In the
Supreme Court of Ohio

State ex rel. Preterm-Cleveland, et al., *Relators,* **v.** **David Yost, et al.,** *Respondents.*	**Case No. 2022-0803** **Original Action in Mandamus**

RELATORS' MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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In the five weeks since Senate Bill 23 ("S.B. 23") went into effect, it has imposed profound, life-altering harms on pregnant Ohioans and violated their fundamental rights to liberty, privacy, and equal protection secured by the Ohio Constitution. By banning abortion starting at a point before many people even know they are pregnant, S.B. 23 has already forced numerous Ohioans to continue pregnancies against their will. Some have suffered personally and financially in attempting to travel hundreds of miles out of state to access abortion care. Many others are unable to do so. Instead, they are being forced either to attempt to terminate their pregnancies outside the medical system, or carry to term and give birth at risk to their physical, mental, and emotional well-being. These harms are grave and irreparable and will continue absent intervention from this Court.

Respondents ignore these egregious harms in their Motion to Dismiss. Instead, they rely on sophistry to contend that this Court lacks subject-matter jurisdiction for three reasons, none of which have any merit. *First,* Respondents incorrectly recast Relators' requested relief as seeking a prohibitory injunction and declaratory judgment, when Relators explicitly seek a writ of mandamus to compel Respondents to abide by their legal duty to uphold the Ohio Constitution and abide by Ohio's preexisting gestational age restriction. *Second,* Respondents incorrectly contend that Relators seek to create a "novel" rule for constitutional challenges, ignoring decades of precedent firmly establishing that a constitutional challenge may be brought as a writ of mandamus when relators seek to compel public officials to act, as Relators do here. *Third*, Respondents repurpose their first argument to claim that the Court's mandamus jurisdiction does not extend to the relief sought by the Relators. But this argument fails because Relators clearly have satisfied the requirements for a writ of mandamus, as detailed in their Complaint and supporting papers.

Respondents rely on these meritless contentions while ignoring the devastating consequences S.B. 23 has inflicted on Ohioans in the short time it has been in effect—extraordinary harms that demand extraordinary relief that only this Court can provide. For these reasons, this Court should deny Respondents' Motion to Dismiss, reach the merits of Relators' Complaint, and halt the ongoing infringement of Ohioans' fundamental rights.

I. Relators Seek a Writ of Mandamus To Compel Action To Remedy Past and Ongoing Injuries.

Respondents contend that Relators actually seek a prohibitory injunction and declaratory judgment, rather than a writ of mandamus. *See* Respondents' Motion to Dismiss ("MTD") at 5-6. Not so. Relators seek a writ of mandamus directing Respondents to perform their duty to uphold the Ohio Constitution and "to abide by Ohio's preexisting gestational age restriction (R.C. 2919.201) and not enforce S.B. 23," in addition to a declaration that S.B. 23 is unconstitutional. Verified Complaint ¶ 18. A writ of mandamus is appropriate for a request to compel "respondent[s] to abide by a former statute." *See State ex rel. Zupancic v. Limbach*, 58 Ohio St.3d 130, 133, 568 N.E.2d 1206 (1991). Respondents' selective use of ellipses to mischaracterize Relators' request as a "writ of mandamus 'directing Respondents to … not enforce S.B. 23,'" MTD 5-6, does not change the fact that Relators' request to compel Respondents to uphold the Ohio Constitution and to comply with Ohio's preexisting gestational age limit is at the heart of Relators' request before the Court.

A. A Request Compelling Official Action is Appropriate for a Writ of Mandamus.

The scope of this Court's subject-matter jurisdiction depends on the nature of the action and the "fundamental nature of the relief sought." *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

("*Ethics First*"). As this Court has held: "[I]f [an action] seeks to *compel* action, then the court does have jurisdiction to provide relief in mandamus…The fact that adjudicating the case requires the court also to prohibit the official from acting under the current version of the statute is 'only ancillary' and does not alter the fundamental nature of the relief sought." *Id.* at ¶¶ 10-11, quoting *Zupancic*, 58 Ohio St.3d at 133, 568 N.E.2d 1206.

