Supreme Court of Ohio Clerk of Court - Filed June 20, 2023 - Case No. 2023-0004

In the
Supreme Court of Ohio

PRETERM-CLEVELAND, ET AL.	:	Case No. 2023-0004
	:	
Appellees,	:	On appeal from the Hamilton County
	:	Court of Appeals,
v.	:	First Appellate District
	:	
DAVE YOST, ATTORNEY GENERAL	:	Court of Appeals
OF OHIO, ET AL.,	:	Case No. C-220504
	:	
Appellants.	:	

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INTRODUCTION

The State attempts to frame this case as implicating the separation of powers, boldly claiming that the Ohio judicial branch interferes with the prerogatives of the legislative and executive branches when it refuses to accept jurisdiction over the appeal of a preliminary injunction temporarily blocking the enforcement of a state law. But it is the State that seeks to circumvent the separation of powers—and place the executive branch above the other branches—by pushing for exceptions that would swallow clear constitutional and statutory rules and this Court's long-standing precedent.

The State asks this Court to fundamentally depart from both well-established rules governing the appealability of preliminary injunctions and well-established doctrine on third-party standing. In proposing a rule by which appellate courts presume for the purposes of determining their jurisdiction that state laws are constitutional, and that the State is always irreparably injured by enjoining such laws, the State asks this Court to hold that preliminary injunctions of state laws are *always* appealable. This approach is the antithesis of both the separation of powers envisioned by the Ohio Constitution and the statutory framework for the appealability of provisional remedies enacted by the Ohio legislature.

Faced with unfavorable precedent, the State makes two asks of this Court that lack any legal basis. First, where Ohio law permits appeals of preliminary injunctions in narrow circumstances, the State asks this Court to instead follow federal law broadly permitting appeals of all preliminary injunctions. Second, where this Court has followed federal law on third-party standing, the State asks this Court to create a new state-law rule concerning third-party standing. These attempted distortions of Ohio law show that the State is merely seeking to accelerate review of the underlying merits of this case. But in so doing, the State ignores the costs to this

Court's legitimacy of flouting well-established law on the basis of such threadbare and oft-rejected arguments (as well as the costs of opening the floodgates to gratuitous appeals).

The two procedural questions before the Court have clear, well-established answers. Decades of Ohio caselaw hold that preliminary injunctions are not appealable except in specific, narrow circumstances not present here, and that third-party standing exists in circumstances such as these. Appellees request only that this Court follow its existing precedent by rejecting the State's two propositions of law.

STATEMENT OF THE FACTS

1. On April 10, 2019, the Ohio General Assembly enacted S.B. 23. Under S.B. 23, a health care provider who intends to perform an abortion is required to determine whether there is embryonic or fetal cardiac activity. If there is cardiac activity (typically detectable at approximately six weeks into pregnancy, as measured from the first day of a patient's last menstrual period), S.B. 23 makes it a felony to "caus[e] or abet[] the termination of" the pregnancy. S.B. 23, Section 1, amending R.C. 2919.192(A), 2919.192(B), and 2919.195(A).
2. S.B. 23 has two very limited exceptions. Abortion is permitted after cardiac activity is detected only if it is necessary to prevent "the death of the pregnant woman," or a "serious risk of substantial and irreversible impairment of a major bodily function." S.B. 23, Section 1, amending R.C. 2919.192(B). "Serious risk of the substantial and irreversible impairment of a major bodily function" is tautologically defined in the statute to mean "any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the

substantial and irreversible impairment of a major bodily function." R.C. 2919.19(A)(12) and 2919.16(K). A "medically diagnosed condition that constitutes a 'serious risk of the substantial and irreversible impairment of a major bodily function' includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes," and "may include, but is not limited to, diabetes and multiple sclerosis," but explicitly "does not include a condition related to the woman's mental health." *Id.* The statute does not provide sufficient guidance to providers like Appellees as to when an exception applies, Preliminary Injunction Order (Oct. 12, 2022) ("PI Order") ¶¶ 46-49, and also does not cover many significant health issues associated with pregnancy, *id.* ¶ 54.

3. In 2019, a federal district court preliminarily enjoined S.B. 23 before the law could take effect. *Preterm-Cleveland v. Yost*, 394 F. Supp.3d 796, 800-801 (S.D.Ohio 2019). On June 24, 2022, following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, ___ U.S. __, 142 S.Ct. 2228, L.E.2d 545 (2022) ("*Dobbs*"), the district court vacated that preliminary injunction and S.B. 23 took effect. *Preterm-Cleveland v. Yost*, No. 1:19-cv-00360, Dkt. #100.

4. Appellees are Ohio reproductive health care providers that offer a wide range of services, including but not limited to abortion care. Five days after S.B. 23 went into effect, Appellees filed a petition for a writ of mandamus with this Court. *See State ex rel. Preterm-Cleveland v. Yost*, Case No. 2022-0803. Appellees voluntarily dismissed the writ in September 2022, when at least one of the Appellee clinics was faced with imminent closure due to the harm caused by S.B. 23. Ohio S.Ct. Case Announcement 2022-3174. Appellees then brought an action in the Court

of Common Pleas for Hamilton County, seeking a temporary restraining order followed by a preliminary injunction, as well as a declaratory judgment and permanent injunctive relief, against S.B. 23.

5. Appellees' Complaint asserted claims for violations of the Ohio Constitution's protections for individual liberty under Article 1, Sections 1, 16, and 21, and the Ohio Constitution's equal protection and benefit guarantee under Article 1, Section 2. Appellees also brought a claim arising from S.B. 23's unconstitutional vagueness, in violation of Article 1, Section 16, but did not move for preliminary injunctive relief on that claim.[1]

6. On September 14, 2022, the trial court entered a 14-day temporary restraining order, which it later extended to October 12, 2022. *See* Temporary Restraining Order (Sept. 14, 2022) ("TRO Order"); Entry Extending Temporary Restraining Order (Sept. 27, 2022). Following limited, expedited discovery and an evidentiary hearing on Appellees' preliminary injunction motion, the trial court issued a preliminary injunction enjoining enforcement of S.B. 23. *See* PI Order.

7. The PI Order found that before S.B. 23 went into effect, Ohioans were able to access "legal and safe abortion … for nearly five decades." PI Order ¶ 131. For the limited period of time S.B. 23 was in effect, the law drastically restricted Ohioans' access to abortion, inflicting significant

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[1] On January 31, 2023, Appellees filed an Amended Complaint. In addition to their constitutional claims, Appellees bring a claim that S.B. 23 is void *ab initio,* as it violated federal law at the time of its enactment. Neither Appellees' vagueness claim nor their void *ab initio* claim has been litigated before the trial court.

physical, economic, emotional and psychological harms on pregnant women in Ohio. *See id.* ¶¶ 44, 63-71.

