IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PRETERM-CLEVELAND, *et al.*, *Plaintiffs,* v. DAVID YOST, *et al.*, *Defendants.*	Case No.: A 2203203 Judge: Christian A. Jenkins **PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER**

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INTRODUCTION

Ohioans are suffering ongoing and irreparable harms from S.B. 23 every day. Absent a Temporary Restraining Order ("TRO") by this Court, Ohioans will continue to have their rights under the Ohio Constitution violated. The text and history of the Ohio Constitution make it clear that the right to abortion is protected in Ohio. Nothing in Defendants' Opposition to Plaintiffs' Motion for Temporary Restraining Order ("Opposition" or "Opp.") is to the contrary.

First, standing: The ability of abortion providers to bring suit on behalf of their patients is squarely recognized by the vast majority of courts both in and out of Ohio. Defendants' protestations otherwise have no basis.

Second, the merits: The Ohio Constitution contains a right to abortion. Defendants devote nearly a third of their Opposition to an irrelevant discussion of "originalist" and "principled living-constitutionalist" approaches to constitutional interpretation. And when they do delve into legal analysis of the right to abortion as it exists under the Ohio Constitution's Due Process and Equal Protection Clauses—Plaintiffs' actual claims—they engage in contorted readings of the Constitution's text and ignore broad swathes of precedent.

Third, harm: Relief is desperately needed. Defendants claim that S.B. 23—a piece of legislation that bans abortion at nearly all stages of pregnancy in Ohio and upends a nearly five-decade status quo—does not create any need for immediate relief. They imply that Plaintiffs have somehow lost their right to seek relief for a continuing constitutional violation and ignore Plaintiffs' stated reasons for filing separate actions in the Ohio Supreme Court and Hamilton County: namely, that S.B. 23 has caused and continues to cause ongoing and increasing irreparable harm to Plaintiffs and their patients. S.B. 23 will lead to the imminent closure of Plaintiff Women's Med Group Professional Corporation's ("WMGPC's") Dayton-area clinic if it

remains in effect and Indiana's recently enacted total ban takes effect, and that is in addition to the dire harms already suffered by Ohioans seeking abortion every day S.B. 23 remains in effect. Those harms require emergency relief in the form of a TRO followed by a preliminary injunction enjoining the enforcement of S.B. 23.

ARGUMENT

I. Plaintiffs Have Third-Party Standing to Bring Claims on Behalf of Their Patients

The Ohio Supreme Court makes clear that parties may rely on third-party standing in circumstances such as these. *See, e.g.*, *E. Liverpool. v. Columbiana Cty. Budget Comm.*, 114 Ohio St. 3d 133, 2007-Ohio-3759, 860 N.E.2d 705, ¶ 25, citing *Craig v. Boren*, 429 U.S. 190, 196-197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). Numerous appellate courts have followed suit. *See Cincinnati City Sch. Dist. v. State Bd. of Educ.*, 113 Ohio App.3d 305, 314, 680 N.E.2d 1061 (10th Dist.1996) (holding that the school district had third-party standing to assert equal-protection claims on behalf of its students); *Akron Ctr. for Reproductive Health v. N. Coast Christian Community*, 9th Dist. Summit No. 12414, 1986 WL 7753, *2 (July 9, 1986) (holding that reproductive health clinic had third-party standing to assert the rights of its employees and patients in action against picketers); *State v. Burker*, 1st Dist. Hamilton No. C-790028, 1979 WL 208813, *3 (Dec. 19, 1979) (holding that individual who sold alcohol to underage buyers had third-party standing to assert federal equal-protection right of the buyers); *cf. Preterm Cleveland v. Voinovich*, 89 Ohio App.3d 684, 627 N.E.2d 570 (10th Dist.1993) (adjudicating case brought by abortion clinic and doctors raising their patients' constitutional rights). This Court should therefore reject Defendants' specious attempt to avoid this overwhelming body of precedent by suggesting that Plaintiffs must identify a decision from the Ohio Supreme Court or the First

District involving third-party standing by an abortion clinic in order to bring this suit. Opp. at 27-28.