Relators' Complaint plainly asks the Court to "compel action," *id*., and so Respondents attempt to rewrite the holding and applicability of *Ethics First* by incorrectly suggesting it is narrow with limited applicability. *See* MTD at 7-8. But the import of *Ethics First*, which follows a long line of this Court's precedent, is clear: "What distinguishes a proper mandamus complaint from an improper one is … whether the complaint seeks to prevent or compel official action.… This distinction is critical: a prohibitory injunction qualifies as an alternative remedy at law that will defeat a request for mandamus, but a mandatory injunction does not." *Id.* at ¶ 10. When, as here, Relators seek a mandatory injunction—compelling Respondents to act to uphold the Ohio Constitution and comply with a preexisting statute—mandamus is proper.

B. Ongoing and Past Harms May be Remedied Through a Writ of Mandamus.

The nature of the injuries Relators ask this Court to remedy defeats Respondents' claim that the writ sought is prohibitory. As this Court has explained, "the difference between a request for a writ of mandamus in the nature of a mandatory injunction (over which th[e] court has original jurisdiction) and a request for a writ of mandamus in the nature of a prohibitory injunction (over which it does not) is temporal. [A request for a prohibitory injunction] attempt[s] to prevent an injury *that has not yet occurred*." (Emphasis added.) *State ex rel. Gadell-Newton v. Husted*, 153 Ohio St.3d 225, 2018-Ohio-1854, 103 N.E.3d 809, ¶ 13. Here, a mandatory injunction lies and mandamus is appropriate because Relators ask the Court to

remedy concrete past, present, and ongoing injuries to Ohioans' fundamental right to abortion—not future, conjectural injuries. *See* Mem. in Supp. of Relators' Verified Compl. for Writ of Mandamus ("Mandamus Brief") 4-8.

Respondents misconstrue this Court's precedent in analogizing this case to *Gadell-Newton*, MTD at 7, in which there was "no evidence or allegation" that the harm at issue—the deletion of digital ballot images by election boards—had yet occurred. *Gadell-Newton*, 153 Ohio St.3d 225, 2018-Ohio-1854, 103 N.E.3d 809, ¶ 12. There, the Court concluded it did not have jurisdiction because relators failed to allege any present harm, only future harm, and that relators thus sought a prohibitory injunction. *Id*. Here, in contrast, the harm is already occurring—each day that S.B. 23 is in effect, Relators must turn away pregnant women[1] seeking to access abortion care, forcing them to incur devastating physical, emotional, and economic consequences.

There is nothing conjectural or prospective about these harms. *See* Abigail Norris Turner, et al., *Who Loses Access to Legal Abortion With a 6-Week Ban?*, Am. Journal of Obstetrics & Gynecology (June 25, 2022), available at https://www.ajog.org/article/S0002-9378(22)00486-0/fulltext (accessed Aug. 1, 2022) (finding that 89 percent of Ohioans who obtained an abortion under the preexisting gestational limit did so after six weeks LMP); *see also* Mandamus Brief at 4-6 (describing the many obstacles preventing women in Ohio from obtaining an abortion before six weeks LMP, including that they may not find out that they are pregnant by that time, may not have sufficient time to decide to end their pregnancy and make the necessary arrangements, may not be able to access the resources necessary to promptly

[1] Relators 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 are currently being harmed by S.B. 23.

obtain abortion care, and may not be able to navigate Ohio's existing abortion regulations); *supra* Section IV. Women who had access to abortion care under Ohio's prior gestational age restriction have—since S.B. 23 took effect—been denied their fundamental rights under the Ohio Constitution. Compelling Respondents to abide by the Ohio Constitution and enforce the preexisting gestational age limit instead of enforcing S.B. 23 would remedy the harm inflicted by S.B. 23 by restoring women's right to access abortion care up to 22 weeks LMP. *Compare* R.C. 2919.201 (banning abortion at 22 weeks LMP) *with* Verified Complaint ¶ 3 (noting S.B. 23 bans abortion after detection of embryonic cardiac activity which occurs at approximately six weeks LMP). Indeed, if the Court were to act today, women who were denied abortions over the last several weeks—and who otherwise would be forced either to incur significant hardship to travel outside the state to obtain an abortion or to carry a pregnancy against her will—could obtain in-state care tomorrow.

