and not enforce S.B. 23.

6. Swift action from this Court is necessary to stop the ongoing, irreparable harm being inflicted on Ohioans. Each day that S.B. 23 is in effect, women who need abortion care—including women who had already scheduled that care—are being turned away at clinics and denied their fundamental right to an abortion.

7. Prior to taking effect in 2019, S.B. 23 was preliminarily enjoined by a federal district court that found the law would pose an "insurmountable" obstacle to abortion access and "prohibit almost all abortion care in Ohio," violating Ohioans' rights under the Fourteenth Amendment of the United States Constitution. *Preterm-Cleveland v. Yost*, 394 F.Supp.3d 796, 800-801 (S.D.Ohio 2019).

8. On June 24, 2022, the United States Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization* ("*Jackson Women's Health Organization*"), No. 19-1392, 2022 WL 2276808 (June 24, 2022), overruling nearly 50 years of federal precedent, beginning with *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and holding that the Fourteenth Amendment of the federal Constitution does not protect the right to abortion.

9. Within an hour of the Supreme Court's decision in *Jackson Women's Health Organization*, the *Yost* defendants filed an emergency motion to dissolve the federal injunction. *See Preterm-Cleveland v. Yost*, No. 1-19-cv-00360, Dkt. #96 (S.D. Ohio). The district court granted that motion over Relators' objection, and S.B. 23 went into effect on the evening of June 24, 2022. *See id*., Dkt. #100.

10. By eviscerating access to abortion and denying Ohioans their fundamental rights, S.B. 23 violates the Ohio Constitution and significantly and irreparably harms their physical, mental, and emotional health and well-being.

11. State courts "are unrestricted in according greater civil liberties and protections to individuals and groups" than their federal counterparts, *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993). And this Court has routinely recognized that

the Ohio Constitution provides broad protections for individual rights independent of the United States Constitution. *Id*.

12. The Ohio Constitution's Due Course of Law Clause, when read together with other distinctive provisions, including Article I, Sections 1, 16, and 21, establishes an independent right to abortion under the Ohio Constitution. That right is infringed by S.B. 23.

13. Captured within the substantive due process rights protected by the Due Course of Law Clause are the rights to reproductive autonomy and bodily integrity. *See State v. Boeddeker*, 1st Dist. Hamilton No. C-970471, 1998 WL 57234, *2 (Feb. 13, 1998) (substantive due process under the Ohio Constitution includes a right to privacy that, in the context of "sexual and reproductive matters," is "fundamental"); *Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, No. A 2101148, at 8 (Hamilton C.P. Apr. 19, 2021) ("*Planned Parenthood Southwest I*") (the Ohio Constitution's substantive due process protections extend to "matters involving privacy, procreation, bodily autonomy, and freedom of choice in health care decision making); *Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, No. A 2100870, at 9 (Hamilton C.P. Jan. 31, 2022) ("*Planned Parenthood Southwest II*") (recognizing the "breadth of the Ohio Constitution's guarantees of bodily autonomy, privacy, and freedom of choice in health care").

14. Likewise, Ohio's Equal Protection and Benefit Clause provides broader protections than its federal analogue. *See League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 2022-Ohio-65, ¶ 151 (Brunner, J., concurring).

15. S.B. 23 violates the Ohio Constitution's Equal Protection and Benefit Clause by discriminating against women, a suspect class. *See, e.g., Adamsky v. Buckeye Loc. Sch. Dist.*, 73 Ohio St.3d 360, 362, 653 N.E.2d 212 (1995) ("[A]suspect class . . . has been traditionally defined as one involving race, national origin, religion, or sex.").

16. Laws that violate fundamental rights or that discriminate against suspect classes are subject to strict scrutiny—which imposes a heavy burden on the State. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420. The State cannot meet its burden here because S.B. 23 does not advance a compelling state interest, nor is it narrowly tailored.

17. Absent a writ of mandamus, Relators have no plain and adequate remedy at law. Given that S.B. 23 has such a widespread effect—impacting the overwhelming majority of women seeking abortions in Ohio—only a clear, binding, state-wide ruling from this Court will ensure that the fundamental rights of all those affected by S.B. 23 are expediently restored.

18. Relators respectfully request that this Court:

    i. Issue an immediate stay of enforcement of S.B. 23 while the merits of Relators' Verified Complaint for a writ of mandamus are pending;

    ii. Issue an Order, Judgment, and/or Writ from this Court declaring S.B. 23 unconstitutional;

    iii. Issue a Peremptory Writ of Mandamus directing Respondents to abide by Ohio's preexisting gestational age restriction (R.C. 2919.201) and not enforce S.B. 23;

    iv. If the Court does not issue a Peremptory Writ, issue an Alternative Writ directing Respondents to abide by Ohio's preexisting gestational age restriction (R.C.

2919.201) and not enforce S.B. 23, with an expedited briefing schedule if the Court denies Relators' emergency motion to stay enforcement of S.B. 23 while the merits of Relators' Verified Complaint are pending;

v. Assess the costs of this action against Respondents; and

vi. Award such other relief as may be appropriate.

NATURE OF THE ACTION AND JURISDICTION

19. This is an original action in mandamus commenced pursuant to the Ohio Supreme Court's original jurisdiction under Article IV, Section 2 of the Ohio Constitution and Chapter 2731 of the Ohio Revised Code. A mandamus action is "a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station." R.C. 2731.01.

20. Relators seek an Order, Judgment, and/or Writ from this Court declaring S.B. 23 unconstitutional. Because enforcement of S.B. 23 violates the Ohio Constitution and Respondents have taken oaths to uphold the Ohio Constitution, Relators additionally seek an Order, Judgment, and/or Writ from this Court commanding the Attorney General, the named County Prosecutors, the ODH Director, the Secretary and Supervising Members of the State Medical Board of Ohio, and their employees, agents, and successors in office to abide by Ohio's prior gestational age restriction and not enforce S.B. 23. *See* R.C. 3.23 ("The oath of office of every . . . officer, deputy, or clerk shall be to support the constitution of the United States and the constitution of this state, and faithfully to discharge the duties of the office."); *see also* R.C. 309.03 (requiring prosecuting attorneys to take the oath).

21. This action, which challenges the constitutionality of a statute that affects fundamental rights, is "squarely within [this Court's] original mandamus jurisdiction." *State ex rel. Ethics First-You Decide Ohio Political Action Commt. v. DeWine*, 147 Ohio St.3d 373, 2016-Ohio-3144, 66 N.E.3d 689, ¶ 11; *State ex rel. Zupancic v. Limbach*, 58 Ohio St.3d 130, 133, 568 N.E.2d 1206 (1991) ("[A] mandamus action may test the constitutionality of a statute."); *see also State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717, 780 N.E.2d 981 (granting writs of mandamus and prohibition to find law permitting warrantless drug testing of workers unconstitutional).

22. This Court recognizes that a writ of mandamus is an appropriate remedy where the challenged statute affects "fundamental" or "core" rights of Ohio citizens, and the circumstances "demand early resolution." *See, e.g.*, *Ohio Bur. of Workers' Comp.* at ¶ 12 (relators had standing to bring mandamus action challenging statute that had "sweeping applicability and affect[ed] a core right").

23. Relators seek a peremptory writ. A peremptory writ is appropriate where, as here, the pertinent facts are uncontroverted and it appears beyond doubt that the relator is entitled to its requested relief. *State ex rel. State Farm Mut. Ins. Co. v. O'Donnell*, 163 Ohio St.3d 541, 2021-Ohio-1205, 171 N.E.3d 321, ¶ 7. Relators' constitutional challenge to S.B. 23 presents a pure question of law: Does a ban on abortion beginning at six weeks LMP violate Ohioans' fundamental rights under the Ohio Constitution? Because it does, S.B. 23 is unconstitutional, and Relators are entitled to the requested relief.

24. Alternatively, Relators seek an alternative writ, and if the Court denies Relators' request for an emergency stay, Relators further request an expedited schedule. Given the ongoing irreparable harm that S.B. 23 is inflicting on Ohioans, should this Court

determine that an alternative writ is the more appropriate course and/or require additional evidence or briefing on these issues without a stay of enforcement, it should also issue an expedited "schedule for the presentation of evidence and the filing and service of briefs or other pleadings." S.Ct.Prac.R. 12.05. An expedited schedule is necessary absent a stay of enforcement in light of the fundamental right at stake and the ongoing, serious harms resulting from S.B. 23.