8. The PI Order also found that during the time S.B. 23 was in effect, Appellees directly suffered harm under S.B. 23. Appellee clinics "were injured by S.B. 23, which had a significantly negative impact on their financial stability." PI Order ¶ 77. Moreover, all Appellees risked criminal and financial penalties. *Id.* ¶ 78. A violation of S.B. 23 is a fifth-degree felony, punishable by up to one year in prison and a fine of $2,500. S.B. 23, Section 1, amending R.C. 2919.195(A); R.C. 2929.14(A)(5) and 2929.18(A)(3)(e). In addition to criminal penalties, the state medical board may assess a forfeiture of up to $20,000 for each violation of S.B. 23, and limit, revoke, or suspend a physician's medical license. *See* S.B. 23, Section 1, amending R.C. 2919.1912(A); R.C. 4371.22(B)(10). Appellee clinics could also face civil penalties and revocation of their ambulatory surgical facility licenses for a violation of S.B. 23. R.C. 3702.32; R.C. 7302.30(A)(2)(a). As a result, while S.B. 23 was in effect, "providers were forced to turn away patients seeking abortion care." PI Order ¶ 64.

9. The trial court emphasized the preliminary nature of the PI Order in its decision, noting that "[t]he Court's findings at this stage [were] based on the limited record before the Court" and stating its intent to set the matter for a case management conference and to issue a scheduling order "providing the parties with adequate time to conduct full discover[y] in preparation for trial." PI Order 1 fn.1.

10. A case management conference was scheduled for December 14, 2022. However, the State appealed the PI Order on October 12, 2022. In light of the State's pending appeal, the trial court declined to set a discovery schedule. *See* Dec. 14, 2022 Case Management Conference Transcript at 4:12-20 ("Dec. 14, 2022 Tr.").

11. On October 28, 2022, the First District Court of Appeals *sua sponte* ordered briefing addressing whether the PI Order was a final, appealable order as is required for appellate jurisdiction. Entry Ordering Jurisdictional Briefing (Oct. 28, 2022). Following that briefing, the First District dismissed the appeal, finding that the trial court's preliminary injunction did not "satisfy the requirements of a final appealable order" because it is "designed to maintain the status quo, and the state fail[ed] to successfully demonstrate that it will be deprived of a meaningful or effective remedy" if and when a permanent injunction is granted and appealed. *Preterm Cleveland v. Yost*, 1st Dist. Hamilton No. C–220504, 2022-Ohio-4540, ¶¶ 28-29 ("App. Op.").

12. The First District reasoned that "an appeal after issuance of the permanent injunction will provide the meaningful and effective remedy," as "plaintiffs ultimately seek a permanent injunction to enjoin the same act on the same reasoning." App. Op. ¶¶ 19-20. It further observed that the PI Order merely maintained "the status quo of legal and safe abortion access that has been in place in Ohio for nearly five decades." *Id.* ¶ 23. Finally, it considered and rejected each of the State's "three purported forms of harm," finding that they did not fit "within [the] confines" of the harm required by R.C. 2505.02(B)(4). *Id.* ¶ 25.

13. On January 3, 2023, the State filed a Notice of Appeal in this Court. *See Preterm-Cleveland, et al. v. Yost, et al.*, Case No. 2023-0004. On March 14, 2023, this Court accepted the appeal on Propositions of Law Nos. I (regarding whether the State can immediately appeal orders preliminarily enjoining state laws) and II (regarding whether Appellees have standing to challenge S.B. 23). Ohio S.Ct. Case Announcement 2023-758.

ARGUMENT

A. Response to Proposition of Law No. 1: The State Cannot, As a Matter of Right, Immediately Appeal Orders Preliminarily Enjoining State Laws

The Court should apply the law governing appellate jurisdiction as it is written and as Ohio courts have interpreted it for decades. Ohio law is clear that appellate jurisdiction is limited to the review of "judgments or final orders" of lower courts. Ohio Constitution, Article IV, Section 3(B)(2); *accord Tassone v. Tassone*, 2021-Ohio-4063, 180 N.E.3d 1241, ¶ 10 (10th Dist.). A final order is one that "'dispos[es] of the whole case or some separate and distinct branch thereof.'" *Crown Servs., Inc. v. Miami Valley Paper Tube Co.*, 162 Ohio St.3d 564, 2020-Ohio-4409, 166 N.E.3d 115, ¶ 13. And, as the State acknowledges, a preliminary injunction is "a provisional remedy that is considered interlocutory, tentative, and impermanent in nature." *Wells Fargo Ins. Servs. USA, Inc. v. Gingrich*, 12th Dist. Butler No. CA–2011–05–085, 2012-Ohio-677, ¶ 5; *see* State Br. 15-16.

A preliminary injunction is thus only considered a final order in specific, narrow circumstances, where: (1) "[t]he order … determines the action with respect to the provisional

remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy" *and* (2) "[t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action." R.C. 2505.02(B)(4).

Those circumstances are not present here, nor do compelling reasons exist to depart from the law regarding the appealability of provisional remedies. The State devotes the thrust of its briefing to assertions that it is irreparably harmed by the PI Order. *See* State Br. 16-21. But those theories of purported harm misconstrue Ohio courts' application of R.C. 2505.02(B)(4) and overlook that the State will be afforded a meaningful and effective remedy by an appeal following final judgment. At their core, the State's claims of irreparable harm whenever either a state law is enjoined or its purported interest in fetal life is threatened invite this Court to create unwarranted exceptions unauthorized by the legislature. This Court should decline to do so and instead apply the law and its own precedent, under which State's arguments clearly fail.

1. *The Preliminary Injunction Is Not Appealable Because It Maintains the Status Quo.*

Courts across Ohio have held that "a preliminary injunction which acts to maintain the status quo pending a ruling on the merits is not a final appealable order under R.C. 2505.02." *Taxiputinbay, LLC v. Village of Put-in-Bay*, 6th Dist. Ottawa No. OT–20–021, 2021-Ohio-191, ¶ 17 (collecting cases) (internal citations and quotations omitted); *accord RKI, Inc. v. Tucker*, 11th Dist. Lake No. 2017–L–004, 2017-Ohio-1516, ¶ 11; *McHenry v. McHenry*, 5th Dist. Stark

No. 2013CA00001, 2013-Ohio-3693, ¶ 18; *see also* App. Op. ¶¶ 21-22. The PI Order does just that. *See* PI Order ¶ 131 ("Enjoining S.B. 23 will not cause any harm to third parties, as it will preserve the status quo of legal and safe abortion access that has been in place in Ohio for nearly five decades."). The widespread application of this rule in Ohio is grounded in the recognition that preliminary injunction orders that preserve the status quo—like the PI Order here— do not deprive the appealing party of a meaningful remedy, but merely delay that remedy until after a final judgment has been reached. *See Deyerle v. City of Perrysburg*, 6th Dist. Wood No. WD–03–063, 2004-Ohio-4273, ¶ 15; *see also* App. Op. ¶¶ 28-29 (holding that the trial court's preliminary injunction did not "satisfy the requirements of a final appealable order" because it is "designed to maintain the status quo"). Here, the delay does not deprive the State of a meaningful remedy because "[i]f this case were to proceed to final judgment and the trial court granted a permanent injunction to appellees, appellant would still have the right to appeal that judgment" to the Supreme Court. *Deyerle* at ¶ 15. While Ohio appellate courts have relied on this well-established principle for decades, the State asks this Court to disregard this body of caselaw without providing any basis for doing so. *See* State Br. 24.