None of this Court's cases cited by Respondents involved requests to address ongoing harm inflicted by the State, *see* MTD at 6-12, and thus they are inapposite. For example, Respondents cite *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Ohio Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, 844 N.E.2d 335, but fail to note that in that case, the relator "did not allege any specific claim by it or any of its members that they had been harmed by the enactment of the present versions [of the challenged statutes]." *United Auto.*, 108 Ohio St.3d 432, 2006-Ohio-1327, 844 N.E.2d 335, ¶ 19. Likewise, Respondents cite to the concurrence in *State ex rel. Ohio Stands Up!, Inc. v. DeWine*, 2021-Ohio-4382 (Kennedy, J., concurring in judgment only), *see* MTD at 12, but that action was dismissed due to relator's "fail[ure] to establish that it [had] standing to seek a writ of prohibition or writ of mandamus in th[e] original action." *Ohio Stands Up!, Inc.*, 2021-Ohio-4382 at ¶ 10.

That granting Relators' writ of mandamus *also* will prevent future injuries does not transform the Complaint into a request for a prohibitory injunction. *See, e.g.*, *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.* ("*Workers' Compensation*"), 97 Ohio St.3d 504, 2002-Ohio-6717, 780 N.E.2d 981, ¶ 12 (granting a writ of mandamus to find a law permitting warrantless drug testing of workers unconstitutional, therefore preventing future drug testing).[2] Respondents' contention that *Workers' Compensation* did not include "any discussion of original jurisdiction" is simply incorrect. *See* MTD at 11. In addressing relators' public rights standing (which is not in dispute here), the *Workers' Compensation* Court set forth the circumstances in which it will exercise its mandamus jurisdiction. 97 Ohio St.3d 504, 2002-Ohio-6717, 780 N.E.2d 981, ¶¶ 10-12. Specifically, the Court made clear that writs of mandamus may be used to "determine the constitutionality of statutes" in "extraordinary" and "exceptional circumstances that demand early resolution." *Id.* at ¶ 12; *see also* Respondents' Brief, *Workers' Compensation*, No. 2001-0642, 2001 WL 34552267, at *1 (Oct. 9, 2001) (arguing that a writ of mandamus is inappropriate when there is an adequate remedy at law). Relators' claims clearly fit within the contours of the Court's original jurisdiction in light of the extraordinary and exceptional circumstances presented by S.B. 23's ongoing enforcement. *See infra* Sections II, IV.

Respondents' argument that the present case differs from *Zupancic* also fails. In *Zupancic*, mandamus was appropriate because the respondent had to act by apportioning public utility property values. 58 Ohio St.3d at 131, 568 N.E.2d 1206. Likewise, here Respondents

[2] *State ex rel. Esarco v. Youngstown City Council*, 116 Ohio St.3d 131, 2007-Ohio-5699, 876 N.E.2d 953, ¶ 10, upon which Respondents rely in support of their argument that Relators seek a prohibitory injunction, MTD at 5, is not to the contrary. In *Esarco*, this Court recognized that a request for a writ of mandamus is proper where, as here, Relators seek to "compel" action from Respondents. *Id.* at ¶ 13. The Court found that relators' mandamus claim in that case had not met the requirements of a mandamus claim due to procedural deficiencies in their Complaint—namely that the verification failed the "personal-knowledge requirement." *Id.* at ¶¶ 13-16.