25. Relators have acted with diligence in bringing the instant action within the timeframe contemplated by the Ohio Constitution. This action commenced three business days after the Supreme Court's decision in *Jackson Women's Health Organization* and the District Court's decision granting the *Yost* Defendants' emergency motion to dissolve the federal injunction blocking enforcement of S.B. 23. There was no unreasonable delay or lapse of time in the Relators' assertion of rights herein, and there is no prejudice to Respondents.

26. Absent a writ, Relators have no plain and adequate remedy at law because there are no other practicable means of ensuring that the fundamental rights of those affected by S.B. 23 are protected. Without a clear, binding, state-wide ruling from this Court, S.B. 23 may be subject to piecemeal and duplicative litigation, which could result in temporary remedies or inconsistent rulings that fail to protect all patients and healthcare providers from the devastating consequences of S.B. 23's enforcement, and lead to confusion and uncertainty as to the availability of abortion care in Ohio. Women in Ohio need immediate clarity and certainty as to whether they will be able to access, and medical providers must know whether they may provide that care. Urgent action from this Court is needed to remedy the grave constitutional and material harms currently being inflicted on all Ohioans by S.B. 23.

THE PARTIES

27. Relator Preterm-Cleveland ("Preterm") is a nonprofit corporation organized under the laws of the State of Ohio and has operated a reproductive health care clinic in Cleveland, Ohio since 1974. Preterm provides a wide range of reproductive and sexual health care services, including abortion. Until the *Yost* injunction was dissolved on June 24, 2022, Preterm provided procedural abortions through 21 weeks 6 days LMP, and medication abortions through 10 weeks LMP. Providers at Preterm will be threatened with criminal penalties, loss of their medical licenses, civil forfeiture, and civil suits if they provide care in violation of S.B. 23. Preterm sues on behalf of itself; its current and future staff, officers, and agents; and its patients.

28. Relator Planned Parenthood Southwest Ohio Region ("PPSWO") is a nonprofit corporation organized under the laws of the State of Ohio. PPSWO and its predecessor organizations have provided a broad range of high-quality reproductive health care to patients in southwest Ohio since 1929. PPSWO provides abortion at its surgery center, located in Cincinnati. Until the *Yost* injunction was dissolved on June 24, 2022, PPSWO provided procedural abortions through 21 weeks 6 days LMP, and medication abortions through 10 weeks LMP. Providers at PPSWO will be threatened with criminal penalties, loss of their medical licenses, civil forfeiture, and civil suits if they provide care in violation of S.B. 23. PPSWO sues on behalf of itself; its current and future staff, officers, and agents; and its patients.

29. Relator Sharon Liner, M.D., is a physician licensed to practice medicine in Ohio with nineteen years of experience in women's healthcare. Dr. Liner is PPSWO's Medical Director, and in that role, she supervises physicians providing abortions, develops PPSWO's policies and procedures, and provides health care services including abortion.

Dr. Liner has been providing abortions since 2002. As a provider at PPSWO, Dr. Liner will be threatened with criminal penalties, loss of her medical license, civil forfeiture, and civil suits if she provides care in violation of S.B. 23. Dr. Liner sues on behalf of herself and her patients.

30. Relator Planned Parenthood of Greater Ohio ("PPGOH") is a nonprofit corporation organized under the laws of the State of Ohio. PPGOH was formed in 2012 through a merger of several local and regional Planned Parenthood affiliates that had served patients in Ohio for decades. PPGOH serves patients in northern, eastern, and central Ohio. PPGOH provides abortions at health centers located in East Columbus and Bedford Heights. Until the *Yost* injunction was dissolved on June 24, 2022, PPGOH provided procedural abortions through 19 weeks 6 days LMP and medication abortion through 10 weeks LMP. Providers at PPGOH will be threatened with criminal penalties, loss of their medical licenses, civil forfeiture, and civil suits if they provide care in violation of S.B. 23. PPGOH sues on behalf of itself; its current and future staff, officers, and agents; and its patients.

31. Relator Women's Med Group Professional Corporation ("WMGPC") owns and operates Women's Med Center of Dayton ("WMCD") in Kettering, Ohio. WMGPC and its predecessors have been providing abortions in the Dayton area since 1975. Until the *Yost* injunction was dissolved on June 24, 2022, WMCD provided procedural abortions through 21 weeks 6 days LMP, and medication abortions through 10 weeks LMP. Providers at WMCD will be threatened with criminal penalties, loss of their medical licenses, civil forfeiture, and civil suits if they provide care in violation of S.B. 23.

WMGPC sues on behalf of itself; its current and future staff, officers, and agents; and its patients.

32. Relator Northeast Ohio Women's Center, LLC ("NEOWC"), a corporation organized under the laws of the State of Ohio, operates a health care clinic and provides abortion care in Shaker Heights, Ohio and in Cuyahoga Falls, Ohio. Until the *Yost* injunction was dissolved on June 24, 2022, NEOWC provided procedural abortions through 16 weeks 6 days LMP, medication abortions through 10 weeks LMP at their Cuyahoga location, and medication abortions through 10 weeks LMP at their Shaker Heights location. Providers at NEOWC will be threatened with criminal penalties, loss of their medical licenses, civil forfeiture, and civil suits if they provide care in violation of S.B. 23. NEOWC sues on behalf of itself; its current and future staff, officers, and agents; and its patients.

33. Relator Toledo Women's Center ("TWC") operates a health care clinic and provides abortion care in Toledo, Ohio. Until the *Yost* injunction was dissolved on June 24, 2022, TWC provided medication abortions through 10 weeks LMP. Providers at TWC will be threatened with criminal penalties, loss of their medical licenses, civil forfeiture, and civil suits if they provide care in violation of S.B. 23. TWC sues on behalf of itself; its current and future staff, officers, and agents; and its patients.

34. Respondent David Yost is the Attorney General of the State of Ohio. He is responsible for the enforcement of all laws, including S.B. 23. Under S.B. 23, he is also charged with commencing and prosecuting civil forfeiture when directed to do so by the State Medical Board. S.B. 23, Section 1, amending R.C. 2919.1912(B). As Attorney General, he has taken an oath of office to support the Ohio Constitution. *See* R.C. 3.23. He is sued in his official capacity.

35. Respondent Bruce. T. Vanderhoff, M.D., M.B.A., is the Director of ODH, which is responsible for promulgating rules to assist in compliance with S.B. 23, including rules governing the process for determining whether a fetal heartbeat exists and rules dictating reporting requirements. As Director of ODH, he has taken an oath of office to support the Ohio Constitution. *See* R.C. 3.23. He is sued in his official capacity.

36. Respondent Kim G. Rothermel, M.D., is the Secretary of the State Medical Board of Ohio, which is charged with enforcing the physician licensing and civil penalties contained in S.B. 23. As Secretary of the State Medical Board of Ohio, she has taken an oath of office to support the Ohio Constitution. *See* R.C. 3.23. She is sued in her official capacity.

37. Respondent Bruce R. Saferin, D.P.M., is the Supervising Member of the State Medical Board of Ohio, which is charged with enforcing the physician licensing and civil penalties contained in S.B. 23. As Supervising Member of the State Medical Board of Ohio, he has taken an oath of office to support the Ohio Constitution. *See* R.C. 3.23. He is sued in his official capacity.

38. Respondent Michael C. O'Malley is the Cuyahoga County Prosecutor. He is responsible for the enforcement of the criminal laws in Cuyahoga County, where Preterm's clinic and PPGOH's Bedford Heights health center are located, including the criminal provisions contained in S.B. 23. As a county prosecutor, he has taken an oath of office to support the Ohio Constitution. *See* R.C. 3.23. He is sued in his official capacity.

39. Respondent Joseph T. Deters is the Hamilton County Prosecutor. He is responsible for the enforcement of the criminal laws in Hamilton County, where PPSWO's Cincinnati

surgery center is located, including the criminal provisions contained in S.B. 23. He is sued in his official capacity.

40. Respondent G. Gary Tyack is the Franklin County Prosecutor. He is responsible for the enforcement of the criminal laws in Franklin County, where PPGOH's East Columbus health center is located, including the criminal provisions contained in S.B. 23. As a county prosecutor, he has taken an oath of office to support the Ohio Constitution. *See* R.C. 3.23. He is sued in his official capacity.