The status quo is the "last, actual, peaceable, uncontested status which preceded the current controversy." *Taxiputinbay* at ¶ 17 (collecting cases); *see also Clean Energy Future, LLC v. Clean Energy Future-Lordstown, LLC*, 11th Dist. Trumbull No. 2017–T–0110, 2017-Ohio-9350, ¶ 5 (quoting *Aquasea Group, LLC v. Singletary*, 11th Dist. Trumbull No. 2013–T–0120, 2014-Ohio-1780 ¶ 11); *Quinlivan v. H.E.A.T. Total Facility Solutions, Inc.*, 6th Dist. Lucas

No. L–10–1058, 2010-Ohio-1603, ¶ 5 (collecting cases). The State incorrectly asserts that the status quo must be defined as "anything" in place on the "eve-of-suit." State Br. 24. But Ohio courts have not equated the status quo with "eve-of-suit" conditions. Instead, they have consistently found that even where a preliminary injunction enjoins the enforcement of a law that was in effect on the "eve-of-suit", the preliminary injunction preserves the pre-controversy status quo. For example, in *Taxiputinbay*, the Sixth District concluded that a preliminary injunction "preserve[d] the status quo" by enjoining the enforcement of a contested ordinance, despite the fact that the ordinance had gone into effect prior to the issuance of the preliminary injunction. *Taxiputinbay* at ¶¶ 16-20; *see also Lamar Advantage GP Co., LLC v. City of Cincinnati*, 114 N.E.3d 805, 813-814 (Ohio C.P. 2018) (holding that an injunction could maintain the status quo where it enjoined a contested ordinance that had already gone into effect).

As recognized by the trial court and the First District, the status quo is the "nearly five decades" "of legal and safe abortion access … in Ohio" that preceded S.B. 23 taking effect on June 24, 2022. PI Order ¶ 131; App. Op. ¶ 23. Indeed, S.B. 23 was challenged and enjoined in federal court in 2019 before it ever took effect, and then challenged again only five days after the federal court preliminary injunction blocking its enforcement was dissolved in light of *Dobbs*. *See Preterm-Cleveland v. Yost*, 394 F.Supp.3d 796, 800-801 (S.D.Ohio 2019); *State ex rel. Preterm-Cleveland v. Yost*, Case No. 2022-0803. That S.B. 23 was briefly in effect between federal and state injunctions does not make it the pre-controversy status quo. In fact, making a preliminary injunction's appealability turn on whether litigation was brought before a law takes

effect (as the State's proposed rule would do) would create undesirable incentives: plaintiffs would have reason to rush to bring suit before a law's effective date; the State would be incentivized to make laws effective immediately, instead of giving Ohioans the opportunity to conform their behavior to changes in the law. Neither outcome is well-advised.

2. *The State Will Have a Meaningful and Effective Remedy if the Ultimate Relief is Granted.*

The PI Order is not final and appealable because the State will have a "meaningful and effective remedy" should the trial court grant Appellees the relief they ultimately seek: a permanent injunction and declaratory relief. *See* R.C. 2505.02(B)(4)(a).

For this reason, courts across Ohio—including the First District in this case, *see* App. Op. ¶¶ 18-20— have concluded that it is "well established that the granting of a temporary or preliminary injunction, in a suit in which the ultimate relief sought is a permanent injunction, is generally not a final appealable order." *Taxiputinbay*, 2021-Ohio-191, at ¶ 12 (quoting *Hootman v. Zock*, 11th Dist. Ashtabula No. 2007–A–0063, 2007-Ohio-5619, ¶ 15); *see also Scott D. Shell DVM, Inc. v. Wallace*, 11th Dist. Geauga No. 2020–G–0240, 2020-Ohio-442, ¶ 9 (same). This is because the entry of a permanent injunction—a final, appealable order—"will allow for a remedy at the conclusion of the proceedings." *Aquasea Group*, 2014-Ohio-1780, ¶ 12.

Further, the State will not be deprived of a "meaningful or effective remedy" because it will not suffer any harm during the pendency of the litigation, and any harm that it could suffer is capable of being rectified after final judgment. *See* State Br. 16-21. A party seeking to appeal

an interlocutory order may do so only if "an appeal after final judgment will not rectify the damage." *AIDS Taskforce of Greater Cleveland v. Ohio Dep't of Health*, 2018-Ohio-2727, 116 N.E.3d 874, ¶ 14 (8th Dist.) (quoting *State v. Muncie*, 91 Ohio St. 3d 440, 451, 746 N.E.2d 1092 (2001)). Such cases are limited to those that implicate concrete, irreversible harms such as the constitutional protection against double jeopardy, which includes a right not to stand trial a second time, *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶¶ 53-59, the disclosure of confidential material that would be "irretrievable" once disclosed, *Cleveland Clinic Found. v. Levin*, 120 Ohio St.3d 1210, 2008-Ohio-6197, 898 N.E.2d 589, ¶¶ 12-13, and the forced administration of medication to an incompetent criminal defendant, which cannot later be undone, *Muncie*, 91 Ohio St.3d 440, 746 N.E.2d 1092. The State has asserted no such concrete, irreversible harms to itself arising from the PI Order.

Indeed, the State's own actions belie its supposed concern that irreversible harms occur each day that S.B. 23 is not in effect. Were the State truly concerned with such harms, it could have sought a stay of the preliminary injunction. It could have expeditiously pursued the case in the trial court. Instead, the State chose the one course of action that guaranteed delay of resolution on the merits by pursuing this appeal.[2] The harms claimed by the State can be rectified by an appeal of the final judgment, as the statutory framework contemplates.

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[2] Contrary to the State's unsubstantiated claims that the trial court intends to hold the State "hostage" (State Br. 3), the trial court has made clear that it intends to move forward expeditiously to finally resolve this case on the merits. In the PI Order, the trial court ordered that the case "be set for a case management conference at which time the Court shall issue a

a. The State's assertion that orders preliminarily enjoining state laws always inflict irreparable harm on the State is unfounded and would upend well-established Ohio law.

The State first claims that "court orders enjoining state laws always inflict irreparable harm on the State—irreparable harm that 'only an interlocutory appeal' can stop." State Br. 16. In doing so, the State reveals what it is really asking this Court to do: ignore Ohio precedent and craft an exception out of whole cloth by holding that the State may *always* immediately appeal preliminary orders enjoining state laws. This proposed exception, which would exempt the State from appellate rules applicable to all other Ohio litigants, has no support in either the statutory text or caselaw.