will *have* to act to uphold the Ohio Constitution and enforce Ohio's prior gestational age restriction if the writ is granted, *see* Verified Complaint ¶¶ 20, 59. Ohio's prior gestational age restriction was enforced by Respondent Attorney General and the county prosecutor respondents against providers who violated the law; Respondent Director of the Ohio Department of Health and the Secretary and Supervising Members of the State Medical Board of Ohio Respondents enforced the restriction through revoking physicians' medical licenses in response to violations. R.C. 2919.201.[3]

Finally, Respondents' contention that compliance with S.B. 23 would be "consistent" with Ohio's preexisting abortion laws, because a ban at six weeks necessarily encompasses a ban at 22 weeks, is similarly misguided. MTD at 9-10. Legislation constitutes not only a floor but a ceiling on prosecutorial enforcement. Ohio's preexisting gestational age restriction *permits* abortion before 22 weeks LMP. Respondents' enforcement of a ban on abortion after six weeks LMP is not "consistent" with Ohio's prior regulatory scheme. S.B. 23 creates a sweeping new prohibition, subject to criminal prosecution, where one did not previously exist: outlawing the provision of abortions between 6 and 22 weeks LMP.

Respondents claim that Relators' request that the Court declare S.B. 23 unconstitutional transforms their request into one that divests this Court of original jurisdiction. MTD at 5-6, 11-12. That is incorrect. A mandamus action may be—and often *must* be—accompanied by a

[3] Respondents also cite to non-binding appellate court decisions in an attempt to cabin *Zupancic*. *See* MTD at 10-11 (citing *State ex rel. Ohio Apt. Assn. v. Wilkins*, 2006-Ohio-6783 ¶¶ 10, 11 (10th Dist.) and *State ex rel. Internatl. Heat & Frost Insulators & Asbestos Workers Local # 3 v. Court of Common Pleas of Cuyahoga Cty.*, 2006-Ohio-274 ¶ 9 (8th Dist.)). Those decisions have little bearing on the contours of this Court's mandamus jurisdiction. Moreover, Respondents fail to acknowledge that in *Wilkins*, the Court of Appeals concluded that mandamus is appropriate in cases where there is "the need for speedy relief," as there undoubtedly is here. 2006-Ohio-6783 ¶¶ 10, 11 (10th Dist.); *see infra* Section IV.

request for a declaratory judgment, which does not preclude mandamus jurisdiction. *See Ethics First*, 147 Ohio St.3d 373, 2016-Ohio-3144, 66 N.E.3d 689, ¶ 10 ("What distinguishes a proper mandamus complaint from an improper one is *not* whether the relator is seeking declaratory judgment as part of the complaint but whether the complaint seeks to prevent or compel official action."); *see also State ex rel. Kingsley v. State Emp. Relations Bd.*, 2011-Ohio-428, ¶ 13 (10th Dist.), *aff'd*, 130 Ohio St.3d 333, 2011-Ohio-5519, 958 N.E.2d 169 ("[T]he availability of a declaratory judgment action [in the lower court] does not provide a basis for precluding relator's mandamus action."); *Zupancic*, 58 Ohio St.3d at 133, 568 N.E.2d 1206 ("In exercising our original jurisdiction we will necessarily have to address the constitutionality of R.C. 5727.15(C) and decide whether to prevent respondent from carrying out the task required under the present apportionment statute; however, these decisions are only ancillary to our consideration of the writ itself on the merits."). Respondents' own cases recognize as much.

In short, Relators seek an affirmative order compelling action by Respondents— namely, to abide by their duty to uphold the Ohio Constitution and abide by the preexisting 22 week gestational age limit—and an accompanying declaration that S.B. 23 is unconstitutional. This writ falls squarely within the Court's original jurisdiction.

II. Mandamus Is An Appropriate Mechanism To Challenge S.B. 23's Constitutionality.

Respondents misconstrue Relators' position, contending that Relators rely on *Ethics First* for the "novel proposition" that all actions challenging the constitutionality of legislation are appropriate mandamus actions. MTD at 8. That is not Relators' position. Mandamus is available and appropriate here because Relators "seek[] a mandatory injunction to compel the respondent public official to abide by the provisions of preexisting law" and satisfy the requirements for mandamus action (the existence of a clear legal right, the existence of a clear

legal duty, and the absence of an adequate remedy at law). *Ethics First*, 147 Ohio St.3d 373, 2016-Ohio-3144, 66 N.E.3d 689, ¶ 11.

