IN THE COURT OF COMMON PLEAS
FOR HAMILTON COUNTY, OHIO

PRETERM-CLEVELAND, *et al.*,	:	
	:	**Case No. A 2203203**
Plaintiffs,	:	
	:	**Judge Christian A. Jenkins**
v.	:	
	:	
DAVE YOST, *et al.*,	:	
	:	
Defendants.	:	
	:	
	:	

DEFENDANTS' OPPOSITION TO PLAINTIFFS'
MOTION FOR TEMPORARY RESTRAINING ORDER

The plaintiffs' request for a TRO seeks relief from a supposed emergency of their own making. Ohio's General Assembly enacted the "Heartbeat Act," 2019 Ohio Laws File 3 (Sub. S.B. 23), over three years ago. The Act forbids doctors from aborting babies with beating hearts unless doing so is necessary to protect the life or health of the mother. Because the Act ran afoul of *Roe v. Wade*, 410 U.S. 113 (1973), a federal court enjoined the law soon after its enactment. But on June 24, 2022—over two months ago—the Supreme Court overruled *Roe*. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022).

The result in *Dobbs* could not have caught the plaintiffs by surprise. For one thing, *Roe* has been the subject of blistering criticism since its issuance. Justice White, dissenting in *Roe*'s companion case, condemned the decision as "an exercise of raw judicial power." *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting). As one leading (pro-choice) scholar explained at the time, *Roe* was bad not so much because it was "bad constitutional law," but rather because it was "*not*

constitutional law and [gave] almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 947 (1973). Given that history, given the oral argument in *Dobbs*, and given the unprecedented leak of the Supreme Court's opinion, the writing has been on the wall for months.

The same day that the Supreme Court issued its long-awaited decision, the federal court that had enjoined the Heartbeat Act dissolved its injunction. *See Preterm-Cleveland v. Yost,* S.D.Ohio No. 1:19-cv-00360, 2022 U.S. Dist. LEXIS 112700 (June 24, 2022) (order dissolving injunction). The Heartbeat Act has been in force in Ohio ever since.

The plaintiffs did not act with the same diligence. Instead of seeking relief in a state trial court the same day or soon thereafter, the plaintiffs made the strategic choice to challenge the Act's constitutionality with a legally indefensible request for mandamus relief in the Supreme Court of Ohio. They claimed that a mandamus action in the State's high court would avoid "piecemeal litigation." Complaint in *State ex. rel Preterm-Cleveland v. Yost*, Oh. S. Ct. No. 2022-0803, at 8 (June 29, 2022). But by July 1, the plaintiffs knew that they could not obtain emergency relief from the Heartbeat Act in the mandamus case. Still, they chose to maintain that action rather than dismiss the case and seek emergency relief elsewhere. *State ex rel. Preterm-Cleveland v. Yost*, 167 Ohio St. 3d 1448, 2022-Ohio-2317. The decision was curious. The plaintiffs knew they had the option to at least seek a TRO in this Court, because they have sought and secured three injunctions here in three different cases since March of last year. *See Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A 2100870 (Jan. 31, 2022); *Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A 2101148 (April 7, 2021); *Women's Medical Group Profession Corp. v. Vanderhoff*, Hamilton C.P. No. A 2200704 (March 2, 2022). Only on September 1—

after the Heartbeat Act had been in force for months—did the plaintiffs seek relief in this Court.

The plaintiffs' strategic choices defeat their claim for a TRO. TROs exist to preserve the status quo long enough for the aggrieved party to seek a preliminary injunction. At this point, the Heartbeat Act *is* the status quo in Ohio. The plaintiffs are not entitled to an order temporarily enjoining it. The plaintiffs have taken a great deal of time to file a state-trial-court action aimed at preserving the pre-*Dobbs* status quo. They had about a year after the Supreme Court granted certiorari in *Dobbs* in which to do so; they waited about four months after the Supreme Court's opinion reversing *Roe* was leaked to the press; and they waited another two months after failing to obtain emergency relief at the Supreme Court of Ohio. Any emergency that exists today is an emergency of their own making.

Beyond the timing issue, the plaintiffs' request fails on the merits, for two overarching reasons. *First*, there is no constitutional right to abortion—the legality of that practice is a question for the democratic process. Regardless of one's method of interpretation—regardless of whether one approaches the issue through an originalist or living constitutionalist lens—the charter of our liberties cannot be interpreted to remove the weighty moral issue of abortion from the democratic process. And no precedent requires this Court to hold otherwise. It should not do so. Instead, it should hold that the "permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Dobbs*, 142 S. Ct. at 2243 (quotation omitted).

Second, if there were a right to abortion, then the right would belong to individual patients—not their doctors and not any of the plaintiffs. The plaintiffs are thus suing to vindicate the supposed rights of third parties. That, they may not do.

FACTUAL AND PROCEDURAL BACKGROUND

The Ohio General Assembly passed the Heartbeat Act in 2019. The Act makes it a criminal offense to "knowingly and purposefully perform or induce an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the unborn human individual the pregnant woman is carrying and whose fetal heartbeat has been detected." R.C. 2919.195(A). The law does not apply to women on whom abortions are performed—it regulates only those who perform abortions on others. R.C. 2919.198.

The Act contains two exceptions that allow for a physician, in the physician's reasonable medical judgment, to perform abortions after cardiac activity is found. The first applies when abortion is necessary to prevent the patient's death. The second applies when there is "a serious risk of the substantial and irreversible impairment of a major bodily function." R.C. 2919.195(B). "'Serious risk of 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. 2919.16(K); *see* R.C. 2919.19(A)(12). That "includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes, may include, but is not limited to, diabetes and multiple sclerosis, and does not include a condition related to the woman's mental health." R.C. 2919.16(K). Another provision specifically allows the performance of abortions in the case of an ectopic pregnancy. R.C. 2919.191.

A violation of the Act is a fifth-degree felony, punishable by up to one year in prison and a fine of $2,500. R.C. 2919.195(A); R.C. 2929.14(A)(5), R.C.2929.18(A)(3)(e). In addition, the state medical board may limit, revoke, or suspend a physician's medical license based on a violation of the Act, see R.C. 4731.22(B)(10), or assess a forfeiture of up to $20,000 for each violation, R.C.

2919.1912(A). Money from such forfeitures is deposited in a foster-care and adoption-initiatives fund. R.C. 2919.1912(C). A patient also can initiate a civil action against a provider who violates the Act. R.C. 2919.199(A)(1), (B)(1).

Before the Heartbeat Act took effect, clinics challenged its constitutionality in federal court. They contended that the Act contradicted the Fourteenth Amendment to the United States Constitution as interpreted by *Roe v. Wade* and *Planned Parenthood v. Casey*. The District Court agreed, and preliminarily enjoined the Act's enforcement. *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796 (S.D. Ohio 2019). On March 3, 2021, the court issued an order staying the case pending the final disposition of all appeals and petitions for certiorari in *Preterm-Cleveland v. Himes*, No. 18-3329 (6th Cir.), and *Memphis Ctr, for Reproductive Health v. Slatery*, No. 20-5969 (6th Cir.). *See Preterm-Cleveland v. Yost*, No. 19-cv-00360 MRB (S.D. Ohio Mar. 3, 2021).