The State's proposed rule is contrary to well-settled Ohio law that, under R.C. 2505.02(B)(4), preliminary orders are only appealable in the narrow circumstances explicitly set forth in that provision. Whether an order meets this test is a fact-intensive inquiry; indeed, Ohio courts have concluded that the applicability of R.C. 2505.02(B)(4) "should be determined on a case-by-case basis." *Wells Fargo Ins. Servs. USA*, 2012-Ohio-677, ¶ 10 fn.1. In arguing for a blanket exception, the State effectively seeks to circumvent R.C. 2505.02(B)(4)'s two-pronged test for assessing the appealability of preliminary orders and rewrite the plain statutory text. But

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scheduling order providing the parties with adequate time to conduct full discover[y] in preparation for trial in accordance with Civ.R. 16(B)." PI Order 1 fn.1. The trial court held the case management conference on December 14, 2022. *See* Dec. 14, 2022 Tr. At that conference, the court ordered that a scheduling order not be set until the resolution of the State's appeal, and the State did not object. *Id.* at 4:12-20.

Ohio courts, including this Court, do not allow parties to invent additional exceptions to the strictures imposed by Ohio law—rather, they apply the requirements of R.C. 2505.02(B)(4) to the case at hand. *See, e.g.*, *State v. Chambliss*, 128 Ohio St.3d 507, 2011-Ohio-1785, 947 N.E.2d 651, ¶¶ 15-27 (applying R.C. 2505.02(B)(4) and concluding that a pretrial order removing a defendant's counsel was a final, appealable order); *Muncie*, 91 Ohio St. 3d at 451, 746 N.E.2d 1092 (applying R.C. 2505.02(B)(4) and finding that "an order compelling the administration of psychotropic medication under R.C. 2945.38 satisfies R.C. 2505.02(B)(4)(b)"); *Empower Aviation, L.L.C. v. Butler Cty. Bd. of Commrs.*, 185 Ohio App.3d 477, 2009-Ohio-6331, 924 N.E.2d 862, ¶¶ 18-26 (1st Dist.) (finding the trial court's denial of a preliminary injunction was not a final, appealable order because "not all the requirements of R.C. 2505.02(B)(4) have been met"); *see also Swan Creek Twp. Bd. of Trustees v. Wylie & Sons Landscaping*, 2007-Ohio-2839, ¶ 2 (6th Dist.); *Hootman*, 2007-Ohio-5619, at ¶¶ 2, 13. This Court should not deviate from the rules set by the legislature and the well-established precedent set by this Court and courts across Ohio for several reasons.

First, the State's proposed rule would undermine the rationale behind Ohio's statutory framework for assessing the appealability of provisional remedies. "The entire concept of 'final orders' is based upon the rationale that the court making an order which is not final is thereby retaining jurisdiction for further proceedings." *Weldele v. Brice*, 2022-Ohio-3246, ¶ 11 (10th Dist.) (citation omitted); *accord Noble v. Colwell*, 44 Ohio St. 3d 92, 94, 540 N.E.2d 1381 (1989) (same). Appellate jurisdiction over preliminary injunctions is limited in order to

"prevent[] the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." *Gardner v. Ford*, 2015-Ohio-4242, ¶ 3 (1st Dist.) (citation omitted). In other words, Ohio disallows such appeals to ensure a case is decided only once. This interest in efficient judicial administration is directly undermined by allowing interlocutory appeals before a lower court has reached a full determination as to the requested relief. It is for this reason that Ohio courts will derogate the interest in avoiding piecemeal litigation only on specific and narrow "occasions." *Empower Aviation* at ¶ 18. The Court should not broaden a rule that was deliberately designed to be narrow. *See Muncie*, 91 Ohio St. 3d at 451, 746 N.E.2d 1092 (explaining that R.C. 2505.02(B)(4)'s limited scope recognizes both "the courts' interest in avoiding piecemeal litigation" and that "occasions may arise in which a party seeking to appeal from an interlocutory order would have no adequate remedy from the effects of that order on appeal from final judgment").

Second, the State's exception would require not only that this Court prematurely address the underlying merits of this case, but that the Court give the State "the benefit of a presumption" that the State is correct on the merits. State Br. 18-19. According to the State, whenever it argues that "[a] law *is* constitutional, courts must assume the validity of that argument," and allow it to immediately appeal any preliminary injunction order on that basis. *Id.*

But in fact, the only cases cited by the State demonstrate the *opposite*—namely, that courts should *not* delve into the merits prior to deciding the threshold issue of appealability. *See,*

e.g., *Premier Health Care Servs., Inc. v. Schneiderman*, 2d Dist. Montgomery No. 18795, 2001 WL 1479241, at *2 (Aug. 21, 2001) ("[W]e note that we must avoid falling into the trap of reasoning circularly that the order from which this appeal is taken is not an appealable order if the appeal can be shown to be without merit. Whether an order from which an appeal has been taken is immediately appealable is a threshold issue that must be determined, conceptually at least, *before the determination of the appeal on its merits*.") (Emphasis added.). Neither this case nor the State's other cited cases, which relate to standing and not appealability, support the State's assertion that in order to avoid resolving the merits of the case, this Court must always presume that the underlying statute is constitutional when deciding appealability. In fact, none of the additional cited cases even involve a preliminary injunction. State Br. 19 (citing *Moore v. Middletown*, 133 Ohio St. 3d 55, 2012-Ohio-3897; *Barrow v. Village of New Miami*, 2016-Ohio-340 (12th Dist.)).

Third, the State's baseless assertion that preliminary injunctions enjoining state laws "necessarily injure[] Ohio every day that [they] remain[] in effect" fails to justify its sought-after departure from Ohio law. State Br. 16-18. The State supports this point through inapposite federal case law, as well as a misapplication of the separation of powers doctrine. *Id.* As an initial matter, the State's reliance on federal case law is misguided because of the key distinction that *all* preliminary injunctions are appealable under federal law. *See* 28 U.S.C. 1292(a)(1); *see also Empower Aviation* at ¶ 5 fn.5 (expressly distinguishing Ohio law on appealability of preliminary injunctions from federal law).

Moreover, Ohio courts have rejected arguments that the State is necessarily irreparably harmed when "its duly enacted laws do not go into effect." *Newburgh Heights v. State*, 2021-Ohio-61, 166 N.E.3d 632, ¶¶ 75-76 (8th Dist.) (quotation omitted), *rev'd on other grounds*, 168 Ohio St.3d 513, 2022-Ohio-1642, 200 N.E.3d 189. The State interprets this Court's decision in *Newburgh Heights* to mean that the Court must have necessarily determined that it had jurisdiction to decide the appeal of a trial court's preliminary injunction order. State Br. 19-20. Even if the *Newburgh Heights* Court had reached the issue of jurisdiction, its decision would have no bearing on the appealability of this matter. Appellants in *Newburgh Heights*—the Village of Newburgh, not the State of Ohio—faced the threat of "losses not recoverable following final judgment in the forms of funds and personnel." *Newburgh v. Ohio*, 8th Dist. Cuyahoga, Nos. 109106 and 109114, Journal Entry (Nov. 13, 2019). The State asserts no such harm here.