That Relators also are seeking a declaration of unconstitutionality does not defeat the propriety of their mandamus action. To the contrary, for nearly 70 years, the Ohio Supreme Court has maintained that writs of mandamus may challenge the constitutionality of a statute. *See* Mandamus Brief at 9; *State ex rel. Purdy v. Clermont Cty. Bd. of Elections*, 77 Ohio St.3d 338, 341, 673 N.E.2d 1351 (1997) ("the constitutionality of a statute may, in certain instances, be challenged by mandamus"); *State ex rel. Brown v. Summit Cty. Bd. of Elections*, 46 Ohio St.3d 166, 167, 545 N.E.2d 1256 (1989) ("mandamus is appropriate to challenge the constitutionality of a statute"); *State ex rel. Michaels v. Morse*, 165 Ohio St. 599, 608, 138 N.E.2d 660 (1956) ("The right of relator to question, by mandamus, the constitutionality of the statute is recognized in Ohio.").

Specifically, this Court has used mandamus actions to determine the constitutionality of a statute when the statute (1) has a widespread effect or (2) affects a "fundamental" right. *Workers' Compensation*, 97 Ohio St.3d 504, 2002-Ohio-6717, 780 N.E.2d 981, ¶ 12. In *Workers' Compensation*, this Court recognized that the challenged statute affected "every" injured worker in Ohio, which included "virtually everyone who works in Ohio." *Id.* This Court also acknowledged that because the right at issue in the mandamus action was "so fundamental as to be contained in [Ohio's] Bill of Rights," it therefore was a "rare" and "extraordinary" case where a mandamus action should be used to challenge the constitutionality of a law. *Id.* As detailed below, this case presents these exact extraordinary circumstances: it quite clearly "has sweeping applicability and affects a core right." *Id.*; *see infra* Section IV. S.B. 23 impacts every

woman who is pregnant or who may become pregnant in Ohio and affects "fundamental" rights contained in Ohio's Bill of Rights. *Id.* The cases cited by Respondents are not to the contrary.

The present case differs from the cases cited by Respondents wherein constitutional challenges were brought in courts of common pleas. *See* MTD at 11-12. In those cases, the relators either sought a prohibitory injunction or failed to satisfy the elements of a mandamus action. *See State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 634-35, 716 N.E.2d 704 (1999) (finding that "[i]n general" a writ of mandamus is inappropriate when relator sought "a declaratory judgment that certain provisions of [a statute] are unconstitutional and a prohibitory injunction," *without* requesting the court compel any action); *see also State ex rel. Beane v. City of Dayton*, 112 Ohio St.3d 553, 2007-Ohio-811, 862 N.E.2d 97, ¶ 31 (finding there was an "adequate remedy at law" to challenge a statute in the courts of common pleas because relators did not allege why any alternative relief would not provide "complete, beneficial, and speedy relief" and filed their mandamus claims "months" after the challenged law took effect); *State ex rel. Satow v. Gausse-Milliken*, 98 Ohio St.3d 479, 2003-Ohio-2074, 786 N.E.2d 1289, ¶ 20 (finding a writ of mandamus unnecessary for a constitutional challenge when the challenged statute was enjoined by a different court order); *United Auto.,* 108 Ohio St.3d 432, 2006-Ohio-1327, 844 N.E.2d 335, ¶¶ 43, 50 (finding the Court lacked jurisdiction to consider a constitutional challenge when relators sought only a prohibitory injunction and declaratory judgment, the case was not "*rare and extraordinary*," and relators did not allege that a specific legal duty was at issue); *State ex rel. Governor v. Taft*, 71 Ohio St.3d 1, 4-5, 640 N.E.2d 1136 (1994) (finding the requirements of a writ of mandamus not met where relator failed to establish a clear legal duty existed). In contrast here, Relators do not seek a prohibitory injunction, as they ask the Court to order Respondents to uphold the Ohio Constitution and to comply with a

preexisting statute. *See supra* Section I. And Relators have satisfied the requirements to bring a mandamus action before this Court. *See supra* Section I, *infra* Section III.