On June 24, 2022, the United States Supreme Court issued its opinion in *Dobbs*, holding that the United States Constitution confers no right to abortion. That same day, Ohio Attorney General Dave Yost filed an emergency motion to dissolve the preliminary injunction because the injunction rested entirely on the conclusion that the Heartbeat Act violated the right to an abortion recognized in *Roe* and *Casey*—the right that *Dobbs* abrogated. That court quickly vacated the injunction, and the Act went into effect that same day.

On June 29, plaintiffs filed a writ of mandamus and emergency motion in the Ohio Supreme Court to stay the Heartbeat Act. *State ex. rel Preterm-Cleveland v. Yost*, No. 2022-0803 (June 29, 2022). Two days later, the Ohio Supreme Court denied the emergency motion for a stay. The State's motion to dismiss was fully briefed and awaiting a final determination by the Court. But on the same day this litigation was filed, the plaintiffs moved to voluntarily dismiss the mandamus

action, declaring that they "cannot wait any longer for a decision from the Ohio Supreme Court on the merits of their position." TRO Br. at 3.

LEGAL STANDARD

Ohio Civil Rule 65(B) empowers courts to issue TROs in only limited circumstances. A TRO is a form of injunctive relief. And an "injunction is an extraordinary remedy in equity where there is no adequate remedy available at law. It is not available as a right." *Garono v. State*, 37 Ohio St. 3d 171, 173 (1988). Given the extraordinary nature of this relief, courts must "take particular caution in granting injunctions, especially in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important works or control the action of another department of government." *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgmt. Dist.*, 73 Ohio St. 3d 590, 604 (1995) (quotations omitted). "The purpose of both a temporary restraining order and a preliminary injunction is to preserve the status quo of the parties pending a decision on the merits." *State ex rel. Kilgore v. City of Cincinnati*, 1st Dist. Hamilton No. C-110007, 2012-Ohio-4406 ¶21 (quotations omitted).

"In determining whether to grant a temporary restraining order, a trial court must consider [1] whether the movant has a strong or substantial likelihood of success on the merits of his underlying claim, [2] whether the movant will be irreparably harmed if the order is not granted, [3] what injury to others will be caused by the granting of the motion, and [4] whether the public interest will be served by the granting of the motion." *Coleman v. Wilkinson*, 147 Ohio App. 3d 357, 2002-Ohio-2021 ¶2. The same standard governs motions for preliminary injunctions. *Castillo-Sang v. Christ Hosp. Cardiovascular Assocs., LLC*, 1st Dist. Hamilton No. C-200072, 2020-Ohio-6865, ¶16, (citing *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267-268, 747 N.E.2d 268 (1st Dist.2000)).

If a plaintiff "d[oes] not prevail on one of the required elements," of this four-element test, the court "need not consider the remainder of the elements." *Intralot, Inc. v. Blair*, 10th Dist. Franklin No. 17AP-4444, 2018-Ohio-3873, ¶47; *see also Aero Fulfillment Servs., Inc. v. Tartar*, 1st Dist. Hamilton No. C-060071, 2007-Ohio-174, ¶¶23, 41. Furthermore, the Ohio Supreme Court has cautioned that a court "cannot employ equitable principles to circumvent valid legislative enactments." *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.*, 69 Ohio St. 3d 521, 526, 1994-Ohio-330 (1994).

ARGUMENT

The plaintiffs' entitlement to injunctive relief turns entirely on the question of whether they are likely to succeed on the merits. For one thing, plaintiffs *must* demonstrate a likelihood of success on the merits to win a TRO or preliminary injunction. *Paige v. Ohio High School Ath. Assn.*, 2013-Ohio-4713, 999 N.E.2d 1211, ¶ 65 (1st Dist.). (Remember, a plaintiff must prevail on *all four* injunctive-relief elements to win such relief. *See Aero Fulfillment Servs v Tartar*, 1st Dist. Hamilton No. C-060071, 2007-Ohio-174 ¶¶ 23, 41; *Intralot Inc. v Blair*, 2018-Ohio-3873, ¶ 47.) Beyond that, if a plaintiff will not likely prevail on the merits in a suit challenging the validity of a state law, the other three factors will necessarily cut against an award of injunctive relief. For example, if the plaintiffs will not likely win on the merits—if they have no right to obtain or perform abortions—they will sustain no legally cognizable injury from the non-issuance of injunctive relief. Similarly, the plaintiffs will not be able to satisfy the remaining factors if they are unlikely to prevail on the merits. With respect to the third factor—harm to other parties—States always suffer irreparable harm when their constitutionally permissible laws are enjoined. *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020) (*per curiam*). As for the fourth—public interest— "giving effect to the will of the

people by enforcing the laws they and their representatives enact serves the public interest." *Id.*

So the question becomes: Will the plaintiffs likely prevail on the merits? No, and the question is not close. The Ohio Constitution confers no right to abortion; no binding precedent permits this Court to hold otherwise; and the plaintiffs would have no standing to assert the right to abortion even if such a right existed.

One note before proceeding. Although the plaintiffs' complaint alleges that the law is unconstitutionally vague, their brief in support of the TRO request does not advance any argument on that issue. Accordingly, the plaintiffs' have not sought emergency relief on that basis, and the State will not address any arguments pertaining to the vagueness issue.

I. Because there is no state constitutional right to abortion, plaintiffs have no right to the relief they seek.

The Ohio Constitution confers no right to abortion. And even if it did, the plaintiffs would have no standing to assert it. Accordingly, they are not likely to prevail on the merits.

A. The Ohio Constitution does not confer a right to abortion.

The remarkable thing about the supposed right to abortion—the fact that led to the nearly universal condemnation of *Roe v. Wade* at the time it was decided—is that there is no theory of constitutional jurisprudence that justifies recognizing a right to abortion. Indeed, even the dissenters in *Dobbs* made no serious effort to defend the right to abortion on first principles—they instead relied on the doctrine of *stare decisis* and on other precedents from the Supreme Court of the United States. None of that is relevant here because the Ohio Supreme Court has never recognized any right to abortion.

This Court will likely hold that the Ohio Constitution confers no right to abortion. The State explains why in two steps. First, the State shows that the Ohio Constitution cannot reasonably

be interpreted as conferring a right to abortion regardless of whether one embraces an originalist or living-constitutionalist approach to constitutional interpretation. Second, the State explains that no binding precedent can plausibly be extended to recognize any abortion right.

1. Any argument that the Ohio Constitution as originally understood confers a right to abortion is frivolous.

An originalist approach to constitutional interpretation requires courts to interpret the Constitution in accordance with its "original public meaning." *State v. Weber*, 163 Ohio St. 3d 125, 155 (2020) (DeWine, J., concurring in the judgment). Thus, if originalism is right, the Constitution must be understood to bear the "common understanding of the people who framed and adopted" it. *Pfeifer v. Graves*, 88 Ohio St. 473, 487 (1913). On this theory, courts should not recognize any such right if doing so would be "inconsistent with the intent of the framers." *Mole*, 149 Ohio St. 3d 215 at ¶21 (plurality op.).