41. Respondent Mathias H. Heck, Jr. is the Montgomery County Prosecutor. He is responsible for the enforcement of the criminal laws in Montgomery County, where WMGPC's facility is located, including the criminal provisions contained in S.B. 23. As a county prosecutor, he has taken an oath of office to support the Ohio Constitution. *See* R.C. 3.23. He is sued in his official capacity.

42. Respondent Julia R. Bates is the Lucas County Prosecutor. She is responsible for the enforcement of the criminal laws in Lucas County, where TWC's health center is located, including the criminal provisions contained in S.B. 23. As a county prosecutor, she has taken an oath of office to support the Ohio Constitution. *See* R.C. 3.23. She is sued in her official capacity.

STATUTORY FRAMEWORK AND PROCEDURAL BACKGROUND

43. Prior to S.B. 23 taking effect on June 24, 2022, abortion was legal and available in Ohio prior to 20 weeks post-fertilization, which is 22 weeks LMP. R.C. 2919.201.

44. In accordance with relevant preexisting law, until June 24, 2022, Relators provided medication abortion (available up to 10 weeks LMP in Ohio), or procedural abortion (available up to 21 weeks and 6 days LMP in Ohio), depending on the clinic. *See supra* ¶¶ 27-33.

45. Since taking effect, S.B. 23 has eviscerated access to abortion in Ohio by lowering the gestational age limit from 22 weeks LMP to approximately six weeks LMP, with very limited exceptions.

46. In the case of an intrauterine pregnancy, S.B. 23 requires providers to determine whether there is cardiac activity and, if cardiac activity is detected, makes it a crime to "perform or induce an abortion." S.B. 23, amending R.C. 2919.195(A).

47. S.B. 23 provides for two very limited exceptions. It permits abortion after cardiac activity is detected only if necessary to prevent (1) the "death of the pregnant woman," or (2) a "serious risk of the substantial and irreversible impairment of a major bodily function." S.B. 23 Section 1, amending R.C. 2919.195(B). "'Serious risk of the substantial and irreversible impairment of a major bodily function' means any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function." R.C. 2919.19(A)(12) and 2919.16(K). A "medically diagnosed condition that constitutes a 'serious risk of the substantial and irreversible impairment of a major bodily function' includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes," but explicitly "does not include a condition related to the women's mental health." *Id.*

48. A violation of S.B. 23 by a provider is a fifth-degree felony, punishable by up to one year in prison, and a fine of $2,500. S.B. 23, Section 1, amending R.C. 2919.195(A); 2929.14(A)(5) and 2929.18(A)(3)(e). In addition to criminal penalties, the state medical board may assess a forfeiture of up to $20,000 for each violation of S.B. 23, and limit, revoke, or suspend a physician's medical license based on a violation of S.B. 23. *See* S.B. 23, Section 1, amending R.C. 2919.1912(A); R.C. 4371.22(B)(10). Moreover, the

Relator clinics could face civil penalties and revocation of their ambulatory surgical facility licenses for a violation of S.B. 23. R.C. 3702.32. A patient may also bring a civil action against a provider who violates S.B. 23 and recover damages in the amount of $10,000 or more. S.B. 23, Section 1, amending R.C. 2919.199(B)(1).

49. In 2019, after S.B. 23 passed and was signed by the Governor, Relators brought an action in the United States District Court for the Southern District of Ohio challenging its constitutionality under then-applicable federal precedent. *See Preterm-Cleveland*, 394 F.Supp.3d 796. On July 3, 2019—before S.B. 23 was set to take effect—the federal court granted plaintiffs' motion for a preliminary injunction, finding that plaintiffs were "certain to succeed" on the merits of their claim that S.B. 23 violated the fundamental constitutional right to abortion under the federal constitution. *Id.* at 800; *see also* Compl., Dkt. #1, No. 1:19-cv-00360 (MRB) (S.D.Ohio); Mot. for Prelim. Inj., Dkt. #2, No. 1:19-cv-00360 (MRB) (S.D.Ohio).

50. Less than an hour after the Supreme Court's decision in *Jackson Women's Health Organization* overruling *Roe* and *Casey*—the key United States Supreme Court precedents upon which plaintiffs' federal constitutional challenge to S.B. 23 were based—defendants filed an emergency motion to dissolve the injunction. *See id.*, Dkt. #96. Later that same evening, the district court granted defendants' motion over plaintiffs' opposition and request for additional time. *See id.*, Dkt. #100.

51. After being blocked for nearly three years, S.B. 23 went into effect in the evening of Friday, June 24, 2022, prohibiting almost all abortion care in Ohio and inflicting immediate and irreparable harm on Ohioans seeking vital and time-sensitive reproductive health care.

FACTUAL ALLEGATIONS IN SUPPORT OF CLAIM

A. S.B. 23's Ban on Abortion At and After Six Weeks LMP Practically Eliminates Abortion Care in Ohio.

52. Pregnancy is commonly measured from the first day of a woman's last menstrual period ("LMP"). A full-term pregnancy is approximately forty weeks LMP. In a normally developing embryo, cells that form the basis for the development of the heart later in gestation produce activity that can generally be detected with an ultrasound starting at approximately six weeks LMP, and sometimes even as early as five weeks LMP.[1] This is a very early point in pregnancy: indeed, at six weeks LMP, a pregnancy is still at the embryonic stage.

53. The embryonic stage of pregnancy lasts from fertilization until approximately eight to ten weeks LMP. Beginning at about eleven weeks LMP, the embryo becomes a fetus.

54. The menstrual cycle is usually approximately four weeks long, but varies depending on the individual. Even a woman with highly regular periods would be four weeks pregnant as measured from her last menstrual period when her missed period occurs.[2] A ban on abortion at and after six weeks only allows two weeks, at most, for a woman to learn that she is pregnant, decide whether to have an abortion, and to seek and obtain abortion care.

55. Prior to six weeks LMP, many women have none of the physical indicators of pregnancy. Many women do not menstruate at regular intervals, or they go long stretches without

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[1] Consistent with medical practice, as well as existing law, *see* R.C. 2919.191(A), Relators perform an ultrasound to date the pregnancy and to determine whether
there is detectable fetal or embryonic cardiac activity. Ultrasounds can be performed either by placing a transducer on the patient's abdomen or by inserting a probe into the patient's vagina.

[2] Relators sometimes use "women" herein to describe people who are or may become pregnant, but people of other gender identities, including transgender men and gender-diverse individuals, may also become pregnant, seek abortion services, and be harmed by S.B. 23.

experiencing a menstrual period. Menstrual patterns also vary with age. Indeed, it is extremely common for women to have irregular periods at some point in their lives. Additionally, women may experience bleeding in early pregnancy that can be mistaken for a period.

56. Further, women who have certain common medical conditions, such as obesity, those who are breastfeeding, or those who use hormonal contraceptives may experience irregular periods and may not recognize a missed period before six weeks LMP.

57. For all of these reasons, a woman may be six weeks pregnant but not realize she has missed a period, much less consider a missed period unusual or a signal that she may be pregnant.

58. Even for those patients who do know they are pregnant early on, many face significant logistical obstacles that make it difficult, if not impossible, to obtain an abortion before six weeks. More time is often needed to obtain leave from work, arrange for childcare (since the majority of women who obtain abortions already have at least one child), find transportation to a provider, secure funds for the abortion and/or travel, and actually travel to a provider.

59. Ohio's existing statutory scheme also makes scheduling an abortion in this short time period extraordinarily difficult. Ohio law mandates that a patient make an in-person trip to a clinic at least 24 hours before obtaining an abortion to comply with mandated counseling and consent procedures, and undergo an ultrasound to determine whether there is cardiac activity. R.C. 2317.56. Patients must also receive information on the "medical risks" associated with abortion, as well as the "probable gestational age of the

zygote, blastocyte, embryo or fetus." R.C. 2317.56(B). Patients must in turn provide a signed consent form certifying they have received this information. *Id.*

60. In addition, Ohio law limits patients' access to funds to cover abortion services, making it even more difficult for women to access care quickly. *See* R.C. 9.04 and 3901.87 (prohibiting Medicaid and other public insurance programs, as well as private insurance plans listed on Ohio's federally run insurance exchange, from covering abortion); R.C. 5106.56 (providing that "[u]nless required by the United States Constitution or by federal statute, regulation, or decisions of federal courts, state or local funds may not be used for payment or reimbursement of abortion services" except in extremely limited circumstances).