III. The Requested Relief Meets the Requirements for a Writ of Mandamus.

Respondents do not contest that Relators meet each of the requirements for bringing a writ of mandamus: a clear legal right to the relief, a clear legal duty for Respondents to perform the requested act, and no plain and adequate remedy at law. *See* Mandamus Brief at 10-13; *State ex rel. Parker v. Lucas Cty. Job & Family Servs.*, 176 Ohio App.3d 715, 2008-Ohio-3274, 893 N.E.2d 558, ¶ 9 (6th Dist.), *cause dismissed*, 120 Ohio St.3d 1529, 2009-Ohio-717, 901 N.E.2d 247 (Table). Nor could they.

Relators have a clear right to their requested relief—an order compelling Respondents to abide by their duties to uphold the Ohio Constitution and enforce Ohio's prior 22 week gestational limit instead of S.B. 23—because S.B. 23 deprives Ohioans of their constitutional right to abortion. As detailed in Relators' Mandamus Brief, the Ohio Constitution's substantive due process and equal protection provisions provide more expansive protections than their federal counterparts, and encompass the fundamental right to an abortion; S.B. 23 cannot pass muster under the strict scrutiny required for such fundamental protections, and is therefore unconstitutional. Mandamus Brief at 13-25, 28-33; 35-38; 43-44. Relators' mandamus claim seeking to compel Respondents to abide by the Ohio Constitution and enforce Ohio's preexisting law restricting abortion at 22 weeks LMP falls squarely within this Court's jurisdiction as set forth in *Ethics First* and its progeny. *See generally Ethics First*, 147 Ohio St.3d 373, 2016-Ohio-3144, 66 N.E.3d 689; *see supra* Sections I, II.

Respondents have a clear legal duty to perform the requested acts and to uphold the Ohio Constitution. *See generally* MTD. Respondent Yost, the Ohio Attorney General, as well as the

prosecuting attorney respondents, have taken oaths of office to be faithful to the Ohio Constitution. *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). Likewise, the Director of the Ohio Department of Health, and the Secretary and Supervising Members of the State Medical Board of Ohio—state officials appointed by the Governor—are required to uphold the Ohio Constitution in discharging their duties. *See* R.C. 3.22 ("Each person chosen or appointed to an office under the constitution or laws of this state … shall take an oath of office before entering upon the discharge of his duties."). Moreover, the Attorney General is required to appear for the State and to prosecute individuals when ordered to do so by the Governor, *see* R.C. 109.02, and is required to advise state boards and officers when requested to do so, *see* R.C. 109.12. To carry out their duties to uphold the Ohio Constitution, Respondent Yost and the prosecuting attorney respondents must be ordered to enforce Ohio's preexisting 22 week limit on abortion, and not S.B. 23, given S.B. 23's patent unconstitutionality.

Finally, Relators have no adequate alternative remedy. This Court's precedent establishes that mandamus actions are appropriate when an urgent remedy is necessary to protect the rights at stake. *See, e.g.*, *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, ¶¶ 41, 47 (holding that mandamus was appropriate in part because alternate remedies were not sufficiently speedy); *State ex rel. Watson v. Hamilton Cty. Bd. of Elections*, 88 Ohio St.3d 239, 242, 725 N.E.2d 255 (2000) (finding mandamus appropriate "because an action for a declaratory judgment and prohibitory injunction would not be sufficiently speedy"); *State ex rel. Smart v. McKinley*, 64 Ohio St.2d 5, 6, 412 N.E.2d 393 (1980)

("Since the November 4 general election is less than one week away, this proceeding was properly brought as an original [mandamus] action in this court."). Given the "dramatic fact pattern" brought about by the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, __ U.S. __, 142 S.Ct. 2228 (2022), any alternate remedies would result in "an appellate process [that] would last well past" the irretrievable violation of the fundamental rights of numerous Ohioans. *State ex rel. Toledo Metro Fed. Credit Union v. Ohio Civ. Rights Comm.*, 78 Ohio St.3d 529, 531, 678 N.E.2d 1396 (1997); *Smart*, 64 Ohio St.2d at 6, 412 N.E.2d 393; *see also infra* Section IV.