Here, there is no plausible argument that any of the provisions on which the plaintiffs rely was originally understood to confer such a right

Consider first Sections 1, 2, and 16 of Article I. The text of these clauses does not speak to the issue of abortion at all. And there is no evidence that anyone alive at the time of the clauses' ratifications believed they conferred a right to end the life of an unborn child. To the contrary, it is certain that the clauses *were not* understood as conferring a right to abortion. We know this because the Ohioans of the relevant era viewed abortion as a crime, not a right. Each of these constitutional provisions was adopted by 1851. But starting in 1834, Ohio prohibited *all* abortions. That year, it enacted a law declaring that "any attempt to abort a pregnant woman unless necessary to preserve her life, actually or in the opinion of two doctors, to be a misdemeanor." Loren G. Stern, *Abortion: Reform and the Law,* 59 J. Crim. L. Criminology & Police Sci. 84 (1968) (quoting Ohio Gen. Stat.

§§ 111(1), 112 (2) at 252 (1834)). Any attempt after quickening 'with intent thereby to destroy such child' was a high misdemeanor punishable by up to seven years imprisonment." *Id*. In 1850, right before the new Constitution was adopted, Ohio prosecuted a doctor for performing an abortion. The State was still prosecuting him when the delegates met to debate the 1851 Constitution. And the Supreme Court affirmed his conviction just two years after the new constitution's 1851 ratification. *Wilson v. State*, 2 Ohio St. 319, 320 (1853). If Ohioans understood the Constitution to confer a right to abortion, someone alive at the time would have suggested as much. But there is no evidence anyone did. And indeed, up until *Roe*, the State *continued* to outlaw abortions. *See* Ohio Gen. Stat. §§111, 112 (1841); R.C. §2901.16 (1972); *see also Steinberg v. Brown*, 26 Ohio Misc. 77 (N.D. Ohio 1970); *State v. Guerrieri*, 20 Ohio App.2d 132, 133, 252 N.E.2d 179 (7th Dist.1969); *State v. Holden*, 28 Ohio Dec. 123, 123, 20 Ohio N.P.(n.s.) 200 (C.P.1917); *State v. Tippie*, 89 Ohio St. 35, 39–40 (1913).

On an originalist approach, that long history dispositively refutes any argument that Sections 1, 2, or 16 of Article I confer a right to abortion. After all, when "a Government practice [was] open, widespread, and unchallenged" for years after the ratification of a constitutional provision, that is proof positive that the provision was not understood to bar the practice in question. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019) (quotation omitted). The "unambiguous and unbroken history" of laws prohibiting abortion proves that the Constitution, as originally understood, confers no right to an abortion. *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (quotation omitted).

Now consider the remaining provision the plaintiffs invoke, the Healthcare Freedom Amendment, ratified in 2011. *See* Ohio Const., art. I, §21. It provides, in relevant part:

> (A) No federal, state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system.
>
> (B) No federal, state, or local law or rule shall prohibit the purchase or sale of health care or health insurance.
>
> (C) No federal, state, or local law or rule shall impose a penalty or fine for the sale or purchase of health care or health insurance.
>
> (D) This section does not affect laws or rules in effect as of March 19, 2010; affect which services a health care provider or hospital is required to perform or provide; affect terms and conditions of government employment; or affect any laws calculated to deter fraud or punish wrongdoing in the health care industry.

This amendment, which Ohioans adopted in response to fears that the Affordable Care Act would force people to buy health insurance and usher in an era of single-payer healthcare, does not speak to abortion. Subsection (A) forbids laws compelling participation in healthcare markets. Subsection (B) guarantees a right to purchase healthcare; it bars the State from adopting a single-payer system that would prohibit citizens from buying healthcare themselves and require them to obtain healthcare through a government-approved provider. Subsection (C) forbids the government from punishing the sale or purchase of healthcare. And Subsection (D) expressly preserves the legislature's ability to regulate healthcare—in particular, its power to deter fraud and punish "wrongdoing."

None of this can plausibly be read as guaranteeing a right to a particular healthcare procedure. To the contrary, Subsection (D) expressly *preserves* the legislature's power to "punish wrongdoing in the health care industry," which presupposes a power to determine what qualifies as "wrongdoing." This preserves the General Assembly's power to prohibit or regulate the circumstances in which procedures can be offered at all. That is why, even after the Amendment's passage, Ohio continues prohibiting the unlicensed practice of medicine; the Amendment gives citizens no right to purchase medical care from someone with no license to practice. *See, e.g.*, R.C.

4731.41. Similarly, Ohio has continued forbidding physicians from using steroids to enhance athletic performance, or from using cocaine hydrochloride except in narrowly defined circumstances. O.A.C. 4731-11-03. And Ohio has continued banning electroshock therapy for minors, female genital mutilation for minors, and assisted suicide. *See, e.g.*, O.A.C. 5122-3-03(D)(2); R.C. 2903.32; R.C. 3795.02. Similarly, the Ohio Department of Health did not violate the Constitution when, early in the COVID-19 pandemic, it temporarily barred the performance of elective surgeries. *See, e.g.*, Director's Order for the Management of Non-essential Surgeries and Procedures throughout Ohio (Mar. 17, 2020), https://perma.cc/2HWG-AJAK. If Subsection (B) were understood as guaranteeing a right to purchase any medical procedure, rather than a right to purchase for oneself whatever healthcare procedures the State permits, none of these regulations, most of which are uncontroversial, would be legal. And indeed, if Subsection (B) guaranteed a right to purchase any medical procedure, including abortion, it would guarantee a right to obtain an abortion *during all nine months* of a pregnancy. Even the plaintiffs are not willing to go that far.

The plain understanding of the text accords with the understanding of those who ratified the Amendment. Consider the political realities. Ohioans overwhelmingly voted in favor of the Amendment; it won 65.63 percent of the vote. *See* Ohio Healthcare Amendment, Issue 3 (2011), Ballotpedia (accessed June 29, 2022), https://perma.cc/XG9T-FRCE. No provision understood as conferring a right to abortion would have garnered so many votes. Certainly, no provision guaranteeing a right to abortion at all phases of a pregnancy—which is what the Amendment would guarantee if it guaranteed a right to abortion—could have won 2/3 of the vote. After all, most people think abortion should be illegal in the second trimester of a pregnancy, and overwhelming majorities (almost 90 percent of Americans) believe abortion should be illegal in the third trimester.

See Lydia Saad, *Trimesters Still Key to U.S. Abortion Views*, Gallup (June 13, 2018), https://perma.cc/E4QZ-VBHZ.

Consider, too, the public discussion of the issue. The State has not found evidence that even one person at the time of the Amendment's ratification suggested it guaranteed a right to abortion. And Ohio Right to Life—a group whose mission includes opposing abortion—*endorsed* the Amendment. Steven Ertelt, *Ohio Pro-Life Group Endorses Issue 3 to Oppose Obamacare*, LifeNews (Sept. 6, 2011), https://perma.cc/Q97D-H2E3.