61. These logistical hurdles and existing restrictions already made it extremely difficult for women to obtain abortions before six weeks LMP. Indeed, in Ohio, the vast majority of abortions took place after six weeks LMP before S.B. 23 went into effect. For example, from January 1, 2022 through June 24, 2022, less than 1 percent of abortions provided by PPSWO were performed prior to 6 weeks LMP.

B. Abortion Is Extremely Common and Safe Medical Care.

62. The decision to terminate a pregnancy is informed by a combination of diverse, complex, and interrelated factors that are intimately related to an individual's values and beliefs, culture and religion, health status and reproductive history, familial situation, and resources and economic stability.

63. A child can place economic and emotional strain on a family. As most patients who seek abortion already have at least one child, families must consider how another child will impact their ability to care for the children they already have.

64. Nationwide, new mothers' earnings drop after they give birth, and they do not fully recover to pre-pregnancy earning levels. *See* Danielle H. Sandler & Nicole Szembrot, *New Mothers Experience Temporary Drop in Earnings*, U.S. Census Bur. (June 16, 2020), https://www.census.gov/library/stories/2020/06/cost-of-motherhood-on-womens-employment-and-earnings.html (accessed June 28, 2022).

65. Pregnancy, childbirth, and an additional child may exacerbate an already difficult situation for those who have suffered trauma, such as sexual assault or domestic violence.

66. Approximately one in four women in this country will have an abortion by age forty-five. A majority of those having abortions (61 percent) already have at least one child, while most (66 percent) also plan to have a child or additional children in the future.

67. Legal abortion is one of the safest medical procedures in the United States and is substantially safer than continuing a pregnancy through to childbirth. The risk of death associated with childbirth is approximately thirteen times higher than that associated with abortion, and every pregnancy-related complication is more common among women giving birth than among those having abortions.

68. Complications from both medication and procedural abortion are extremely rare. In the rare cases where complications occur, they can usually be managed in an outpatient clinic setting, either at the time of the abortion or at a follow-up visit.

69. In contrast, if a woman is forced to continue a pregnancy against her will, it poses risks to her physical, mental, and emotional health, as well as to the stability and well-being of her family, including her children.

70. Even for someone who is healthy and has an uncomplicated pregnancy, carrying a pregnancy to term and giving birth poses serious medical risk and can have long-term

medical and physical consequences. Pregnancy comes with profound and long-lasting physiological changes. These changes include lasting effects on a woman's health and wellbeing, including her ability to have children in the future.

71. Pregnancy poses extraordinary physical challenges, even to the healthiest women. As one example, pregnancy stresses most major organs: by mid-pregnancy, a pregnant woman's heart rate increases in order to pump 50% more blood than usual. The increased blood flow causes a woman's kidneys to become enlarged, and also the liver must produce more clotting factors to prevent hemorrhage when the placenta separates from the uterus. This in turn increases the risks of blood clots or thrombosis. Similarly, a pregnant woman's lungs are also deeply affected by pregnancy: her lungs must work harder to clear not only the carbon dioxide produced by her own body, but also the carbon dioxide produced by the fetus. As the pregnancy progresses, a pregnant woman's lungs are compressed by the growing fetus, leaving most pregnant women feeling chronically short of breath. Indeed, every organ in the abdomen—e.g., intestines, liver, spleen—is increasingly compressed throughout pregnancy by the expanding uterus.

72. For a woman with a medical condition caused or exacerbated by pregnancy, like diabetes, hypertension, asthma, heart disease, an autoimmune disorder, or renal disease, or for a woman who learns that her fetus has been diagnosed with a severe or lethal anomaly, risks of medical complications are increased.

73. The most stark risk of carrying a pregnancy to term is death. In Ohio, women died from pregnancy-related causes at a ratio of 14.7 per 100,000 live births from 2008 through 2016. *See* Ohio Dept. of Health, *A Report on Pregnancy-Associated Deaths in Ohio 2008 - 2016*, A_Report_on_Pregnancy-Associated_Deaths_in_Ohio_2008-

2016+website+version.pdf (accessed June 28, 2022). In 2018, the maternal mortality rate was 14.1 per 100,000 live births. *See* Centers for Disease Control & Prevention, *Maternal Mortality by State, 2018*, MMRStateDataTable (cdc.gov) (accessed June 28, 2022).

C. The Impact of S.B. 23 in Ohio.

74. The near-total ban on abortion imposed by S.B. 23 is already having and—absent intervention from this Court—will continue to have a devastating impact on the lives of women who need abortion care in Ohio.

75. Since the federal court lifted its injunction on Friday, June 24, Relators have been forced to cancel appointments for women who had scheduled abortion appointments and turn away others seeking care.

76. For example, Relator PPSWO has canceled over 600 patient appointments since S.B. 23 took effect. When patients have not been reached by phone, patients have been arriving at the health center, only to be told they cannot receive abortion care. Many patients broke down in tears at the clinic when denied an abortion. *See* Haley BeMiller & Abbey Marshall, *Canceled Appointments, Out-of-Pocket State Referrals: 6-Week Ban Uproots Ohio Abortion Access*, Columbus Dispatch (updated June 27, 2022 11:02 a.m.), https://www.dispatch.com/story/news/2022/06/25/ohio-abortion-clinics-cancel-appointments-heartbeat-bill/7734347001/ (accessed June 28, 2022).

77. The harms from S.B. 23 are devastating. At best, Relators' patients are forced to travel out of state for care—at a time when abortion is banned or about to be banned in sixteen states and states that still protect abortion are experiencing an influx of patients. Nationwide, seven states have banned abortion, with nine additional states expected to ban abortion in the coming days. *See Tracking the States Where Abortion Is Now*

Banned, N.Y. Times, updated June 28, 2022 5:45 P.M., https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html; Julie Bosman, *Americans Face New Abortion Landscape in Wake of Roe Decision*, New York Times (June 25, 2022), Americans Face New Abortion Landscape in Wake of Roe Decision - The New York Times (nytimes.com) ("At abortion clinics across the country, providers hastily canceled appointments out of fear of prosecution, and stunned women abruptly made plans to cross state lines into places where abortion was still allowed.").

78. At worst, Ohioans are put in a dire situation. Travel to another state is not possible for every patient who cannot access abortion in Ohio. Women who are past six weeks LMP and unable to travel out of state will be forced to either carry their pregnancies to term and give birth against their will—at risk to their physical, economic, emotional, and psychological well-being—or to resort to potentially unsafe methods of abortion.[3] *See* Diana Greene Foster, Ph.D, *The Turnaway Study: The Cost of Denying Women Access to Abortion* (2020) (examining the physical, mental, and socioeconomic consequences of receiving an abortion compared to carrying an unwanted pregnancy to term).

79. For example, since S.B. 23 took effect on Friday, several patients at Relator PPSWO have threatened to commit suicide when denied abortion care. One patient said she would attempt to terminate her pregnancy by drinking bleach. Another asked how much Vitamin C she would need to take to terminate her pregnancy.

[3] While there are safe and effective methods to induce abortion outside clinical settings with medication, attempts to access and use these abortion-inducing drugs, often from unlicensed sources, can put patients at risk. Others without the resources to access medically safe methods of self-managed abortion may resort to dangerous tactics to try to terminate an unwanted pregnancy, such as self-harm or ingesting poison.

80. The consequences of S.B. 23 will be disproportionately felt by communities of color and low-income communities, which comprise the majority of patients seeking abortions.

81. In 2020, 48.1 percent of Ohioans who obtained abortions were Black, while the Black community represented only 13.1 percent of Ohio's population; 12.1 percent of Ohioans who obtained abortions were from other communities of color (Indigenous (American Indian), Asian/Pacific Islander, Multiracial, and Hispanic Ohioans), while those communities only made up 9.3 percent of Ohio's population. *See* Ohio Dept. of Health, *Induced Abortions in Ohio* (2020), https://odh.ohio.gov/know-our-programs/vital-statistics/resources/vs-abortionreport2020 (accessed June 28, 2022); U.S. Census Bur., *Quick Facts: Ohio*, https://www.census.gov/quickfacts/OH (accessed June 28, 2022).