Additionally, notwithstanding the State's claim that separation of powers principles require its proposed rule, it is the *State's* position that would undermine the separation of powers doctrine. The State asserts that orders "wrongly" enjoining state laws "frustrate the constitutional structure" by "thwart[ing] the executive branch's enforcement of legislation that the people empowered the legislature to enact." State Br. 17. But as the State acknowledges, under the Ohio Constitution, "[t]he judiciary has both the power and the solemn duty to determine the constitutionality and validity of acts by other branches of the government." *State v. Dingus*, 2017-Ohio-2619, 81 N.E.3d 513, ¶ 42 (4th Dist.); *State v. Bodyke*, 126 Ohio St.3d

266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 46. Indeed, judicial review of legislative acts "ha[s] been firmly established as an essential feature of the Ohio system of separation of powers." *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 116 (quoting *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 462, 715 N.E.2d 1062 (1999)); *see also Cincinnati, Wilmington & Zanesville RR. Co. v. Clinton Cty. Commrs.*, 1 Ohio St. 77, 81 (1852) ("It seems now … to be generally, if not universally conceded, that it is the right and consequently the duty of the judicial tribunals to determine, whether a legislative act drawn in question in a suit pending before them, is opposed to the constitution of the United States, or of this State, and if so found, to treat it as a nullity."). As this Court itself explained in 1852, the duty "[t]o adjudicate upon, and protect the[] rights and interests [of individual citizens], *constitute[s] the whole business of the judicial department*." (Emphasis added.) *Cincinnati, Wilmington & Zanesville RR.*, 1 Ohio St. at 81-82. The State's proposed highly deferential approach would "frustrate the constitutional structure" by forcing the judiciary to accept appeals in contravention to this Court's established precedent simply because the executive demands it.[3]

[3] The State asserts that affirming the lower courts' decisions will undermine the "true mettle" of the Ohio Constitution (State Br. 1, 2), relying on a mischaracterized dissent from Judge Sutton of the Sixth Circuit. Judge Sutton's dissent discusses the danger that *emergency regulations* may pose to the separation of powers—not failure to allow the State to immediately appeal preliminary injunctions. *See In re MCP No. 165*, 20 F.4th 264, 269 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc). In contrast to the State's characterization, Judge Sutton's decision reaffirmed the role of the judiciary in protecting against overreach by the

Lastly, the State's argument undermines the legislative branch by creating a categorical exception where the Ohio legislature declined to do so, raising additional separation of powers concerns. The original text of R.C. 2505.02 contained no exception for the appealability of orders granting or denying provisional remedies and instead was a blanket prohibition against such appeals. The legislature's 1998 amendment of R.C. 2505.02 to allow appeals of a limited class of preliminary orders "was borne out of several cases wherein courts of appeals questioned the appealability of judgments requiring disclosure of sensitive information." *Wilson v. Barnesville Hosp.*, 7th Dist. Belmont No. 01–BA–40, 2001-Ohio-3499, 2001 WL 1647298, *3 (Dec. 21, 2001); *see also* Gary L. Garrison, Appellate Jurisdiction in Ohio over Final Appealable Orders, 50 Clev.St.L.Rev. 595, 598 (2002-2003) (explaining that the amendments to R.C. 2505.02 arose out of "several troubling cases … concerning issues of privilege and confidentiality"). Had the legislature intended to create a carveout in the amended statute that permitted appeals of preliminary injunctions enjoining state laws, it easily could have done so—but it did not.[4] The legislative history of R.C. 2505.02 thus makes two things clear: first, the Ohio legislature intended a strong presumption against the appealability of non-final orders granting or denying provisional remedies; and, second, the exception is intended to address only

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other branches of government. *See id.* ("No matter the policy benefits of a well-intended regulation, a court may not enforce it if the agency's reach exceeds a statute's grasp.").

[4] Indeed, in amending R.C. 2505.02, the legislature *did* deliberately create a carveout by deeming "[a]n order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly" a final appealable order. R.C. 2505.02(B)(6).

specific and concrete harms akin to the disclosure of sensitive information, not the type of vague and amorphous harm the State contends is at issue when its laws do not go into effect.

b. Purported harm to the State's goal of protecting fetal life does not satisfy the requirements of R.C. 2505.02(B)(4).

The State cannot rely on purported harm to its interest in preventing abortions in order to protect fetal life as evidence of harm to the *State*. As Ohio courts, including this Court, have held, R.C. 2505.02(B)(4)'s limited exception applies only to harm "suffered by the appealing party." *Muncie*, 91 Ohio St. 3d at 451-452, 746 N.E.2d 1092; *see also Othman v. Heritage Mut. Ins. Co.*, 158 Ohio App.3d 283, 2004-Ohio-4361, 814 N.E.2d 1261, ¶ 11 (5th Dist.); *Jacob v. Youngstown Ohio Hosp. Co.*, 7th Dist. Mahoning No. 11 MA 193, 2012-Ohio-1302, ¶¶ 19-23 (dismissing appeal where there was no showing of unrectifiable damage to appellant). Here, too, the State asks this Court to make an unwarranted exception to this statutory framework by claiming that the PI Order "irreparably undermines the State's … goal" in enacting S.B. 23. State Br. 20. But, as the First District rightly noted, "the state focuses on harm to third-parties rather than on harm to itself." App. Op. ¶ 25.

Moreover, even if harm to the State's alleged interest in preventing abortions to protect fetal life were relevant to the R.C. 2505.02(B)(4) analysis (it is not), the State has failed to show a need for immediate review of the PI Order. The State bears the burden on this point but has presented no concrete evidence of harm. *See Smith v. Chen*, 142 Ohio St.3d 411, 2015-Ohio-1480, 31 N.E.3d 633, ¶ 8 (the "burden" of "affirmatively establish[ing] that an immediate appeal

is necessary in order to afford a meaningful and effective remedy" "falls on the party who knocks on the courthouse doors asking for interlocutory relief"). Indeed, the State has made no effort at all to show how many—if any—abortions would be prevented by immediate review of the preliminary injunction. That alone dooms the State's demand for immediate appellate review.

What is more, the State ignores that it could advance its stated interest in fetal life through other means, including those that also promote women's health. *See* PI Order ¶ 110. The State's singular focus on preventing abortion as the *only* means of protecting fetal life—notwithstanding the myriad alternatives to it—undermines its argument that there is irreparable harm to the State. It instead relies entirely on the conclusory assertion that "[e]very otherwise-prohibited abortion" performed under the PI Order infringes on the State's goal of "protecting innocent life." State Br. 20. Yet the State conspicuously ignores the extensive record evidence of harm to the "innocent li[ves]" of pregnant Ohioans under S.B. 23, something the State, relying on its sovereign responsibility to represent the interests of Ohioans, should also be interested in preventing. As the trial court held, "asserting an absolute interest in protecting fetal life places no value on the rights of the pregnant person[.]" PI Order ¶ 106; *see also id.* ¶ 32 ("The starkest risk of carrying a pregnancy to term is death."). Appellees have demonstrated S.B. 23's irreparable harm to women, whereas the State has only asserted an opposing interest in protecting fetal life. The State asserts that these two interests are in conflict and asks this Court

to credit its interest and its interest only, despite developing no record to establish that harm, or to refute the harm to pregnant women.