Moreover, Ohio courts follow federal standing law, *Brinkman v. Miami Univ.*, 12th Dist. Butler No. CA2006-12-313, 2007-Ohio-4372 ¶ 43 (observing that Ohio courts "regularly" follow federal precedent "on matters of standing"), and federal courts have consistently held that abortion providers have standing to raise claims to protect their patients' fundamental right to access abortion. *See June Med. Servs. L.L.C. v. Russo*, 140 S.Ct. 2103, 2118, 207 L.Ed.2d 566 (2020) (plurality opinion) (collecting cases); *see also E. Liverpool*, 114 Ohio St. 3d 133, 2007-Ohio-3759, 860 N.E. 2d 705, ¶ 22 (adopting the federal test for third-party standing), citing *Kowalski v. Tesmer*, 543 U.S. 125, 129-130, 125 S.Ct. 564, 160 L.Ed.2d 519.[1]

Defendants cite a single case—*State v. Moore*, 2d Dist. Greene C.A. No. 97 CA 137, 1998 WL 754603, (Oct. 30, 1998)—to support their assertion that "[a] third party has no fundamental liberty interest in terminating another's pregnancy." *See* Opp. at 28 (quoting *Moore*, 1998 WL 754603, at *4). But they grossly mischaracterize that case. First, the court was not discussing third-party standing; instead, it addressed whether a third party could claim to be similarly situated to a pregnant woman for the purposes of equal protection analysis.[2] *Moore*, 1998 WL 754603, at *4. And even more glaringly, the "third party" in question in *Moore* was not a provider, but "the father of [the] unborn child" who was on trial for "intend[ing] to hire a

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[1] *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2243 (2022), does not derogate from the United States Supreme Court's long established third-party standing doctrine—in fact, it provides yet another example of a clinic asserting third-party standing on behalf of its patients.

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

'hitman' to kill [the] unborn child." *Id.* at *1. The case has no relevance to the question of whether providers have third-party standing to bring Due Process and Equal Protection claims on behalf of their patients.

Furthermore, the court in *Moore* explicitly contrasted the father's lack of demonstrated interest in a pregnancy with the well-established interest of providers: "Moore cannot seriously argue that he is similarly situated to pregnant women *and physicians* for the purposes of electing to terminate a pregnancy . . . Moore is obviously not 'alike in all relevant respects' to pregnant women and their physicians." *Id.* at *11. The case thus is squarely in line with extensive Ohio precedent holding that providers have third-party standing to bring claims on behalf of their patients. *See Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A. 2100870 (Jan. 31, 2022), at 3; *Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A 2101148 (Apr. 19, 2021), at 5.

Defendants also argue that Plaintiffs have not demonstrated an "injury in fact" and that this failure precludes third-party standing here. *See* Opp. at 28.[3] This is wrong; Plaintiffs allege imminent and irreparable harm. Compl. ¶¶ 56-67. These harms—including Plaintiffs' inability to provide abortion care, resulting in severe burdens on patients and economic damages to Plaintiffs' longstanding businesses—are sufficient to establish an injury in fact. *Akron Ctr. for Reproductive Health*, 1986 WL 7753, at *3 (finding that injury in fact was satisfied because on occasion center had to close early and "a number of women…[could not] receive medical

[3] Defendants' argument that Plaintiffs must "'show [] some hindrance that stands in the way of' the third parties' 'seeking relief' themselves," Opp. at 28-29, is also misplaced. Here, where "enforcement of [a] challenged restriction against the litigant would result indirectly in the violation of third parties' rights," a litigant need not demonstrate that the third party is hindered in accessing the courts. *June Med. Servs.* at 2118-19. Instead, in these circumstances, abortion providers are "the obvious claimant" and "the least awkward challenger" because they are the party upon whom the challenged statute imposes "legal duties and disabilities." *Id.* at 2119, quoting *Craig*, 429 U.S. at 196-197.

treatment"). Moreover, under S.B. 23, Plaintiffs face the threat of imprisonment, license revocation, fines, and criminal and civil liability, Compl. ¶¶ 44-48, in addition to Plaintiffs' inability to provide services which, if S.B. 23 and Indiana's abortion ban remain in effect, will cause Plaintiff WMGPC to close its Dayton and Indiana clinics on September 15, *id.* at ¶ 8.

Plaintiffs have standing to bring these important claims on behalf of their patients.