82. Indeed, Black people will suffer some of the gravest consequences of S.B. 23's enforcement. In Ohio, Black women are two and a half times more likely to die from a cause related to pregnancy than white women. *See* Ohio Dept. of Health, *A Report on Pregnancy-Associated Deaths in Ohio 2008 - 2016*, A_Report_on_Pregnancy-Associated_Deaths_in_Ohio_2008-2016+website+version.pdf (accessed June 28, 2022) (Black women in Ohio have a maternal mortality rate of 29.5 deaths per 100,000 births compared to 11.5 deaths per 100,000 births for white women). And Black infants in Ohio are three times more likely than their white counterparts to die before their first birthday. *See* News Release, *Ohio Infant Deaths in 2017 Second-Lowest on Record While Racial Disparities in Birth Outcomes Continued,* Ohio Dept. of Health (Dec. 6, 2018), https://odh.ohio.gov/media-center/odh-news-releases/2017-ohio-infant-mortality-report.

83. A large majority of patients who obtain abortion care are low income. *See* Natl. Academies of Sciences, Eng. & Medicine, *The Safety and Quality of Abortion Care in the United States*, 6 (2018) (finding that 75 percent of people who obtain abortion care are "poor or low income").

84. Absent action from this Court, S.B. 23 will continue to drastically restrict Ohioans' access to abortion, and violate Ohioans' fundamental rights guaranteed by the Ohio Constitution.

CLAIMS FOR WRIT OF MANDAMUS

A. S.B. 23 Violates Article I, Sections 1, 16, and 21 of the Ohio Constitution, Which Protect the Fundamental Right to an Abortion.

85. Each and every allegation contained above is incorporated as if fully rewritten herein.

86. By prohibiting abortion starting as early as six weeks into pregnancy, S.B. 23 violates the Ohio Constitution's broad protections for individual liberties under Article I, Sections 1, 16, and 21.

i. The Ohio Constitution Provides Broad Protections for Individual Liberties That are Independent of the United States Constitution.

87. This Court routinely recognizes that the Ohio Constitution provides broad protections for individual rights, and that these protections are independent of the United States Constitution. *See Arnold v. Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993) ("The Ohio Constitution is a document of independent force."); *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 21 ("Federal opinions do not control [the Court's] independent analyses in interpreting the Ohio Constitution, even when [it looks] to federal precedent for guidance.").

88. The Court accordingly must interpret the Ohio Constitution's guarantees independently from their federal analogues. *See Stolz v. J & B Steel Erectors, Inc.*, 155 Ohio St.3d 567,

2018-Ohio-5088, 122 N.E.3d 1228, ¶ 42 (Fischer, J., concurring) (arguing that "[b]y treating the [state and federal Equal Protection] clauses as functionally equivalent, this court delegates its final authority to interpret the Ohio clause to the United States Supreme Court," which "is improper under our federal system and unconstitutional under the Ohio Constitution" (citing Article IV, Section 1, Ohio Constitution)).

89. Because the Ohio Constitution "accord[s] greater civil liberties and protections to individuals and groups" than its federal counterpart, *Arnold* at 42, this Court has held in numerous contexts that the Ohio Constitution is more protective than the federal constitution, including: free exercise of religion, *Humphrey v. Lane*, 89 Ohio St.3d 62, 728 N.E.2d 1039 (2000); juveniles' right to counsel, *State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156; government appropriation of private property, *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115; exclusion of physical evidence obtained due to unmirandized statements, *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985; and warrantless arrests for minor misdemeanors, *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175.

90. This Court also has made clear that it may find the Ohio Constitution provides greater protections for individual rights, even if that means departing from its prior decisions, particularly when the United States Supreme Court has narrowed the scope of corresponding federal rights. *See, e.g.*, *Humphrey*, 89 Ohio St.3d at 67, 728 N.E.2d 1039 (acknowledging the United States Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) prompted the Court to depart from prior decisions that "traditionally mirrored federal jurisprudence" and holding the Ohio Constitution's Free Exercise Clause

is broader than its federal counterpart); *see also State v. Hackett*, 164 Ohio St.3d 74, 2020-Ohio-6699, 172 N.E.3d 75, ¶ 26 (Fischer, J., concurring) (encouraging parties to "not presume that the rights afforded to a person under the United States Constitution are the only rights or are the same rights as those afforded to a person under the Ohio Constitution . . . even when this court has previously ruled that the state and federal Constitutions are coextensive"); *Bode* at ¶ 23-24.

ii. The Ohio Constitution Protects the Right to Abortion.

91. Significant textual and historical differences between the Ohio Constitution and the United States Constitution demonstrate that the Ohio Constitution's substantive due process protections are broader, and encompass the fundamental right to abortion.

(a) The Ohio Constitution's Due Course of Law Clause Protects the Substantive Due Process Right to Abortion.

92. The Ohio Constitution's Due Course of Law Clause provides:

> All courts shall be open, and every person, for an injury done him in his land, goods, *person*, or reputation, *shall have remedy by due course of law*, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

(Emphasis added.) Ohio Constitution, Article I, Section 16.

93. The Ohio Supreme Court has held that Ohio's Due Course of Law provision protects substantive as well as procedural due process rights. *See Stolz*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, ¶ 13, quoting *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 48-49.

94. Ohio courts recognize the breadth of the Ohio Constitution's substantive due process protections, finding that they extend to "matters involving privacy, procreation, bodily autonomy, and freedom of choice in health care decision making." *See, e.g.*, *Planned*

Parenthood Southwest Ohio Region v. Ohio Dept. of Health, Hamilton C.P. No. A 2101148, at 8 (Apr. 19, 2021) ("*Planned Parenthood Southwest I*", citing *Stone v. City of Stow*, 64 Ohio St.3d 156, 160-163, 593 N.E.2d 294 (1992) (referencing a right to privacy protected by the Ohio Constitution)); *see also State v. Boeddeker*, 1st Dist. Hamilton No. C-970471, 1998 WL 57234, *2 (Feb. 13, 1998) (substantive due process under the Ohio Constitution includes a right to privacy that, in the context of "sexual and reproductive matters," is "fundamental"); *Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A 2100870, at 9 (Jan. 31, 2022) ("*Planned Parenthood Southwest II*") (recognizing the "breadth of the Ohio Constitution's guarantees of bodily autonomy, privacy, and freedom of choice in health care").

95. Ohio's Due Course of Law Clause affirmatively guarantees "remedy by due course of law" to "every person, for an injury done him in his land, goods, *person*, or reputation." (Emphasis added.) Ohio Constitution, Article I, Section 16. "Deprivation of reproductive autonomy falls squarely within the meaning of an injury done to one's person under the Ohio Constitution." *Planned Parenthood Southwest I* at 10. Given the significant physical impacts and health risks of pregnancy, there can be no doubt that the forced continuation of pregnancy infringes on a woman's right to bodily integrity. *See Preterm Cleveland v. Voinovich*, 89 Ohio App.3d 684, 712, 627 N.E.2d 570 (10th Dist.1993) (Petree, J., dissenting) (noting the "tremendous demands and the innate risks of reproduction" in finding that "regulation of abortion inherently impacts on a right to bodily integrity").

(b) The Ohio Constitution's Protections of the Fundamental Right to Liberty and Health Care Freedom Reinforce the Fundamental Right to Abortion.

96. Other distinctive provisions in the Ohio Constitution, when considered together with Ohio's Due Course of Law Clause, further demonstrate that the Ohio Constitution protects the fundamental right to abortion.

97. Article I, Section 1 of the Ohio Constitution provides that "[a]ll men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

98. Ohio courts have explained that Article I, Section 1 recognizes inalienable rights that are broader than any right recognized in the United States Constitution. *See* Ohio Constitution, Article I, Section 1 ("[a]ll men . . . by nature" have certain inalienable rights, including the right to "liberty"); *Preterm Cleveland*, 89 Ohio App. 3d at 691, 627 N.E.2d 570. In *Preterm Cleveland*, the Court concluded: "In that sense, the Ohio Constitution confers greater rights than are conferred by the United States Constitution[.]" *Id.*

99. This Court has recognized that Article I, Section I encompasses Ohioans' liberty interests in "personal security, bodily integrity, and autonomy," which "are rights inherent in every individual." *Steele v. Hamilton Cty. Community Mental Health Bd.*, 90 Ohio St.3d 176, 180-181, 736 N.E.2d 10 (2000) (recognizing Ohioans' fundamental right to refuse medical treatment stemming from these "cherished liberties").