In the end, there is no sound argument that the many Ohioans who voted in favor of the Healthcare Freedom Amendment were duped into constitutionalizing the right to abortion.

2. A principled living-constitutionalist approach does not permit recognizing a constitutional right to abortion.

On another view of the judicial role, courts must interpret the Constitution to "evolve[]" in a manner that reflects "the basic mores of societ[al] change." *Broom*, 146 Ohio St. 3d 60 ¶95 (O'Neill, J., dissenting) (quotation omitted). On this approach, the Constitution draws "its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality).

The danger of living constitutionalism is plain. It invites courts to make value judgments, which presents a temptation for courts to "declare" that "the Constitution" means whatever a majority of judges think "it ought to mean." *Dred Scott v. Sandford*, 60 U.S. 393, 15 L.Ed. 691, 621 (1857) (Curtis, J., dissenting). That "is a formula for an end run around popular government." William H. Rehnquist, *The Notion of A Living Constitution*, 54 Tex. L. Rev. 693, 706 (1976). To guard against that—to ensure some objectivity in the analysis—living constitutionalists decide cases with reference to *society's* values instead of their own. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 662–

71 (2015); *Graham v. Florida*, 560 U.S. 48, 58–59 (2010); *Roper v. Simmons*, 543 U.S. 551, 560–61, 564–68 (2005); *Lawrence v. Texas*, 539 U.S. 558, 568–72 (2003); *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002); *Casey*, 505 U.S. at 850 (quoting *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting)); *Mapp v. Ohio*, 367 U.S. 643, 651–53 (1961). In this way, living constitutionalism requires *interpreting* law, not making it. *See* Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 97–98 (2022).

Ohioans' values require leaving abortion to the democratic process. For one thing, Ohioans ratified a constitution that can be easily amended through popular initiative. *See* Ohio Const., art. II, §1a; R.C. 3519.01(A). Ohioans often place issues on the ballot, and they often ratify those initiatives. *See, e.g.*, Ohio Const., art. I, §§10a, 21. This process and practice suggests that Ohio's values include the value of resolving contentious issues through the democratic process—not through judge-made law. That, alone, cuts against recognizing any right to abortion. Precisely because state constitutions are easier to amend when that is what the People want, courts should be *less willing* to read rights into state constitutions than the federal one. *Cf.* Sutton, *Who Decides*? at 134.

Ohio's history of abortion legislation cuts the same way. Again, Ohio forbade abortion at all times between 1834 and *Roe*. And in the nearly half-century since *Roe*, Ohio's elected representatives have repeatedly enacted laws *restricting* the availability of abortion. *See, e.g.*, R.C. 2919.123(A); R.C. 2919.121(B)(1); R.C. 2919.192; R.C. 2317.56; R.C. 2919.10; R.C. 3727.60. Over time, the trend has been toward greater restrictions. *Compare, e.g.*, R.C. 1919.195 with R.C. 2919.201 and R.C. 2919.17. This trend shows that a right to abortion would contradict, not accord with, evolving societal values. *See Atkins*, 536 U.S. at 315–16. So does the fact that, notwithstanding this flurry of action, and notwithstanding the ease with which Ohioans can put forward constitutional initiatives,

an initiative aimed at expanding or preserving the right to abortion has never even qualified for the ballot.

In addition to looking at the values codified by law, living constitutionalists on occasion look to foreign practices and evolving knowledge. But neither source supports recognizing a right to abortion.

Begin with the international community. At least "117 countries … either ban abortion outright or sharply limit its availability to narrow instances." *Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409, 449 (6th Cir. 2021) (Thapar, J., concurring in the judgment in part and dissenting in part), *vacated for reh'g en banc* 18 F.4th 550. "By contrast, only seven countries" follow *Roe* in "permitting abortions after twenty weeks." *Id*. And those seven countries include China and North Korea—hardly models of evolving standards of decency. *Id*. Now consider other American States. While the dust is still settling after *Dobbs*, numerous States have enacted laws that will forbid abortion in many or most circumstances now that *Roe* has been overturned. *See, e.g.*, Ark. Code Ann. §5-61-304; Human Life Protection Act, 2019 Arkansas Laws Act 180, §2 (S.B. 149); Idaho Code Ann. §18-622; Ky. Rev. Stat. §311.772; La. Stat. Ann. §40:1061; Miss. Code. Ann. §41-41-45; 2007 Miss. Laws Ch. 441, §6 (S.B. 2391); Mo. Ann. Stat. §188.017; N.D. Cent. Code Ann. §12.1-31-12; 27; 2007 North Dakota Laws Ch. 132, §2 (H.B. 1466); Okla. Stat. Ann. tit. 63, §1-731.4; 2022 Okla. Sess. Law Serv. Ch. 133 (S.B. 1555); S.D. Codified Laws §22-17-5.1; Tenn. Code Ann. §39-15-213; Tex. Health & Safety Code Ann. §170A.001; 2021 Tex. Sess. Law Serv. Ch. 800 (H.B. 1280); Utah Code Ann. §76-7a-201; Abortion Prohibition Amendments, 2020 Utah Laws Ch. 279 (S.B. 174); Wyo. Stat. Ann. §35-6-102. Others never repealed laws prohibiting or greatly restricting abortion. *See, e.g.*, Ala. Code §13A-13-7; Ariz. Rev. Stat. §13-3603; Mich. Comp. Laws §750.14; Wis. Stat.

Ann. §940.04; W. Va. Code Ann. §61-2-8. Unless this Court is prepared to say that the governments of at least *eighteen* sister States stand against fundamental justice, this list ought to carry a great deal of weight.

Evolving knowledge also undermines any argument for a constitutional right to abortion. "As to the question 'when life begins,' the *Roe* majority maintained that 'at that point in the development of man's knowledge,' it was 'not in a position to speculate.'" *Memphis*, 14 F.4th at 450 (Thapar, J., concurring in the judgment in part and dissenting in part) (quoting *Roe*, 410 U.S. at 159) (alteration accepted). "Whether or not the scientific answer to that question was clear then, it is now. From fertilization, an embryo (and later, fetus) is alive and possesses its unique DNA." *Id.* (citing Enrica Bianchi, et al., *Juno Is the Egg Izumo Receptor and Is Essential for Mammalian Fertilization*, 508 Nature 483, 483 (2014)). And "from conception on, the human embryo is 'fully programmed and has the active disposition to use that information to develop himself or herself to the mature stage of a human being.'" *Id.* (quoting Robert P. George & Christopher Tollefsen, *Embryo: A Defense of Human Life* 50 (2008)). "Of course, that new life is not yet mature—growth and development are necessary before that life can survive independently—but it is nonetheless human life." *Hamilton v. Scott*, 97 So. 3d 728, 746–47 (Ala. 2012) (Parker, J., concurring).