Finally, because the State can *always* claim harm to a purported interest in protecting fetal life when abortion laws are at issue, the State is effectively arguing for a categorical exception to the general rule of appealability where abortion is involved. The State admits as much, asserting that abortions always constitute irreparable harm to "innocent life," and thus the second prong of R.C. 2505.02 (B)(4) is necessarily met. State Br. 20. Once again, the State asks this Court to dramatically expand R.C. 2505.02(B)(4)—a statute that was designed to be strictly limited in scope—by creating a new exception that has no basis in statutory text. There is no way to interpret R.C. 2505.02(B)(4) as always allowing the State to appeal orders preliminarily enjoining abortion restrictions without rewriting the statute.

c. Purported harm to the State's interest in regulating the medical profession does not satisfy the requirements of R.C. 2505.02(B)(4).

Finally, the State claims that the PI Order thwarts its interest in "exercis[ing] its power to regulate the medical profession." State Br. 20. Specifically, the State argues that the preliminary injunction "thwarts" this power "every time a doctor performs an irreversible procedure that state law prohibits" but that the PI Order allows. *Id.* The State provides no support for this assertion beyond a cursory citation to *Muncie*, in which the Court recognized that an order compelling the involuntary administration of psychotropic medication constitutes a "particularly severe interference with an individual's liberty interest." *Muncie*, 91 Ohio St. 3d at 451-452, 746

N.E.2d 1092. The Court concluded that an individual forced to ingest antipsychotic drugs would have no meaningful or effective remedy by an appeal following final judgment, noting "the potential for serious and even fatal side effects that can result from the administration of such medication." *Id.* As an initial matter, nothing in *Muncie* suggests that the State's purported interest in regulating the medical profession provides the basis for a concrete, irreversible harm—rather, the Court focused on a preliminary order's impact on the "*individual's* liberty interest." (Emphasis added.) *Id*. Moreover, in contrast to *Muncie*, where the harms from the involuntary administration of psychotropic medication could not be remedied after final judgment because at that point the medication would have been administered (and had potentially serious or fatal side effects), here, the State's purported interest in regulating the medical profession can still be exercised should it prevail in an appeal of any permanent relief granted to Appellees.

B. Response to Proposition of Law No. 2: Abortion Providers Have Standing to Challenge SB 23

The State again seeks to depart from long-standing precedent holding that third-party standing is appropriate in circumstances such as here, where health care providers seek to pursue claims on behalf of their patients. Unlike in the area of appellate jurisdiction, Ohio law tracks federal law with respect to third-party standing. Under federal law, it has been settled for over fifty years that abortion providers have standing to litigate on behalf of their patients. The State provides no basis for deviating from this well-established rule. Its arguments instead make clear

that it effectively seeks to exclude abortion providers from Ohio's third-party standing doctrine—an exclusion that finds no support in either Ohio or federal law. The State's position, which relies on the lone decision of another state's court, runs contrary to the great weight of authority in both the U.S. Supreme Court and other state courts, including Ohio.

1. *Third-Party Standing Is Settled Law in Ohio.*

As the State acknowledges, this Court recognizes the doctrine of third-party standing. State Br. 28 (citing *City of N. Canton v. City of Canton*, 114 Ohio St. 3d 253, 2007-Ohio-4005, 871 N.E.2d 586, ¶ 14; *Util. Serv. Partners, Inc. v. Pub. Utils. Comm,*, 124 Ohio St. 3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 49); *see also Ohio Apt. Assn. v. Levin*, 127 Ohio St. 3d 76, 2010-Ohio-4414, 936 N.E. 2d 919, ¶ 37.[5] The parties agree that third-party standing is appropriate where a claimant "(i) suffers its own injury in fact, (ii) possesses a sufficiently 'close relationship with the person who possesses the right,' and (iii) shows some 'hindrance' that stands in the way of the claimant seeking relief." *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)). Third-party standing doctrine is well-established in Ohio; this Court and other Ohio courts have concluded that a party had third-party standing under Ohio law. *Id.* (finding a municipality had third-party standing to bring an equal

[5] While the State expends pages on the origins and limitations of standing doctrine (State Br. 26-27), none of this exposition undermines its acknowledgement that this Court has "recognized" third-party standing (*id.* at 27-28).

protection claim on behalf of its citizens); *Riverside v. State*, 2d Dist. Montgomery No. 26024, 2014-Ohio-1974, ¶¶ 22-28 (same); *Cincinnati City Sch. Dist. v. State Bd. of Edn.*, 113 Ohio App.3d 305, 314, 680 N.E.2d 1061 (10th Dist. 1996) (finding a school district had third-party standing to bring a claim on behalf of its students); *Akron Ctr. For Reproductive Health v. N. Coast Christian Community*, 9th Dist. Summit No. 12414, 1986 WL 7753, *2-3 (July 9, 1986) (finding that an abortion clinic had third-party standing to bring claims on behalf of its patients related to their right to access the clinic's services).

The State attempts to diminish this precedent by claiming there is only one case in which this Court found third-party standing, *City of E. Liverpool* at ¶ 22. *See* State Br. 28-30. But the fact that the Court has only had one occasion to make this finding does not undermine Appellees' third-party standing, particularly given that both *Liverpool* and federal precedent amply demonstrate that third-party standing is appropriate in the circumstances presented here. Indeed, the State identifies only two cases in which this Court *declined* to find third-party standing. *See* State Br. 28-30 (discussing *City of N. Canton* at ¶11; *Util. Serv. Partners,* 124 Ohio St. 3d 284, 2009-Ohio-6764, 921 N.E.2d 1038). In *City of N. Canton*, the Court recognized that *Liverpool* set forth the applicable test for third-party standing. *City of N. Canton* at ¶ 14. The Court proceeded to distinguish *Liverpool*, concluding that (1) North Canton lacked "a sufficiently close relationship" with a property owner, as it had "no interest in or relationship with" the property owner, "[e]xcept for the underlying contract between them"; and (2) the property owner was not hindered from asserting its own rights. *Id.* at ¶¶ 16-17. The arms-length contractual relationship

between the plaintiff and property owner in *City of N. Canton* stands in stark contrast to the relationship between Appellees and their patients, where Appellees are caring for their patients in the context of a critical medical decision. *See infra* 31-35. Moreover, as discussed below, Appellees' patients face a number of concrete obstacles in asserting their own claims. *See infra* 35-39. For similar reasons, the State's discussion of *Utility Service Partners, Inc.* fails to move the needle, given that in that case, plaintiffs' interests "appear[ed] opposed" to the rights-holders. *Util. Serv. Partners* at ¶ 51.[6] There is no such conflict of interest here. *See infra* 33-35. In contrast, this Court's reasoning in *Liverpool* provides ample support for finding that Appellees have third-party standing. Like the *Liverpool* plaintiffs, Appellees will suffer an injury "intertwined with the injury claimed by [their patients]," have a "close relationship" with their patients, and seek to represent patients who face hindrances in the assertion of their own claims. *City of E. Liverpool* at ¶¶ 22-25; *see infra* 31-40.[7]

The State's request that the Court narrow its third-party standing doctrine thus seeks a departure from long-standing and well-reasoned Ohio law. Moreover, unlike in the context of the appealability of preliminary injunctions, it is well established that Ohio courts *do* follow their

[6] The Court also found that the rights-holders faced "no hindrance" in pursuing relief. *Util. Serv. Partners* at ¶ 52.