100. Given the broad scope of Ohio's liberty provisions, it is not surprising that at least one Ohio Court of Appeals has concluded that the right to abortion is protected by the Ohio Constitution. *See Preterm Cleveland*, 89 Ohio App.3d at 692, 627 N.E.2d 570. In

Preterm Cleveland, the Court of Appeals found that "[i]n light of the broad scope of 'liberty' as used in the Ohio Constitution, it would seem almost axiomatic that the right of a woman to choose whether to bear a child is a liberty within the constitutional protection." *Id.* at 691.

101. Article I, Sections 1 and 16 must also be read in light of Article I, Section 21 of the Ohio Constitution—the Health Care Freedom Amendment—which has no analogue in the United States Constitution. The Amendment, enacted in 2011 with overwhelming two-to-one support from Ohio voters, "[p]reserv[es] [Ohioans'] freedom to choose health care and health care coverage" for Ohioans. It expressly provides for the protection of individual autonomy in medical decision-making. When read together with the provisions discussed above, the Health Care Freedom Amendment further bolsters the Ohio Constitution's strong emphasis on protection of liberty and personal autonomy, and reinforces that these protections extend to Ohioans' right to make decisions about their own bodies—including the fundamental right to make a decision as private and central to a person's bodily integrity as the decision to have an abortion.

(c) The State's Long History of Valuing Individual Liberties and Rejecting Governmental Intrusion into Personal Decisions Supports Interpreting the Constitution to Protect the Right to Abortion.

102. The history of the Ohio Constitution makes clear that individual liberties and limits on legislative power are core values at the heart of the Constitution, reinforcing that the text should be interpreted to protect the right to abortion.

103. Ohio's first Constitution, adopted in 1802, was "designed to protect individual rights" through "[b]oth the structure of the new government and the inclusion of a Bill of Rights." Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution*, 21

(2011). The 1851 Constitution reinforced this commitment to individual rights by placing limits on the legislature's power and reordering the document to emphasize the importance of such rights. Whereas the Bill of Rights was the final article in the 1802 Constitution, the drafters of the 1851 Constitution moved the Bill of Rights to Article I, emphasizing that individual liberties stood at the forefront of Ohio's governmental principles. *See id.* at 81.

104. When the Ohio Constitution was adopted, abortion was a common and widely accepted practice in Ohio, particularly up to the point of quickening. *See* James C. Mohr*, Abortion in America: The Origins and Evolution of National Policy*, 206-08 (1978) (discussing the findings in a report by a special committee of the Ohio legislature); Loren G. Stern, *Abortion: Reform and the Law*, 59 J. Criminal L. & Criminology 84-85, 84 n.1 (1968) (defining quickening as "that stage of gestation, usually sixteen to twenty weeks after conception, when the woman feels the first fetal movement"). The prevalence of abortion in Ohio continued even after legislation was passed in 1834 that made providing an abortion before quickening a misdemeanor and abortion after quickening a "high misdemeanor." *See* Stern, *supra*, at 84 fn.1; Mohr, *supra*, at 206-208. Moreover, these regulations targeted physicians and unlicensed abortion providers and were an apparent response to the very serious health risks associated with abortion at the time. Thus, they provide no insight into the contours of the Ohio Constitution's liberty protections at the time of adoption or today. *See, e.g. Steinberg v. Brown*, 321 F.Supp. 741, 750, 753 (N.D.Ohio 1970) (Green, J., dissenting).

105. In keeping with Ohio's robust tradition of recognizing independent constitutional protections for individual rights and autonomy, this Court should join the many others

that have found state constitutional protections for abortion that are independent of any provision of the United StatesConstitution. *See, e.g.*, *Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 27 (Minn.1995) (holding that the "right of privacy under the Minnesota constitution," which is grounded in "protecting the integrity of one's own body" and "protects only fundamental rights," "encompasses a woman's right to decide to terminate her pregnancy"); *Hodes & Nauser*, *MDs, P.A. v. Schmidt*, 309 Kan. 610, 646, 440 P.3d 461 (2019) (holding the right to decide whether to continue a pregnancy falls under the right to personal autonomy guaranteed by the Kansas Constitution); *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 653, 654 (Miss.1998) (concluding the Mississippi Constitution's right to privacy encompasses the right to choose whether or not to have an abortion); *Right to Choose v. Byrne*, 91 N.J. 287, 303, 306, 450 A.2d 925 (1982) (holding the New Jersey Constitution protects the fundamental right to choose whether to have an abortion); *Armstrong v. State*, 989 P.2d 364, 377 (Mont.1999) (holding procreative autonomy is a fundamental right of individual privacy under the Montana Constitution); *Valley Hosp. Assn, Inc. v. Mat-Su Coalition For Choice*, 948 P.2d 963, 969 (Alaska 1997) (holding Alaska's express constitutional privacy provision encompasses reproductive rights); *In re T.W.*, 551 So.2d 1186, 1193 (Fla.1989) (holding that the Florida constitutional right to privacy encompasses a woman's right to terminate pregnancy); *Commt. to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 279, 172 Cal.Rptr. 866, 625 P.2d 779 (1981) (recognizing the right to procreative choice falls under the California constitutional right to privacy).

B. S.B. 23 Violates the Fundamental Right to an Abortion.

106. S.B. 23 bans abortions at approximately six weeks LMP—which is so early in pregnancy that many women do not even know they are pregnant. S.B. 23 imposes criminal

penalties on doctors who provide abortions, even though abortion rights are constitutionally protected. Thus, women cannot exercise their fundamental right under the Ohio Constitution to obtain an abortion

107. Laws implicating fundamental rights are subject to strict scrutiny and are permissible only if they are narrowly tailored to serve a compelling state interest. *See Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 155.

108. Most state courts that have found a right to abortion under their state's constitution have applied strict scrutiny to laws restricting abortion access. *See, e.g.*, *Valley Hosp. Assn.*, 948 P.2d at 969, 971 (finding no "compelling state interest" where policy generally prohibiting elective abortions was solely a matter of conscience); *Commt. to Defend Reproductive Rights*, 625 P.2d at 784, 793, 797 (finding state's interest in protecting a fetus is not compelling enough to justify impairment of "fundamental constitutional right to choose whether or not to bear a child"). This Court should do the same.

i. S.B. 23 Fails Strict Scrutiny.

109. To survive strict scrutiny, a law must be "narrowly tailored to serve a compelling state interest." *See, e.g., Rowitz v. McClain*, 2019-Ohio-5438, 138 N.E.3d 1241, ¶ 19 (10th Dist.). Strict scrutiny places a "heavy" burden of proof on the state. *Crowe v. Owens Corning Fiberglas*, 8th Dist. Cuyahoga No. 73206, 1998 WL 767622, *4 (Oct. 29, 1998), *aff'd*, 87 Ohio St.3d 204, 718 N.E.2d 923 (Mem) (1999).

110. The State cannot meet its burden here. Neither of the purported interests asserted in the text of the legislation—an "interest in protecting the health of the woman" and an interest in protecting fetal life—are sufficiently compelling to justify banning Ohioans from exercising their fundamental right to abortion starting as early as five or six weeks. *See* S.B. 23, Section 3(G); *see also* Ohio Legislative Service Commission Bill Analysis, S.B.

23, at 7; Resp. to Mot. for Prelim. Inj., Dkt. #17, No. 1:19-cv-00360 (MRB) (S.D.Ohio) at 3, 8 (asserting S.B. 23 advances the state's interests in protecting the health of the woman and fetal life); Resp. to Mot. for J. on the Pleadings & Prelim. Inj., Dkt. #35, No. 1:19-cv-00360 (MRB) (S.D.Ohio) at 3, 13-14 (same).

111. First, banning access to abortion, a safe and common medical procedure, does nothing to protect women's health. As explained above, abortion is an extremely safe and common medical procedure, and denying women access to abortion actually *harms* women's health. *See supra* ¶¶ 69-84. In other words, regardless of the weight accorded the State's interest in protecting the health of the woman, the State simply cannot show that a ban on abortion starting as early as six weeks actually advances that interest in any way—to the contrary, it undermines the interest.