What is more, advances in "medical and scientific technology have greatly expanded our knowledge of prenatal life." *Id.* "The development of ultrasound technology has enhanced … *public* understanding, allowing us to watch the growth and development of the unborn child in a way previous generations could never have imagined." *Id.* "These images reveal how an unborn child visibly takes on 'the human form' in all relevant aspects by 12 weeks' gestation." *Memphis*, 14 F.4th at 450 (Thapar, J., concurring in the judgment in part and dissenting in part). And "neonatal and

medical science … now graphically portrays … how a baby develops sensitivity to external stimuli and to pain much earlier than was [previously] believed." *McCorvey v. Hill*, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring).

In light of these scientific and technological advances, it is no surprise that many Americans oppose permissive abortion laws. Americans today have more compassion for living organisms—human and non-human alike—than ever before. Consider the countless state and federal laws barring animal cruelty. *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r of Indiana State Dep't of Health*, 917 F.3d 532, 537 (7th Cir. 2018) (Easterbrook, J., dissenting from denial of rehearing *en banc*), *vacated and remanded sub nom. Box v. Planned Parenthood of Ind. and Ky.*, 139 S. Ct. 1780 (2019) (*per curiam*). Legislatures enact these laws "not simply because all mammals can feel pain and may well have emotions, but also because animal welfare affects human welfare. Many people feel disgust, humiliation, or shame when animals or their remains are poorly treated." *Id.* It is hardly a surprise that a society evolved enough to feel compassion for animals also feels compassion for unborn human beings, whom they can now see through images clearer than anything available at the time of *Roe*.

In the end, abortion is a contentious issue. There are many Americans—and many Ohioans—on both sides of that issue. *See, e.g.*, Rick Exner, *Ohio sharply divided on bill to ban abortion as early as 6 weeks, poll shows*, Cleveland.com (Mar. 26, 2019), https://perma.cc/G2HH-37BU. That is precisely why living constitutionalism cannot justify taking the issue from the political process. Again, a principled approach to living constitutionalism requires reference to the way in which "our society views" the issue in question, *Atkins*, 536 U.S. at 316, not on the way it appears to those who happen to serve as judges. In this contentious field, there is no plausible argument that *society's*

"ideas of the Constitution have evolved" so "substantially," *Broom*, 146 Ohio St. 3d 60 at ¶95 (O'Neill, J., dissenting) (quotation omitted), that the question of abortion's legality is now removed from the democratic process.

3. No precedent justifies recognizing a right to abortion.

The discussion above shows that the Constitution cannot be interpreted to confer a right to abortion. But there remains the question whether binding precedent *requires* recognizing such a right. No such precedent exists. In fact, binding precedent is best read to *preclude* the Court from recognizing any right to abortion.

Equal protection. The United States Constitution forbids the States from "deny[ing] to any person … the equal protection of the laws." U.S. Const., amend. XIV, §1. In *Dobbs*, the U.S. Supreme Court held that this clause *does not* confer any right to abortion. *Dobbs*, 142 S. Ct. at 2245–46–. Still, the plaintiffs argue that Ohio's analogous provision does. In particular, they point to Article I, Section 2, which states:

> 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.

The first problem with this argument is that, for almost a century, the Supreme Court of Ohio has held that "the federal and Ohio Equal Protection Clauses are to be construed and analyzed identically." *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St. 3d 55, 60 (1999); *accord State v. Moore*, 154 Ohio St. 3d 94, 2018-Ohio-3237 ¶22; *State v. Aalim*, 150 Ohio St. 3d 489, 2017-Ohio-2956 ¶29; *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St. 3d 307, 2016-Ohio-8118 ¶46 (lead op.); *Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 2010-Ohio-4908 ¶17; *Eppley v. Tri-Valley Loc. Sch. Dist. Bd. of Educ.*, 122 Ohio

St. 3d 56, 2009-Ohio-1970 ¶11; *McCrone v. Bank One Corp.*, 107 Ohio St. 3d 272, 2005-Ohio-6905 ¶7; *State v. Thompson*, 95 Ohio St. 3d 264, 2002-Ohio-2124 ¶11; *Desenco, Inc. v. Akron*, 84 Ohio St. 3d 535, 544 (1999); *Beatty v. Akron City Hosp.*, 67 Ohio St. 2d 483, 491–94 (1981); *Keaton v. Ribbeck*, 58 Ohio St. 2d 443, 445 (1979) (*per curiam*); *State ex rel. Struble v. Davis*, 132 Ohio St. 555, 560 (1937). It is now blackletter law that the federal Equal Protection Clause confers no right to abortion. *See Dobbs*, 142 S. Ct. at 2245–46. This Court cannot overrule the cases linking the State's equal-protection clause to its federal analogue. And in light of all these precedents, it follows that Article I, Section 2 of the Ohio Constitution confers no such right either.

One quick aside. While some of the Supreme Court of Ohio's non-majority opinions suggest that Ohio's Equal Protection Clause affords greater rights than the federal analogue, those opinions also recognize an important limitation on recognizing heightened protections. Specifically, "such an interpretation" is permissible only when it is "both prudent and not inconsistent with the intent of the framers." *Mole,* 149 Ohio St. 3d 215, at ¶21 (plurality op.). Here, as explained above, reading the Equal Protection Clause to confer a right to abortion would be quite "inconsistent with the intent of the framers." *Id.* In addition to the fact that no one alive in 1851 understood the Clause to guarantee any such right, Ohioans drafted and ratified the 1851 Constitution while Josiah Wilson was being criminally charged for supplying abortifacients in violation of Ohio law. *Wilson,* 2 Ohio. St. at 320. Soon thereafter, in 1853, the Supreme Court of Ohio upheld his conviction, specifically holding that Ohio law barred abortions performed "at any time during the period of gestation." *Id.* So there is little doubt what the ratifying generation thought the Clause said about abortion—nothing at all, meaning the matter remained subject to regulation by the political branches.

Returning to the question at bar: Does any precedent support housing a right to abortion in Ohio's Equal Protection Clause? No. To the contrary, the Supreme Court of Ohio's holdings regarding the Clause's meaning forbid recognizing any such right. That court has said that, as "a general matter, this provision requires that the government treat all similarly situated persons alike." *Sherman v. Ohio Pub. Employees Retirement Sys.*, 163 Ohio St. 3d 258, 2020-Ohio-490 ¶14. The Heartbeat Act does exactly that—it applies equally to everyone who might seek or perform an abortion. And the challenged laws are also "rationally related to a legitimate government interest." *Id.* (quotation omitted). Namely, the interest in protecting unborn life. *See Dobbs*, 142 S. Ct. at 2284.

Of course, this "rational basis" test does not apply to equal-protection claims involving discriminatory treatment of "a suspect class." *Sherman*, 163 Ohio St. 3d 258 at ¶14. Relevant here, when "a discriminatory classification based on sex … is at issue, [courts] employ heightened or intermediate scrutiny and require that the classification be substantially related to an important governmental objective." *Thompson*, 95 Ohio St. 3d 264 at ¶13. But for two reasons, the rule requiring heightened scrutiny of laws that discriminate on the basis of sex does not permit striking down the Heartbeat Act.