[7] While the State suggests that *Liverpool* establishes the requirement that "the plaintiff's interests [be] fully aligned with the interests of third parties who lacked any ability to sue on their own," State Br. 30, it does not identify any support in *Liverpool* for this exaggerated interpretation. And indeed, *Liverpool* establishes no such requirement. *City of E. Liverpool* at ¶ 24 (observing merely that "[t]he city and its citizens have an interdependent interest in the city's treasury").

federal counterparts on matters relating to standing. *See Brinkman v. Miami Univ.*, 12th Dist. Butler No. CA2006–12–313, 2007-Ohio-4372 ¶ 43; *see also Moore v. City of Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22 (citing the third-party standing test established in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Indeed, Ohio's requirements for third-party standing are directly adopted from federal courts. *See City of E. Liverpool*, at ¶ 22 (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 130, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004)). Third-party standing is unquestionably established in federal law. *See Kowalski*, 543 U.S. at 129-130 (recognizing "that there may be circumstances where it is necessary to grant a third party standing to assert the rights of another").

The State concedes that federal courts have long allowed abortion providers to bring litigation on behalf of their patients. State Br. 33; *see also June Med. Servs. LLC v. Russo,* ___ U.S. __, 140 S.Ct. 2103, 2118, 207 L.E.2d 566 (2020) ("*June Medical*") (citing nine Supreme Court cases dating back to 1973 in which providers challenged abortion restrictions). Three years ago, *June Medical* reaffirmed that abortion providers have third-party standing to assert the rights of their patients. 140 S.Ct. at 2118. The Supreme Court explained this practice was consistent with its decisions permitting "plaintiffs to assert third-party rights in cases where the 'enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.'" *Id.* at 2118-2119 (citing *Kowalski*, 543 U.S. at 130). The State nonetheless dismisses fifty years of precedent as "irrelevant," and suggests this Court

instead look to the decision of a single state court and three *dissenting* opinions from *June Medical*. *See* State Br. 33-34 (discussing *Cameron v. EMW Women's Surgical Ctr., PSC*, 664 S.W.3d 633, 658 (Ky. 2023)); *June Med.,* 140 S.Ct. at 2142-2149 (Thomas, J., dissenting); *id.* at 2169 (Alito, J., dissenting); *id.* at 2174 (Gorsuch, J., dissenting)). This Court is not bound by another state court's interpretation of standing—particularly where that interpretation flouts decades of both Ohio and federal precedent. And other states have rejected the approach taken by the Kentucky Supreme Court, instead uniformly finding that abortion providers have standing to litigate on behalf of their patients. *See, e.g.*, *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1160 (Idaho 2023); *Weems v. State by & through Fox*, 440 P.3d 4, 9-10 (Mont. 2019); *Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo. v. Kline*, 197 P.3d 370, 394 (Kan. 2008); *Feminist Women's Health Ctr. v. Burgess*, 651 S.E.2d 36, 39 (Ga. 2007); *Planned Parenthood of Kan. & Mid-Mo. v. Nixon*, 220 S.W.3d 732, 738 (Mo. 2007) (en banc); *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 34 (Alaska 2001); *Armstrong v. State*, 989 P.2d 364, 370 (Mont. 1999); *Pro-Choice Miss. v. Fordice*, 716 So.2d 645, 665 (Miss. 1998); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 847 (N.M. 1998); *Davis v. Fieker*, 952 P.2d 505, 508 (Okla. 1997); *Cheaney v. State*, 285 N.E.2d 265, 266 (Ind. 1972). At least eleven other states have implicitly recognized that abortion providers have third-party standing to assert claims on behalf of their patients. *See, e.g.*, *Oklahoma Call for Reproductive Justice v. Drummond*, 526 P.3d 1123 (Okla. 2023); *Planned Parenthood v. South Carolina*, 882 S.E.2d 770 (S.C. 2023); *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975

N.W.2d 710 (Iowa 2020); *Gainesville Woman Care v. State*, 210 So. 3d 1243 (Fla. 2017); *MKB Mgt. Corp. v. Burdick*, 855 N.W.2d 31 (N.D. 2014) (per curiam); *Hope Clinic for Women v. Flores*, 991 N.E.2d 745 (Ill. 2013); *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28 (Ariz. 2002); *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253 (Tex. 2002); *Planned Parenthood of Cent. New Jersey v. Farmer*, 762 A.2d 620 (N.J. 2000); *Women's Health Ctr. v. Panepinto*, 446 S.E.2d 658 (W.V. 1993); *Planned Parenthood Ass'n v. Dept. of Human Resources of Oregon*, 687 P.2d 785 (Or. 1984) (en banc).

Moreover, the State and amici mischaracterize the Supreme Court's ruling in *Dobbs* by suggesting that it changed federal law on third-party standing. *See* State Br. 33-34; Brief for Miss., et al. as Amici Curiae Supporting Appellants 5-6; Brief for Cincinnati Right to Life, et al. as Amici Curiae Supporting Appellants 5-6. In *Dobbs*, the Supreme Court did not overrule its well-established third-party standing doctrine, either generally or as applied to abortion providers. The Court neither found that the abortion provider plaintiffs lacked standing nor repudiated third-party standing in the abortion context. To the contrary, the Court reached the merits of the case, demonstrating that its decision did not change third-party standing law. *See Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2242-2243, 213 L.E.2d 545 (2022). And following *Dobbs*, other state courts have continued to find that abortion providers may litigate on behalf of their patients, indicating the State and amici stand nearly alone in their interpretation of *Dobbs*. *Planned Parenthood Great Nw.*, 522 P.3d at 1160 ("The *Dobbs* decision did not, however, abrogate the basic third-party standing principle that '[a]side from the

woman herself . . . the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision [to get an abortion].'") (quoting *Singleton*, 428 U.S. 106, 117, 96 S.Ct. 2868, L.E.2d 826 (1976)); *see also Oklahoma Call for Reproductive Justice*, 526 P.3d 1123 (implicitly recognizing providers' standing); *Planned Parenthood of Mont. v. State by & through Knudsen*, 515. P.3d 301 (Mont. 2022) (State did not challenge providers' standing).