II. Plaintiffs Are Likely to Succeed on the Merits of Their Claims that S.B. 23 Violates Ohioans' Equal Protection and Substantive Due Process Rights

Defendants do not engage with the body of precedent that demonstrates the breadth of the substantive due process protections in the Ohio Constitution—except to take issue with Plaintiffs' use of *Preterm Cleveland v. Voinovich*, 89 Ohio App.3d 684. *Compare* Plaintiffs' Motion For Temporary Restraining Order Followed By Preliminary Injunction; Request For Hearing at 17-22 ("Mot."), *with* Opp. at 25-26.[4] That case, along with the others cited by Plaintiffs, *see* Mot. at 17-22, demonstrates clearly that the Ohio Constitution's due process protections extend to matters involving "privacy, procreation, bodily autonomy, and freedom of choice in health care decision making." *Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A 2101148, at 8 (Apr. 19, 2021), citing *Stone v. City of Stow*, 64 Ohio St.3d 156, 160-63, 593 N.E.2d 294 (1992). Plaintiffs' opening motion also references a number of cases in which other state courts identified an independent right to abortion in their

[4] Plaintiffs also point to *Williams v. Marion Rapid Transit*, 152 Ohio St. 114, 87 N.E.2d 334 (1949), as evidence that there is no right to abortion in the Ohio Constitution, but this case is inapposite for numerous reasons. First, the decision concerned "an unborn viable child capable of existing independently of the mother"—but embryos are not capable of existing independently of the woman at six weeks LMP. *Id*. at 114; Compl. ¶¶ 49-50. Second, it concerned allegedly negligent behavior on behalf of the defendant. *Id*. at 115-116. Third, the Court addressed only the limited question of whether "a newborn child[whose] toxicology screen yields a positive result for an illegal drug due to prenatal maternal drug abuse" constituted an abused child for the purposes of a particular statute. *Id.* at 200.

state constitutions based on provisions that share key similarities to provisions of the Ohio Constitution. *See* Mot. at 18, 22. The holdings in these cases reinforce that Sections 1 and 16 of the Ohio Constitution also protect the right to abortion, particularly when interpreted in the context of the enhanced protections for health care freedom provided by the Health Care Freedom Amendment ("HCFA"). *See id.*; *infra* at 8-9. While Defendants assert that Ohio's due process protections should be interpreted in lockstep with the federal due process clause, *see* Opp. at 23-24, this contention ignores the large body of precedent cited by Plaintiffs that demonstrate that the right to abortion is independently encompassed by Ohio's due process and equal protection guarantees, *see* Mot. at 17-22. That is the issue before the court today.

Defendants similarly mischaracterize the scope of Ohio's equal protection guarantee as compared to its federal analogue. They ignore the substantial line of recent cases showing the Ohio Supreme Court's increasing emphasis on the Equal Protection and Benefit Clause's unique protections. *Compare* Mot. at 29 (citing *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 23; *State v. Noling*, 149 Ohio St.3d 327, 2016-Ohio-8252, 75 N.E.3d 141, ¶ 11; *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 167 Ohio St.3d 255, 2022-Ohio-65, 2203 N.E.3d 279, ¶ 151 (Brunner, J., concurring)), *with* Opp. at 18-19. Instead, the vast majority of the cases Defendants rely upon are more than a decade old. *See* Opp. at 18-19 (collecting cases). And of the three recent cases that Defendants do cite for the proposition that the state and federal equal protection clauses must be construed identically, two of them say nothing of the sort, but instead explicitly decline to pass judgment on the issue. *See State v. Moore*, 154 Ohio St. 3d 94, 99, 2018-Ohio-3237, ¶ 22, 111 N.E.3d 1146, 1152 ("this is not an appropriate case to take up the question whether the [federal and state equal protection] provisions should be given different treatment"); *Simpkins v. Grace Brethren Church of*

Delaware, *Ohio*, 149 Ohio St. 3d 307, 319, 2016-Ohio-8118, ¶ 46, 75 N.E.3d 122, 135 ("[a]ppellants here do not argue that Ohio's Equal Protection Clause provides greater protections than the federal Equal Protection Clause"). This leaves Defendants with a single recent case (*State v. Aalim*, 150 Ohio St. 3d 489, 2017-Ohio-2956, 83 N.E.3d 883) to buttress their contention that the Ohio Supreme Court has not recognized the independent sweep of Ohio's Equal Protection Clause—a case that, unlike the case before this Court, involved neither a fundamental right nor a suspect classification.