First, the Heartbeat Act satisfies intermediate scrutiny because it is substantially related to the government's important interest in protecting unborn life. Even the plaintiffs concede the Heartbeat Act will have the effect of protecting unborn life, and there are few state interests more important than protecting innocent life.

Second, neither intermediate scrutiny or any other form of heighted scrutiny even applies, because the Act does not discriminate on the basis of sex. The Heartbeat Act regulates anyone, regardless of sex, who performs an abortion. True, "men do not menstruate" or become pregnant,

while "women do." *Rowitz v. McClain*, 2019-Ohio-5438 ¶79 (10th Dist.) (Brunner, J., dissenting). But the fact that a law will have a disparate impact on one sex or the other does not require heightened scrutiny. If it did, then courts would have to apply heighted scrutiny to laws that provide funding for procedures—like breast and prostate exams, or birth and vasectomies—relevant to only men or only women. The same heightened scrutiny would apply to laws that tax or regulate products that only men or only women can use, like tampons or beard oil. That is not the law. *See Rowitz* , 2019-Ohio-5438 at ¶¶20, 39 (majority) (Beatty Blunt, J., for the court); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 272–73 (1993); *Poelker v. Doe*, 432 U.S. 519, 520–21 (1977); *Maher v. Roe*, 432 U.S. 464, 471 (1977); *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). While legislatures can pass laws to address policies that disparately impact the sexes, *see Allen v. totes/Isotoner Corp.*, 123 Ohio St. 3d 216, 2009-Ohio-4231 ¶¶24–32 (O'Connor, J., concurring in judgment) (recounting history), every court must strenuously avoid "substitut[ing] [its] own views of those issues for those of the legislature as they are embodied in the Revised Code," *id.* at ¶32 n.1.

It makes sense that laws regulating "a medical procedure that only one sex can undergo do[] not trigger heighted constitutional scrutiny" unless they are a "mere pretext" aimed at discriminating on the basis of sex. *Dobbs*, 142 S. Ct. at 2245–46 (quotation omitted; alteration accepted). Ohio's Equal Protection Clause, just like the Fourteenth Amendment's analogue, requires the government to "treat all similarly situated persons alike." *Sherman*, 163 Ohio St. 3d 258 at ¶14. When laws regulate (or decline to regulate) procedures based on characteristics unique to those procedures, they *do* treat similarly situated persons alike. So it is with abortion laws. "Abortion restrictions do not impose legal burdens on the basis of gender, but on the basis of the asserted presence and value of a human life in utero." Michael Stokes Paulsen, *The Worst Constitutional*

Decision of All Time, 78 Notre Dame L. Rev. 995, 1009 n.35 (2003). Put differently, an "abortion restriction's target category—pregnancies (or some subset thereof)—embraces all relevant instances of the identified harm that the restriction seeks to prevent." *Id*. It thus treats like persons alike, and comports with equal-protection principles. *Bray*, 506 U.S. at 272–73.

The State readily concedes that an abortion law would run into constitutional difficulties if it were motivated by animus towards women—if, for example, it were a pretext for misogyny. The plaintiffs insinuate that the many legislators who voted to adopt the law were motivated by discriminatory attitudes toward women, saying that Ohio's law "discriminated against women by subordinating them to men based on antiquated notions and stereotypes regarding women's roles as childbearers and caregivers." TRO Br. at 31. That accusation wrongly assumes that no legislator could be motivated by a genuine desire to protect unborn life. That assumption is unfounded. The Heartbeat Act expressly codifies the State's "interest in protecting the life of an unborn human." Heartbeat Act, 2019 Ohio Laws File 3, §3(G). True, it *also* notes that the State "has a valid interest in protecting the health of the woman." *Id*. But that is simply a correct statement of the law, as *Casey* itself recognized. *See* 505 U.S. at 846. The plaintiffs wrongly dismiss those who do not share their views on abortion—men and women alike—as bigots. This Court should not follow suit. To suggest that laws restricting abortion rest on animus toward women would cast aspersions on millions of "decent and honorable" Ohioans who hold opposing views on this weighty moral issue. *Obergefell*, 576 U.S. at 672.

Due Course of Law and Inalienable Rights. Section 16 of Ohio's Bill of Rights guarantees that "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." Section 1 says that Ohioans have "inalienable rights" including "liberty." The plaintiffs argue that these provisions, too, confer a right to abortion. This argument is, if anything, even weaker.

First, the Supreme Court has "recognized [Section 16] as the equivalent of the 'due process of law' protections in the United States Constitution." *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948 ¶48. The federal Due Process Clause confers no right to an abortion. *See Dobbs*, 142 S. Ct. at 2246–56. Therefore, neither does Ohio's. As for Section 1, the Court has given it no separate force apart from the guarantees read into Section 16. Indeed, the Ohio Supreme Court has held that Section 1 is not self-executing—a holding the plaintiffs do not contest. *See* TRO Br. at 20; *State v. Williams*, 88 Ohio St. 3d 513, 523 (2000).

Second, when Ohio courts engage in what is often called substantive-due-process analysis, they do so under Section 16, not Section 1. *See, e.g.*, *Stolz v. J & B Steel Erectors*, 155 Ohio St. 3d 567, 2018-Ohio-5088 ¶12; *Ferguson v. State*, 151 Ohio St. 3d 265, 2017-Ohio-7844 ¶43. So any claim to a substantive-due-process right to abort a child must flow through Section 16, not Section 1.

The plaintiffs' claim seeks to vindicate a *substantive* right to obtain an abortion. If that seems odd, it should. On its face, Section 16 confers no substantive rights—instead, it guarantees procedural rights to sue for redress. The oxymoronic substantive-due-process doctrine is hard to defend as a matter of textual interpretation. *State v. Aalim*, 150 Ohio St. 3d 489, 2017-Ohio-2956 ¶48 (DeWine, J., concurring); David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789–1888*, p. 272 (1985). And, if not properly cabined, it vests a concerning amount of policymaking authority in courts. To avoid that, the Supreme Court of the United States has adopted a framework that strictly limits the doctrine's application. *See Dobbs*, 142 S. Ct. at 2247; *Washington*

v. Glucksberg, 521 U.S. 702, 720–21 (1997). Ohio's Supreme Court has adopted the same framework. *Aalim*, 150 Ohio St. 3d 489 at ¶16.

That framework confers no right to abortion. Under the substantive-due-process doctrine, "[g]overnment actions that infringe upon a fundamental right are subject to strict scrutiny, while those that do not need only be rationally related to a legitimate government interest." *Stolz*, 155 Ohio St. 3d 567 at ¶14. The challenged law survives rational-basis review for reasons discussed already. So unless the law infringes a "fundamental right," any substantive-due-process challenge fails. The plaintiffs claim the law infringes the fundamental right to abortion. There is no such "fundamental" right. A right is "fundamental" only if it is "objectively, deeply rooted in this Nation's history and tradition' … and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Aalim*, 150 Ohio St. 3d 489 at ¶16 (quotations omitted). There is no plausible argument that abortion is so deeply rooted in the nation's history—even the dissent in *Dobbs* conceded that point. *See, e.g.*, *Dobbs*, 142 S. Ct. at 2323 (Breyer, Sotomayor, Kagan, JJ., dissenting). And the argument is even weaker with respect to *Ohio's* history. Again, for most of Ohio's history, abortion was not a right but rather a crime. *See above* I.A.1. (Because there is no fundamental right to abortion, the plaintiffs' long discussion of strict scrutiny's application to this case is entirely irrelevant, *see* TRO Br. at 23-27—though the State preserves its argument that the Heartbeat Act satisfies strict scrutiny also.)