112. Second, the State does not have a compelling interest in protecting fetal life as early as five or six weeks LMP. The State bears the "heavy burden" of showing that its interest is compelling under strict scrutiny review, *In re Judicial Campaign Complaint Against O'Toole,* 141 Ohio St.3d 355, 2014-Ohio-4046, 24 N.E.3d 1114, ¶ 20, and numerous state courts—including courts in Ohio—have recognized that the state's interest in protecting fetal life is weaker earlier in pregnancy. *See, e.g.*, *In re T.W.*, 551 So.2d at 1193 (recognizing that under the Florida Constitution the state's interest in "the potentiality of life in the fetus" is less compelling early in pregnancy); *Commt. to Defend Reproductive Rights*, 625 P.2d at 795 ("[D]uring the first two trimesters of pregnancy, when the fetus is not viable, the state's interest in protecting the fetus is not of compelling character"); *see also Preterm Cleveland*, 89 Ohio App.3d at 692, 627 N.E.2d 570 (analyzing legislation regarding abortion under the Ohio Constitution and concluding that

any state interest in protecting fetal life is not equally compelling at all points in pregnancy).[4] The State cannot justify a prohibition so early in the pregnancy, and certainly cannot establish that it is compelling.

113. Moreover, here, "the state is not merely proposing to protect a fetus from general harm, but rather is asserting an interest in protecting a fetus vis-a-vis the woman of whom the fetus is an integral part," and—as such—its interest "clashes head-on with the woman's own fundamental right of procreative choice." *Commt. to Defend Reproductive Rights*, 625 P.2d at 795. Put another way, an interest in protecting fetal life starting before many women *even know* they are pregnant is the functional equivalent of an interest in preventing nearly *all* abortion, and thus an interest in stripping the vast majority of women of their fundamental right to choose. Such a sweeping, all-consuming interest is not sufficient to satisfy the first prong of a rigorous test intended *to protect* a woman's fundamental right to make her own decisions about her body, her health, and her future. Indeed, were the State's interest in fetal life considered "compelling" starting as early as six weeks in pregnancy, the exception contemplated by strict scrutiny—that laws impinging on fundamental rights are permissible *only* where they are narrowly tailored to serve a compelling government interest—would risk swallowing the rule, and, with it, the right to abortion itself.

114. Even if the State's asserted interests were compelling, an outright *ban* on abortion beginning at six weeks LMP is not narrowly tailored and thus cannot survive strict scrutiny. Narrow tailoring requires the government to adopt "the *least* restrictive means

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[4] Early abortion law in Ohio also adhered to this pattern, reflecting the widespread recognition—even in the mid-19th century—that the state's interest in protecting fetal life is weakest early in pregnancy. *See supra* ¶ 104.

of achieving the [state's] compelling interest." (Emphasis added.) *Bartell v. Lohiser*, 215 F.3d 550, 558 (6th Cir.2000); *see also Crowe*, 8th Dist. Cuyahoga No. 73206, 1998 WL 767622, *5 (finding that a statute did not withstand strict scrutiny where it was not "the least restrictive alternative necessary to effectuate the asserted goal of the legislation").

115. S.B. 23 is *highly* restrictive—barring access to abortions almost entirely. But there are numerous alternative and less restrictive means to advance the State's asserted interests. For example, the State could provide pregnant women with access to regular reproductive and prenatal health care, promote prenatal care by expanding access to medical insurance, and/or provide financial assistance for prenatal vitamins and nutritious meals. Such measures would do far more to advance the health of pregnant women without depriving them of a fundamental right. *See* Emily E. Petersen et al., *Vital Signs: Pregnancy-Related Deaths, United States, 2011–2015, and Strategies for Prevention, 13 States, 2013–2017*, 68 Morbidity & Mortality Weekly Report 423-429 (May 10, 2019) (finding that frequent prenatal care can reduce maternal deaths by up to 60 percent). Similarly, were the State to assist pregnant women and new parents in shouldering the costs of pregnancy, birth, and childcare, through better access to prenatal care, protections in the workplace, and better health care coverage, it could improve outcomes for pregnancy and parenthood, and thus further an interest in protecting fetal life—and the lives of children and their parents—without infringing on Ohioans' fundamental rights.

116. Accordingly, S.B. 23 fails strict scrutiny.

C. S.B. 23 Violates the Ohio Constitution's Equal Protection Guarantee.

i. Ohio's Equal Protection and Benefit Clause Provides Expansive Protection for Individual Rights.

117. The Ohio Constitution's Equal Protection Clause is expansive. It provides:

> "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly."

Ohio Constitution, Article 1, Section 2.

118. The broad language of Ohio's Equal Protection and Benefit Clause reflects an intentional decision to guarantee citizens more protection against government overreach than contemporaneous constitutions of other states and is more protective of individual rights on its face than the federal Equal Protection Clause it predates. *Compare* Ohio Constitution Article 1, Section 2 ("Government is instituted for [the people's] equal protection and benefit[.]" (Emphasis added.)) *with* Fourteenth Amendment to the United States Constitution, Section 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

119. Opinions of this Court are in accord, holding that the Ohio Equal Protection and Benefit Clause provides greater protections than the federal Constitution. In *State v. Mole*, for example, this Court found that "the guarantees of equal protection in the Ohio Constitution independently forbid" certain conduct, exclusive of federal Constitutional protections. 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 23. This Court reaffirmed that principle soon afterward, holding that "the Equal Protection Clause of the Ohio Constitution is coextensive with, or stronger than, that of the federal Constitution." *State v. Noling*, 149 Ohio St.3d 327, 2016-Ohio-8252, 75 N.E.3d 141, ¶ 11.

120. More recent opinions have continued to distinguish the Equal Protection and Benefit Clause from its federal counterpart, concluding that "the language of the equal-protection provision of the Ohio Constitution differs significantly from the language of the Equal Protection Clause of the Fourteenth Amendment." *Sherman v. Ohio Pub. Emps. Retirement Sys.*, 163 Ohio St.3d 258, 2020-Ohio-4960, 169 N.E.3d 602, ¶ 34 (Fischer, J., concurring); *see also id.* at ¶ 40 (DeWine, J., dissenting) ("The language of this provision differs in significant respects from the language of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and the two clauses have unique histories."). Indeed, earlier this year, a member of this Court reaffirmed that Ohio's Equal Protection and Benefit Clause is "broader than the language of the Fourteenth Amendment." *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 2022-Ohio-65, 2022 WL 110261, ¶ 151 (Brunner, J., concurring).

ii. S.B. 23 Is Subject To, And Fails, Strict Scrutiny Because It Discriminates Against Women, A Suspect Class.

121. The Ohio Constitution subjects laws that discriminate against suspect classes to strict scrutiny. *See Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 64 ("When legislation infringes upon . . . the rights of a suspect class, strict scrutiny applies.").

122. A suspect class is "one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 33 (cleaned up).

123. Because women have historically experienced the "purposeful unequal treatment" and relegation to "a position of political powerlessness" that defines suspect classes, *see id.*,

this Court has long recognized that sex or gender can constitute a suspect class, *see, e.g.*, *Adamsky v. Buckeye Loc. Sch. Dist.*, 73 Ohio St.3d 360, 362, 653 N.E.2d 212 (1995) ("[A] suspect class . . . has been traditionally defined as one involving race, national origin, religion, or *sex*." (Emphasis added.))

124. S.B. 23 expressly targets "pregnant *wom[e]n*." (Emphasis added.) *See, e.g.*, S.B. 23, Section 1, amending R.C. 2919.192(A) (requiring "[a] person who intends to perform or induce an abortion on a pregnant woman" to determine "whether there is a detectable fetal heartbeat"); *id.*, Section 3(H) (asserting that "the pregnant woman" has a purported "valid interest in knowing the likelihood of the fetus surviving to full-term birth based upon the presence of cardiac activity"). It "is a provision regulating abortion services conducted on women." *Preterm Cleveland*, 89 Ohio App. 3d at 714, 627 N.E.2d 570 (Petree, J., concurring in part).

125. The "express terms of [the] statute" thus target a suspect class and warrant strict scrutiny. *Garner v. City of Cuyahoga Falls*, N.D.Ohio No. 5:07CV2099, 2008 WL 11377807, *7 (Jan. 29, 2008), *aff'd*, 311 F.App'x 896 (6th Cir.2009), quoting *Sioux City Bridge Co. v. Dakota Cty.*, 260 U.S. 441, 445, 43 S.Ct. 190, 67 L.Ed. 340 (1923).