IV. Extraordinary and Ongoing Circumstances Warrant the Issuance of a Writ of Mandamus.

Respondents note that mandamus is an "extraordinary remedy." MTD at 4. Respondents are right—which is exactly why mandamus is appropriate, given the extraordinary circumstances present here. S.B. 23 went into effect mere hours after the United States Supreme Court's decision in *Jackson Women's Health Organization*, which overturned five decades of federal precedent protecting the right to abortion—the very definition of the "extraordinary circumstances" in which "the constitutionality of a statute may … be challenged by mandamus." *Burger v. City of Cleveland Hts.*, 87 Ohio St.3d 188, 190, 718 N.E.2d 912 (1999) (Douglas, J., concurring) (partially quoting *State ex rel. Purdy v. Clermont Cty. Bd. of Elections*, 77 Ohio St.3d 338, 341, 673 N.E.2d 1351); *cf. State ex rel. Smith v. O'Connor*, 71 Ohio St.3d 660, 662, 646 N.E.2d 1115 (1995) (observing that "an intervening decision by the Supreme Court" can present "extraordinary circumstances"). Respondents' brief ignores that S.B. 23, in turn, nullifies Ohioans' constitutionally protected right to abortion. S.B. 23 will remain in effect and continue to impose ongoing harms on Ohioans absent urgent action from this Court.

Respondents cursorily dismiss these harms as "*future* injuries," MTD at 7, notwithstanding the evidence of ongoing injuries that impact the lives of more and more Ohioans each and every day that S.B. 23 is in effect. All women and girls in Ohio are at risk, including the youngest and most vulnerable. In just one particularly horrifying and widely-discussed example, shortly after S.B. 23 went into effect, a ten-year-old rape victim in Ohio was forced to travel to Indiana to seek an abortion rather than obtaining care in her own home state. *See* Edward Helmore, *10-year-old rape victim forced to travel from Ohio to Indiana for abortion*, The Guardian, (July 3, 2022), available at https://www.theguardian.com/us-news/2022/jul/03/ohio-indiana-abortion-rape-victim (accessed Aug. 1, 2022). The victim sought help from a doctor, who had to assist her in finding care out of state because she was six weeks and three days pregnant. *See* Caroline Vakil, *10-year-old girl denied abortion in Ohio*, The Hill (July 2, 2022), available at https://thehill.com/policy/healthcare/3544588-10-year-old-girl-denied-abortion-in-ohio/ (accessed Aug. 1, 2022); *see also* Bethany Bruner, et al., *Arrest made in rape of Ohio girl that led to Indiana abortion drawing international attention*, The Columbus Dispatch (July 13, 2022), available at https://www.dispatch.com/story/news/2022/07/13/columbus-man-charged-rape-10-year-old-led-abortion-in-indiana/10046625002/ (accessed Aug. 1, 2022) (the victim's accused rapist confessed to raping the 10-year-old and was arrested on July 12, 2022).