All this makes plain that the 1802 language about the process for remedying recognized wrongs has nothing to say about any right to abort an unborn child. The General Assembly is free to outlaw an act that harms another living being—human or otherwise. Indeed, the precedent most relevant to this case *undermines* the plaintiffs' claims about the Constitution. In 1949, this Court

held that a "viable child, injured while en ventre sa mere, who survives such injury," has a remedy against the tortfeasor. *Williams v. Marion Rapid Transit*, 152 Ohio St. 114, 116, 129 (1949) (quotation marks omitted). The Court concluded that the Constitution *required* a remedy, even though no statute afforded one. *Id*. The plaintiffs' claimed "right to bodily integrity" has no stopping point at in-utero viability. So if the Constitution truly confers a right to harm an in-utero child, it must include the right to harm a viable in-utero child. That claim runs headlong into *Williams*, which recognized the right of the *child* to a remedy for anyone harming *her* when she was in utero.

The plaintiffs do not grapple with any of this. They cite no binding decision interpreting Article I, Section 16. They instead locate the right to abort in the language of Section 16 affording a remedy "by due course of law" for injuries to a "person." TRO Br. at 18. According to the plaintiffs, a remedy for an injury entails "bodily integrity" (or "privacy"), which in turn entails a right to abort a child. *Id*. That chain of logic fails the test of precedent at the first step. If every injury to the body must have a remedy, then the Ohio Supreme Court's many cases upholding laws that foreclosed relief for personal injury are all wrongly decided. That includes cases upholding laws that blocked recovery for medical malpractice and product liability. *See, e.g.*, *Ruther v. Kaiser*, 134 Ohio St. 3d 408, 2012-Ohio-5686 ¶¶13–14; *Antoon v. Cleveland Clinic Found.*, 148 Ohio St. 3d 483, 2016-Ohio-7432 ¶¶27–28; *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546 ¶150. If those cases are right—and this Court must assume they are—the plaintiffs' argument must be wrong. Along the same lines, if any of the immunity doctrines are constitutionally valid, *see, e.g.*, *Borkowski v. Abood*, 117 Ohio St. 3d 347, 2008-Ohio-587 (judicial immunity), the plaintiffs' arguments must be wrong.

It is true that one out-of-district appellate decision did recognize a right to abortion. But it

did so in a way that hurts the plaintiffs more than it helps them. *See Preterm Cleveland v. Voinovich*, 89 Ohio App. 3d 684 (10th Dist. 1993). As an initial matter, this Court is not bound by a Tenth District case. *See Slezak v. Slezak*, 2019-Ohio-3467, ¶19 (9th Dist.) Instead, it is bound by First District precedents, Supreme Court of Ohio precedents, and the Ohio Constitution, none of which recognizes a right to abortion. In any event, the majority in *Preterm-Cleveland* never adopted a standard by which abortion laws are to be judged. *Id.* at 695. The majority did, however, reject strict scrutiny and suggest that laws regulating abortion should probably be analyzed under something akin to a rational-basis test. *Id.* at 695 & n.10. A holding that the right to abortion is not infringed by laws that satisfy rational-basis review leads to the same place as a holding that there is no right to abortion: the Heartbeat Act would survive constitutional scrutiny. After all, it is rationally related to promoting the State's interest in protecting the lives of unborn children. *Dobbs*, 142 S. Ct. at 2284.

True enough, there are some out-of-state cases adopting a right to abortion. But they largely parrot the now-overruled *Roe* and *Casey* decisions. And they mostly ground their holdings in clauses other than a due-course-of-law provision. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 613 (2019); *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645, 653 (Miss. 1998); *Women of the State of Minnesota by Doe v. Gomez*, 542 N.W.2d 17, 26 (Minn. 1995). More recently, courts have recognized that their analogous provisions *do not* confer a right to abortion. *See, e.g.*, *Planned Parenthood of the Heartland, Inc. v. Reynolds*, 962 N.W.2d 37, 44 (Iowa 2021).

Healthcare Freedom Amendment. That leaves only the Healthcare Freedom Amendment. Neither the Supreme Court nor the First District has ever announced any interpretation of that Amendment. Accordingly, its plain meaning controls. As addressed above, the plain meaning

confers no right to abortion.

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In sum, neither first principles nor precedent justifies interpreting the Ohio Constitution to confer a right to abortion. The plaintiffs will not likely prevail in this challenge

B. Even if there were a right to abortion, plaintiffs have no power to enforce it.

The plaintiffs here are abortion clinics, not women seeking abortions. The clinics are thus asserting the rights of third-parties. That gives rise to the question whether they have standing to do so. They do not.

"'Third-party standing—that is, standing to litigate on behalf of a third party—is disfavored, but an exception may apply in a case in which a litigant (i) suffers [their] own injury in fact, (ii) possesses a sufficiently close relationship with [the third party, who] possesses the right [or rights at stake in the litigation], and (iii) shows some hindrance that stands in the way of the [third party] seeking relief' for itself." *Grande Voiture D'Ohio La Societe des 40 Hommes et 8 Chevaux v. Montgomery Cty. Voiture No. 34 La Societe Des 40 Hommes et 8 Chevaux*, 2d Dist. Montgomery No. 28388, 2020-Ohio-3821, ¶15**,** quoting *City of E. Liverpool v. Columbiana Cty. Budget Comm.*, 114 Ohio St.3d 133, 2007-Ohio-3759, 870 N.E.2d 705, ¶22, quoting *Kowalski v. Tesmer*, 543 U.S. 125, 129-130, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (internal quotations omitted). "Third-party standing is 'not looked favorably upon,'" and permitted only where truly necessary. *Util. Serv. Partners v. PUC*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶49, quoting *Kowalski*, 543 U.S. at 130.