126. S.B. 23 also discriminates against women by subordinating them to men based on antiquated stereotypes regarding women's roles as child-bearers and caregivers. The justification given in the text of S.B. 23—that severely restricting abortion "protect[s] the health of the pregnant woman," *see* S.B. 23, Section 3—is not only not true, but is inextricably intertwined with archaic nineteenth century justifications regarding the proper role of women as child-bearers and homemakers. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal*

Protection, 44 Stan.L.Rev. 261, 280–323 (1992) (recounting how nineteenth-century doctors argued that banning abortion would protect fetal life, protect a woman's health, enforce wives' marital duties, and control the relative birthrates of "native" and immigrant populations, in order to preserve the demographic character of the nation).

127. The notion that S.B. 23 "protects" women rests on outdated sex-role stereotypes and erroneous medical claims, in line with those promoted by nineteenth century physicians who claimed that abortion would "insidiously undermine[]" women's reproductive organs, and "permanently incapacitate[] [women] for conception." *See* Horatio Storer, *Why Not? A book for Every Woman* (1866) available at https://www.gutenberg.org/files/65701/65701-h/65701-h.htm.

128. S.B. 23 also imposes an impermissible classification on the basis of sex by discriminating against "pregnant" women. The United States Supreme Court has made clear that certain laws regulating pregnancy are sex-based classifications that violate the federal Equal Protection Clause if, as here, they are rooted in subordinating sex-role stereotypes. *See United States v. Virginia*, 518 U.S. 515, 534, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (holding that sex "classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women") (Citation omitted.); *see also Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 736, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (holding that pregnancy-based regulations anchored in subordinating stereotypes about gender roles can violate the federal Equal Protection Clause). This Court should apply, at minimum, the conclusion compelled by *Virginia, Hibbs*, and common sense: that laws regulating pregnancy are sex-based classifications that will violate the Equal Protection Clause unless they satisfy strict scrutiny analysis.

129. S.B. 23 also discriminates against *pregnant* women by subjecting them to impermissible, antiquated, and subordinating stereotypes about women and the roles pregnant women play in modern society. S.B. 23 firmly places pregnant women, and eventually mothers, in the home, raising children, and excludes them from spheres of life that are considered more "masculine," like the workplace, in violation of the Equal Protection and Benefit Clause.

130. For the reasons discussed above, S.B. 23 fails strict scrutiny. The State can identify no compelling interest served by the law, nor demonstrate that the statute is narrowly tailored to further any purported compelling interest. *See supra* ¶¶ 109-116.

iii. S.B. 23 Cannot Survive Intermediate Scrutiny.

131. As discussed above, the constitutional text dictates, and a long line of cases hold, that classifications based on sex and gender are subject to strict scrutiny. But even if this Court were to apply a lesser tier of scrutiny, the writ should still issue. At a minimum, laws that restrict reproductive freedom have clear ramifications for gender equality and trigger intermediate scrutiny. *See Preterm Cleveland*, 89 Ohio App. at 714, 627 N.E.2d 570 (Petree, J., concurring in part) ("Given the substantial impact on the female gender of laws regulating reproduction, the aforementioned serious concerns about control over bodily integrity implicit in our constitutional order, and the profound and pragmatic reality of such laws in application to the female gender, it is only fair that such laws be subjected to intermediate level scrutiny by Ohio courts.").

132. Intermediate scrutiny requires that "the classification be substantially related to an important governmental objective." *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, ¶ 13. In other words, the law in question must be sufficiently

tailored to the state's interest. *See, e.g.*, *City of Cleveland v. McCardle*, 139 Ohio St.3d 414, 2014-Ohio-2140, 12 N.E.3d 1169, ¶ 13, 21.

133. For all the reasons discussed above, S.B. 23 is not substantially related to any important governmental objective. As an initial matter, S.B. 23 bears no relation to the purported interest of protecting pregnant women. A law that so clearly fails to advance a purported interest—and moreover, relies on the "baggage of sexual stereotypes" as described above—is not "substantially related" to that interest. *See Cintron v. Nader*, 8th Dist. Cuyahoga No. 39564, 1980 WL 354341, *7 (June 26, 1980) (gender classification was not substantially related to any "important" goals in part because it relied on "the baggage of sexual stereotypes"); *Crawford Cty. Child Support Enforcement Agency v. Sprague*, 3rd Dist. No. 3-97-13, 1997 WL 746770, *4 (Dec. 5, 1997) (statute that undermined the State's purported interest was not substantially related to that interest).

134. Further, the State's claimed interest in protecting fetal life at six weeks is not a sufficiently "important government objective." As described above, *see supra* ¶¶ 112-113, a generalized interest in protecting "fetal life" is not sufficient, and in any case, state and federal courts have consistently held that the State's interest in protecting fetal life is weaker earlier in pregnancy. Under intermediate scrutiny review, when a law places a significant burden on a constitutional right—as S.B. 23 does—the State has an increased burden to demonstrate the importance of its interest. *See State v. Wheatley*, 2018-Ohio-464, 94 N.E.3d 578, ¶ 16 (4th Dist.), quoting *Tyler v. Hillsdale Cty. Sheriff's Dept.*, 837 F.3d 678, 686 (6th Cir. 2016) ("[T]he government bears the burden of justifying the constitutionality of the law under a heightened form of scrutiny[.]"). The State cannot meet that burden here.

135. Finally, S.B. 23 is not substantially related to the State's claimed interest in protecting fetal life. An interest in protecting fetal life could be advanced in any number of ways, most significantly by *increasing* access to medical care rather than restricting it. Those alternatives only underscore that S.B. 23 cannot withstand intermediate scrutiny.

PRAYER FOR RELIEF

WHEREFORE, Relators respectfully pray the Court to grant the following relief:

i. Issue an immediate stay of enforcement of S.B. 23 while the merits of Relators' Verified Complaint are pending;

ii. Issue an Order, Judgment, and/or Writ from this Court declaring S.B. 23 unconstitutional;

iii. Issue a Peremptory Writ of Mandamus directing Respondents to abide by Ohio's preexisting gestational age restriction (R.C. 2919.201) and not enforce S.B. 23;

iv. If the Court does not issue a Peremptory Writ, issue an Alternative Writ directing Respondents to abide by Ohio's preexisting gestational age restriction (R.C. 2919.201) and not enforce S.B. 23, with an expedited briefing schedule if the Court denies Relators' motion to stay enforcement of S.B. 23 while the merits of Relators' Verified Complaint are pending;

v. Assess the costs of this action against Respondents; and

vi. Award such other relief as may be appropriate.

Respectfully submitted,

/s/ B. Jessie Hill

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IN THE SUPREME COURT OF OHIO

STATE ex rel. PRETERM-CLEVELAND, *et al.*,	:	
	:	
Relators,	:	
	:	Case No.____________
v.	:	
	:	Original Action in Mandamus
DAVID YOST, Ohio Attorney General, *et al.*,	:	
	:	
Respondents.	:	
	:	
	:	
	:	

AFFIDAVIT OF DR. SHARON LINER IN SUPPORT OF RELATORS' VERIFIED COMPLAINT IN ORIGINAL ACTION FOR PEREMPTORY AND/OR WRIT OF MANDAMUS

I, Dr. Sharon Liner, a relator in this action, having been duly sworn and cautioned according to law, hereby state that I am over the age of eighteen years and am competent to testify as to the facts set forth below based on my personal knowledge:

1. I am a medical doctor, licensed in the state of Ohio and specializing in family medicine. I am employed by Planned Parenthood Southwest Ohio Region.
2. I have read the foregoing Complaint and have personal knowledge of the allegations and facts within it. Based on my personal knowledge, the facts contained in the Complaint are true.

The undersigned hereby affirms that the statements made in the foregoing affidavit are true, under penalty of perjury.

Sharon Liner, M.D.
Planned Parenthood of Southwest Ohio

State of Florida
County of Lee

Sworn to and subscribed before me this 28th day of June, 2022.

Dixie L Hackworth

Notary Public

Dixie L. Hackworth, Remote Online Notary

Signer(s) Sharon Liner,produced, Ohio DL,as identification, along with multi-factory KBA authentication and was notarized online using audio/video recording.