Defendants' curious application of Ohio's Equal Protection and Benefit Clause does not stop there. Their insistence that S.B. 23 does not target women rings hollow as they are forced to admit that "men do not menstruate or become pregnant, while women do." Opp. at 21 (citation omitted). It is simply not accurate that S.B. 23 does not target women. Defendants ignore the actual text of S.B. 23, which expressly and repeatedly targets only "pregnant wom[e]n." *See id.; see*, *e.g.*, 2019 Am.Sub.S.B. No. 23, Section 1, amending R.C. 2919.192(A); *id.*, Section 3(H).[5] And they almost entirely ignore one of the two justifications explicitly provided for S.B. 23, which is to "protect[] the health of the woman." *See* 2019 Am.Sub.S.B. No. 23, Section 3(G). Defendants conclusorily dismiss that justification on the novel basis that it is "simply a correct statement of the law," rather than a justification, Opp. at 22, and instead simply assert that *all* abortion laws are justified on the singular "basis of the asserted presence and value of a human

[5] The cases Defendants cite to show that S.B. 23 is in fact a facially neutral law are all distinguishable. The cases involved statutes that either did not expressly target women as S.B. 23 does, s*ee Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993); *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974); *Rowitz v. McClain*, 2019-Ohio-5438, 138 N.E.3d 1241, or did not involve restrictions on abortion access, *see Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977). And in any event, all of the cases flatly ignore that pregnancy is a condition that is unique to women, and that classifications based on pregnancy clearly target women. *See* Mot. at 30-31.

life in utero," *id.* at 21-22 (citing Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995, 1009 n.35 (2003)). But Plaintiffs have shown that these laws were largely motivated by gender stereotypes and outdated notions of the proper role of women in society. *See* Mot. at 31-32. Defendants' blanket, unsupported statements regarding abortion regulations do nothing to change the fact that S.B. 23 explicitly targets women both as written and in practice.

Rather than engage with *recent* Ohio Supreme Court caselaw, Defendants argue against Plaintiffs' likelihood of success on the merits by painting a *historical* portrait of Ohio in the middle of the 19th century. *See* Opp. at 9-10. Their portrait is not only irrelevant; it is composed of gross generalizations and cherry-picked facts.[6] The right of Ohio women to obtain abortions is not dependent on the societal mores in Ohio in the 1850s, but rather on the contemporary legal precedent concerning the due process and equal protection guarantees of the Ohio Constitution—as well as on its evolving text.

Defendants' narrow focus on nineteenth century Ohio also ignores the fact that the state constitution was amended in 2011 by the HCFA to affirm the value of health care freedom for all Ohioans. Defendants argue that because the amendment itself does not explicitly use the word "abortion," it has no bearing whatsoever on the existence of that right in the Ohio Constitution. *See* Opp. at 12-13. But when Ohioans voted to adopt the HCFA, they were not voting to adopt

[6] Contrary to Defendants' portrayal, abortion was a common and widely accepted practice in Ohio throughout the 19th century, particularly up to the point of quickening. *See* James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy*, 206-208 (1978) (discussing the findings in a report by a special committee of the Ohio legislature); Loren G. Stern, *Abortion: Reform and the Law*, 59 J. Criminal L. & Criminology 84, 84 n.1 (1968) (defining quickening as "that stage of gestation, usually sixteen to twenty weeks after conception, when the woman feels the first fetal movement"). The prevalence of abortion in Ohio continued even after Ohio passed its first abortion regulations in 1834. *See id.*; Mohr at 206-208.

an explicit list of rights, nor were they voting to ratify one or more of the drafters' subjective motivations; they voted to add broad language to their Constitution enshrining health care freedom.[7] While Plaintiffs do not assert that the Ohio Constitution's right to abortion resides in the HCFA, they do assert that the Constitution's extant rights to liberty and personal autonomy must be read and understood in light of that amendment. *See* Mot. at 21-22. *That* is the explicit purpose of the HCFA. *See* Ohio Constitution, Article I, Section 21 ("Preservation of the freedom to choose health care and health care coverage"). Defendants completely ignore the well-established rule of Ohio constitutional construction that its provisions are construed holistically, shedding light on each other; instead insisting that each constitutional provision must stand in isolation. *See*, *e.g.*, *Smith v. Leis*, 106 Ohio St.3d 309, 318, 2005-Ohio-5125, ¶ 59, 835 N.E.2d 5, 13 (2005) ("[I]t is our duty to give a construction to the Constitution as will make it consistent with itself, and will harmonize and give effect to all its various provisions." (citation omitted)); *Steele v. Hamilton County Community Mental Health Bd.*, 90 Ohio St.3d 176, 181, 736 N.E.2d 10, 15 (2000) (reading Section 1 and Section 16 as providing the basis for the "fundamental right" to refuse medical treatment).[8]

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[7] Defendants also rely on numerous incorrect assumptions regarding public opinion in abortion. *Compare* Opp. at 12-13, *with*, Quinnipiac University, *Ohio Voters Oppose Fetal Heartbeat Abortion Ban, Quinnipiac University Poll Finds; 90 Percent Support Universal Gun Background Checks*, https://bit.ly/3y02tjU (July 26, 2019), at 6 (poll showing that more than half of all Ohio voters *oppose* banning abortion after a fetal heartbeat is detectable).