At several Relator facilities, women have "threaten[ed] to commit suicide" after being denied abortion care. *See* Relators' Motion for an Emergency Stay at 9; *see also* Liner Aff. in Support of Motion for Emergency Stay ¶ 10; Mills Aff. in Support of Motion for Emergency Stay ¶ 9 ("Numerous people, after being told that we couldn't help them, have mentioned considering suicide; one young patient, who was turned away at 14 weeks LMP, is even on a 24

hour watch in the hospital because she tried to end her own life."). Others have indicated they would attempt potentially dangerous methods for self-inducing abortions after being denied one by a health center. Liner Aff. in Support of Motion for Emergency Stay ¶ 10 ("[A] patient stated that 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."). One woman with stage III melanoma was even denied cancer treatment by her physicians until she receives an abortion—which she cannot do in Ohio now that S.B. 23 is in effect. Trick Aff. in Support of Motion for Emergency Stay ¶ 6. When the patient learned she could not receive an abortion in Ohio, she "broke down and cried inconsolably despite the attempts of multiple staff members … to comfort her." *Id.* As women are forced to carry to term, they also are subject to irreparable physical, economic, emotional, and psychological harms. *See* Diana Green 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); Liner Aff. in Support of Motion for Emergency Stay ¶ 10.

Since S.B. 23 went into effect, countless Ohioans have had to attempt to obtain vital abortion care outside Ohio's borders. For many women who must now travel to obtain abortion care, leaving the state poses substantial—if not insurmountable—obstacles. *See* Relators' Motion for an Emergency Stay at 9; Liner Aff. in Support of Motion for Emergency Stay ¶ 7; Krishen Aff. in Support of Motion for Emergency Stay ¶ 5; *see also* Payal Chakraborty, et al, *How Ohio's Proposed Abortion Bans Would Impact Travel Distance to Access Abortion Care*, 54 Perspect. Sex. Reprod. Health 2022, 54-63 (Apr. 20, 2022), available at https://onlinelibrary.wiley.com/doi/epdf/10.1363/psrh.12191 (accessed Aug. 1, 2022) (finding that if *Roe* is overruled, the current average driving distance from an Ohio county to the nearest

abortion facility would increase from 26 miles to 157 miles (best case) or 269 miles (worst case) given abortion restrictions in Ohio and neighboring states). Those who are able to travel will be forced to navigate the financial, logistical, and personal privacy complications associated with travel, as well as the increasing difficulty of finding an available provider and scheduling a timely appointment in the neighboring states overwhelmed by patients seeking the same care.[4]

Many other pregnant women who cannot overcome the barriers associated with obtaining care out-of-state either will resort to potentially dangerous methods for terminating their own pregnancies outside the medical system, or be forced to carry to term and give birth against their will—incurring significant emotional, physical, and psychological harms. Because the harms caused by S.B. 23 are extraordinary and ongoing, they warrant the extraordinary remedy of mandamus.

CONCLUSION

This Court should deny Respondents' Motion to Dismiss and issue a peremptory or alternative writ.

Date: August 1, 2022 Respectfully submitted,

[4]*See, e.g.*, E. Tammy Kim, *The Abortion Surge Engulfing Clinics in Pennsylvania*, New Yorker (July 22, 2022), available at https://www.newyorker.com/news/dispatch/the-abortion-surge-engulfing-clinics-in-pennsylvania (accessed Aug. 1, 2022) (describing the challenges Pennsylvania clinics are facing in providing for the surge of Ohioans seeking abortions, including one Allegheny clinic that "was receiving five hundred calls a day, mostly from Ohio").

And in the near future, pregnant women in Ohio may have to travel even farther to access abortion. Lawmakers in Indiana, one of the states bordering Ohio, recently convened a special session to consider a near-total ban on abortion. Allison Durke, *Indiana Could Become Next State to Ban Abortion as Legislature Convenes Special Session*, Forbes (July 25, 2022), available at https://www.forbes.com/sites/alisondurkee/2022/07/25/indiana-could-become-next-state-to-ban-abortion-as-legislature-convenes-special-session/?sh=1c418bea66ab (accessed Aug. 1, 2022).

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2022, the foregoing was electronically filed via the Court's e-filing system. I further certify that a copy of the foregoing was served via electronic mail upon counsel for the following parties:

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Additionally, I certify that on August 1, 2022, a copy of the foregoing was served via electronic mail to the following Respondents that have not yet entered an appearance in this matter:

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