Even if there were a right to abortion, the plaintiffs would have no third-party standing to assert it. Neither the Ohio Supreme Court nor the First District Court of Appeals has held that

abortion clinics have third-party standing to assert claims on behalf of their patients. And applicable case law shows that the plaintiffs lack third-party standing here. *See State v. Moore*, 2d Dist. Greene C.A. CASE No. 97 CA 137, 1998 Ohio App. LEXIS 5040, at *11 (Oct. 30, 1998) ("[A] third party has no fundamental liberty interest in terminating another's pregnancy."). Even so, plaintiffs' have failed to satisfy the first element of the test because they did not demonstrate that they have suffered their own injury in fact. The only harm they actually assert—that "Plaintiff WMGCP's Dayton area clinic now faces imminent closure"— will occur only "if S.B. 23 remains in effect *and Indiana's new total ban on abortion also takes effect*." TRO Br. at 3 (emphasis added). That injury is insufficient because it is too speculative—it is not yet clear whether or when Indiana's law will take effect. *See Camp Washington Community Bd. v. Rece,* 104 Ohio App.3d 750, 754, 663 N.E.2d 373 (1st Dist.1995) (quoting *Miller v. City of W. Carrollton*, 91 Ohio App.3d 291, 296, 632 N.E.2d 582 (2d Dist.1993)) ("Equity will not interfere where the anticipated injury is doubtful or speculative; reasonable probability of irreparable injury must be shown."). And that speculative harm is asserted by only one of the six plaintiffs in this case. The only other possible harms referenced in support of their motion are canceled appointments and turning away patients. TRO Br. at 34. But the plaintiffs do not say that these harms represent their own injury in fact or provide any evidence of actual harm.

Regardless, the third element of the third-party standing analysis is fatal for the plaintiffs. More precisely, the plaintiffs cannot "show[] some hindrance that stands in the way of" the third parties' "seeking relief" themselves. *PUC*, 124 Ohio St.3d 284 at ¶49 (quotations omitted). The third parties here—the plaintiffs' potential patients—"did not choose to file suit," nor ha[ve] [they] did not even attempt[] to intervene," , and "nothing prohibited" them from "from

asserting [their] own claim." *Id.* at ¶52 (quotations omitted); *see also State ex rel. Harrell v. Bd. of Edn.*, 46 Ohio St.3d 55, 63, 544 N.E.2d 924 (1989); *Bernardini v. Bd. of Edn.*, 58 Ohio St.2d 1, 3 n.1, 387 N.E.2d 1222 (1979). An aggrieved patient could file suit—as a *Jane Doe*, if necessary—and attempt to win an injunction entitling her to an abortion. Nothing stops any would-be patient from doing so; indeed, *Roe v. Wade* itself was a suit brought by a woman asserting her own alleged rights, not a provider asserting those rights for her.

The clinics are suing not because individuals are unable to do so. Rather, they are suing because individuals will win relief *only for themselves*, whereas the clinics want to win statewide relief barring the defendants from enforcing the Heartbeat Act against anyone. Put differently, while it would be more convenient from the clinics' perspectives for them to win relief themselves, convenience does not justify third-party standing. The plaintiffs cite only two appellate decisions on this point, and neither found third-party standing. *See* TRO Br. at 15, n. 4; *State v. Madison,* 160 Ohio St.3d 232, 2020-Ohio-3735, 155 N.E.3d 867 ¶95; *Util. Serv. Partners,* 124 Ohio St.3d 284 at ¶¶50–52. The Court here should similarly hold that the plaintiffs lack standing to sue.

II. The Plaintiffs have not demonstrated any irreparable harm justifying a TRO.

Tellingly, the plaintiffs spend barely more than a page detailing the purported irreparable harm caused by the Heartbeat Act. Plaintiffs provide only a few vague and speculative assertions, relying instead on the idea that violations of constitutional rights cause irreparable harm. *See id.* at 34. But those alleged constitutional rights and harms belong to third-parties. The plaintiffs have not made any showing that they have any right violated by the Heartbeat Act or an irreparable harm of their own, nor can they leverage the harms of their potential patients to fill that void.

As already shown above, the Heartbeat Act does not violate any provision of the Ohio

Constitution, so the plaintiffs' other claim of "numerous concrete harms" cannot fill the gap. TRO Br. at 34. Even so, there is no need for emergency relief here, because "[t]he purpose of both a temporary restraining order and a preliminary injunction is to preserve the status quo of the parties pending a decision on the merits." *Kilgore*, 2012-Ohio-4406 at ¶21 (quotations omitted). And the Heartbeat Act is the status quo in Ohio. A federal court dissolved the injunction of the Act on June 24, 2022—over two months ago. *Preterm-Cleveland v. Yost,* S.D.Ohio No. 1:19-cv-00360, 2022 U.S. Dist. LEXIS 112700 (June 24, 2022) (order dissolving injunction). If this Court wants to "preserve the status quo of the parties," it should decline to issue a TRO. *Kilgore*, 2012-Ohio-4406 at ¶21.

The plaintiffs' delay in filing this lawsuit undermines any claim that they need "immediate" relief here. TRO Br. at 33. Even though the Heartbeat Act has been the law since June 24, 2022, the plaintiffs chose not to file a TRO in June or July. Instead, they opted to file a mandamus action in the Ohio Supreme Court. *See State ex. rel Preterm-Cleveland v. Yost*, No. 2022-0803 (June 29, 2022). Now, more than two months later, the plaintiffs claim that they will face irreparable harm absent "immediate" injunctive relief. TRO Br. at 33. But plaintiffs' own intentional delay undermines this claim. The plaintiffs made a strategic choice to go straight to the Ohio Supreme Court with a procedurally improper mandamus action rather than seek emergency relief in a state trial court—on the theory that a mandamus action in the State's highest court would avoid "piecemeal litigation." Complaint in *State ex. rel Preterm-Cleveland v. Yost*, Oh. S. Ct. No. 2022-0803, at 8 (June 29, 2022). The plaintiffs are much practiced at filing—and obtaining—TROs and preliminary injunctions in the Hamilton County Court of Common Pleas. *See Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A 2100870 (Jan. 31, 2022); *Planned Parenthood*

Southwest Ohio Region v. Ohio Dept. of Health, Hamilton C.P. No. A 2101148 (April 20, 2021); *Women's Medical Group Profession Corp. v. Vanderhoff*, Hamilton C.P. No. A 2200704 (March 2, 2022). And despite the ongoing harms they now claim, the plaintiffs did nothing for an additional two months. That hardly suggests a need for *immediate* relief.

"[A] party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (affirming denial of preliminary injunction where "the record suggests that the delay largely arose from a circumstance within plaintiffs' control"); *see also, e.g.*, *Amdocs, Inc. v. Bar*, No. 4:16CV323 HEA, 2016 U.S. Dist. LEXIS 195670, at *11 (E.D. Mo. May 23, 2016) (holding that plaintiff's delay in seeking a temporary restraining order "belies any assertion it has suffered or will suffer any immediate or irreparable harm"); *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 603 (8th Cir. 1999) (holding that party's "delay in objecting . . . belies any claim of irreparable injury pending trial"). Here, "despite [p]laintiffs[']allegations of immediate, irreparable harm, [p]laintiffs waited . . . two more months to file the present motion for temporary restraining order." *City of Berkeley v. Ferguson-Florissant Sch. Dist.*, No. 4:19CV168 RLW, 2019 U.S. Dist. LEXIS 61561, at *5 (E.D. Mo. Apr. 10, 2019). "Plaintiffs' lack of diligence in filing the Complaint and the motion for temporary restraining order is inconsistent with their assertion that they will suffer immediate and irreparable harm." *Id.* at *6.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' Motion for Temporary Restraining Order.

Respectfully Submitted,

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