[8] Defendants also point to other countries and states with abortion restrictions as evidence that interpreting the Ohio Constitution differently would be tantamount to saying that these other jurisdictions "stand against fundamental justice[.]" Opp. at 15-16. This dramatic statement does nothing to demonstrate why these other pieces of legislation should influence this Court's interpretation of the Ohio Constitution, "a document of independent force." *Arnold v. Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993).

III. Defendants Do Not Contest Plaintiffs' Showing of Irreparable Harm

Defendants cannot deny the actual, irreparable harm being suffered by Ohioans every day. Instead, Defendants accuse Plaintiffs of a lack of "diligence" that led to the filing of the instant case, Opp. at 2, ignoring the horrific circumstances that Plaintiffs have sought for over two months to alleviate. Defendants fail to rebut the irreparable harm alleged by Plaintiffs and detailed in the six affidavits submitted by providers at Plaintiffs' clinics submitted in support of Plaintiffs' motion. *See generally* Trick Aff; Liner Aff.; Burkons Aff.; Pierce Aff; Krishen Aff.; Haskell Aff. These harms are specific, devastating, and concrete, and increase each day that S.B. 23 is in effect. *See* Mot. at 9-15, 33-35.

Nor is the reality of these harms contingent on the course that Plaintiffs' litigation has taken. Defendants suggest that the ongoing harm caused by S.B. 23's unprecedented ban on abortion is somehow made less real by the fact that Plaintiffs first sought immediate relief in the Ohio Supreme Court when the ban went into effect. *See* Opp. at 30-31. This is absurd. Plaintiffs filed in the Supreme Court precisely because of the urgent need for a binding, universal declaration of S.B. 23's unconstitutionality that would provide relief for the multitude of harms being suffered by Plaintiffs and their patients, and requested a stay and an expedited briefing schedule consistent with that need. *See* Compl. ¶ 2. In the two months since that action was filed, that harm has grown until it became untenable, forcing Plaintiffs to seek immediate relief in this Court. The reason that Plaintiffs have filed this action is precisely *because* they and their patients so desperately need relief, and they could not wait any longer for the Ohio Supreme Court to provide that relief. *See id.* at ¶¶ 60-62 (describing the increased urgency in light of the imminent closure of Plaintiff WMGPC's Dayton clinic); Mot. at 1-2, 14 (same).

Finally, Defendants assert that "the Heartbeat Act is the status quo in Ohio." Opp. at 30. But "status quo" means "the last, actual, peaceable, uncontested status which preceded the

pending controversy." *Lamar Advantage GP Co., LLC v. City of Cincinnati*, 114 N.E.3d 805, 813 (Ohio C.P. 2018) (citation omitted). And S.B. 23, which has been in effect for only two months, was a radically disruptive change to the *five-decade status quo* of abortion access in the state. *See* Compl. ¶ 13; Mot. at 8, 35. Ohio courts consistently issue temporary restraining orders and preliminary injunctions to preserve the pre-controversy status quo by enjoining enforcement of already-enacted laws. *See, e.g.*, *Taxiputinbay, LLC v. Put-in-Bay*, 6th Dist. Ottawa No. OT-20-021, 2021-Ohio-191, ¶¶ 16-20 (dismissing a challenge to a preliminary injunction that "preserve[d] the status quo" by enjoining enforcement of a contested ordinance after the ordinance had already gone into effect); *Lamar Advantage GP Co., LLC*, 114 N.E.3d at 813 (holding that an injunction to preserve the status quo could require the contested ordinance to be enjoined from enforcement after it had already gone into effect). The circumstances here fit squarely into this line of precedent: S.B. 23 is not the status quo. Instead, Ohio's pre-S.B. 23 norm is "the last, actual, peaceable, uncontested status which preceded the pending controversy." *Id.* at 813. Accordingly, an injunction prohibiting the enforcement of S.B. 23 will preserve the five-decade status quo in Ohio.

CONCLUSION

For the foregoing reasons, Plaintiffs ask this Court to issue a temporary restraining order followed by a preliminary injunction, and enjoin Defendants, their employees, agents, and successors in office, from enforcing S.B. 23.

Dated: September 8, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 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 September 8, 2022, a copy of the foregoing was served via electronic mail to the following Defendants that have not yet entered an appearance in this matter:

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