In accord with their federal and state counterparts, Ohio courts have consistently found that abortion providers have standing to raise claims on behalf of their patients. *See, e.g., Preterm-Cleveland v. Voinovich*, 89 Ohio App.3d 684, 627 N.E.2d 570 (10th Dist. 1993); *Planned Parenthood Sw. Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A 2101148 at 5 (Apr. 19, 2021); *Planned Parenthood Sw. Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A. 2100870 at 3 (Jan. 31, 2022); *see also Akron Ctr. For Reproductive Health*, 9th Dist. Summit No. 12414, 1986 WL 7753, *2-3 (recognizing that provider had third-party standing to bring claims on behalf of its patients). The State criticizes this precedent as "hardly demonstrat[ing] 'settled law,'" but notably has not identified a *single* Ohio state or federal case in which providers were *not* permitted to proceed with litigation on behalf of their patients. State Br. 34-35. The State's criticisms amount to a thinly-veiled attempt to break with both Ohio and federal court third-party standing jurisprudence and create an exception for litigation brought by abortion providers. There is no basis for doing so here.

2. *All Requirements for Third-Party Standing Are Satisfied.*

The State does not dispute that Appellees have met the first requirement for third-party standing—that a party has suffered its own injury in fact—instead relying entirely on arguments that Appellees have not satisfied the second and third elements. *See* State Br. 30-34. The first factor is plainly satisfied here: S.B. 23 injured Appellees when it was in effect—by imposing the specter of civil and criminal penalties and impacting their financial stability—and would continue to injure Appellees if it were reinstated. *See supra* 5. And as discussed below, when Ohio and federal third-party standing law are appropriately applied, it is clear that the second and third factors are also met.

a. Appellees possess a sufficiently close relationship with their patients.

The State argues that Appellees do not "possess a sufficiently close relationship" with their patients. State Br. 30-32. The State ignores the weight of precedent that has concluded overwhelmingly that abortion providers *do* possess a sufficiently close relationship with their patients, including for the purposes of third-party standing. The State thus relies entirely on a few dissenting opinions and the decision of the Kentucky Supreme Court, none of which is of any precedential value.

Almost fifty years ago, the Supreme Court explained that the "closeness of the relationship" between a patient and doctor "is patent," as "[a] woman cannot safely secure an abortion without the aid of a physician." *Singleton*, 428 U.S. at 117, 96 S.Ct. 2868, 49 L.E.2d 826 (1976) (plurality). "Aside from the woman herself . . . the physician is uniquely qualified to

litigate the constitutionality of the State's interference with, or discrimination against, [the abortion] decision." *Id*. While the State suggests that third-party standing requires that plaintiffs "know who their future patients are," State Br. 30-31 (quoting *June Med.*, 140 S.Ct. at 2174 (Gorsuch, J., dissenting) (quotation omitted)), neither federal nor Ohio courts have established any such requirement. Indeed, third-party standing has been found in analogous scenarios, such as where plaintiffs seek to establish rights on behalf of "potential customers." *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 195, 97 S.Ct. 451, 50 L.E.2d 397 (1976) (permitting a beer vendor to assert rights on behalf of potential customers); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 683-684, 97 S.Ct. 2010, 52 L.E.2d 675 (1977) (permitting contraceptives vendor to assert rights "on behalf of its potential customers"); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (similar); *Griswold v. Connecticut*, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (similar). It defies logic to suggest that the relationship between a patient and an abortion provider is not at least as close as the relationship between a beer vendor and a customer. *See Craig*, 429 U.S. at 195. And in the ample federal and state precedent firmly establishing that abortion providers have third-party standing to bring claims on behalf of their patients, no court has taken issue with the fact that providers will have future—as yet unknown—patients.

Moreover, the State ignores that Ohio abortion providers *do* know who their patients are at the time of the procedure. Ohio law mandates that at least twenty-four hours prior to obtaining an abortion, a patient make an in-person trip to the clinic to meet with a physician to consent, determine whether there is cardiac activity, and receive state-mandated information. R.C.

2317.56. The patient must also be informed of who will be providing the abortion at least twenty-four hours before the procedure. *Id.* As a result of these requirements, providers must schedule their patients' appointments in advance of a procedure. All of these known patients would be affected were S.B. 23 to go into effect. *See, e.g.*, Sept. 2, 2022 TRO Motion at 9-10 ("When S.B. 23 went into effect, providers canceled the appointments of patients—some of whom had already had their first of two mandated appointments—because they were past S.B. 23's six-week-limit."); *see also* Sept. 2, 2022 Liner Aff. in Support of TRO Motion ¶ 5 (Planned Parenthood Southwest Ohio Region has "had to cancel over 600 patient appointments").

The State next asserts that the "close relationship" between providers and their patients is "upended by a 'potential conflict of interest.'" State Br. 31-32. The only "conflict of interest" they identify is the hypothetical scenario of a patient bringing litigation against her provider after receiving an abortion. *Id.* This argument is even more threadbare than the last, relying entirely on the Kentucky Supreme Court's decision in *Cameron*. *See* 664 S.W.3d at 658. The State also references the Supreme Court's decision in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004), in which the Court found that it is "improper . . . to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing." *See* State Br. 31. As an initial matter, *Elk Grove* did not address the contours of third-party standing, but rather, focused on "the standing problem raised by the domestic relations issues in [the] case[.]" 542 U.S. at 13. Moreover, the State has

failed to articulate any theory as to how this litigation "may have an adverse effect" on Appellees' patients —rather, the record evidence demonstrates the opposite. *See supra* 21-22.

The State has not identified any other court that has found a conflict of interest preventing abortion providers—or any other physicians who may be subject to suits by their patients—from litigating on behalf of their patients. And courts have in fact recognized third-party standing even where—unlike here—the affected interest of the third-party claimant differs from that of the right-holder. *See, e.g., Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 fn.3, 109 S.Ct. 2646, 105 L.E.2d 528 (1989) (law firm had third-party standing to assert client's constitutional right to counsel in challenge to forfeiture statute where firm had an interest in client's forfeited assets); *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990) (finding third-party standing of attorney who allegedly collected improper fees and asserted that the fee provisions statute violated his clients' due process rights).

More fundamentally, there is no conflict of interest here. As the Supreme Court has observed, "the 'threatened imposition of governmental sanctions' for noncompliance" with the challenged law "assures us that the plaintiffs have every incentive to 'resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function.'" *June Med.,* 140 S. Ct. at 2119 (quoting *Craig*, 429 U.S. at 195). Moreover, physicians providing abortion care have an ethical obligation to prioritize the medical needs of their patients. *See* AMA, Principles of Medical Ethics (rev. June 2001), https://code-medical-ethics.ama-assn.org/principles (accessed June 20, 2023) ("As a member of this

profession, a physician must recognize responsibility to patients first and foremost[.]"); *see also* ACOG, Code of Professional Ethics of the American College of Obstetricians & Gynecologists 1 (Dec. 2018) ("ACOG Code of Ethics"), https://www.acog.org/-/media/project/acog/acogorg/files/pdfs/acog-policies/code-of-professional-ethics-of-the-american-college-of-obstetricians-and-gynecologists.pdf (accessed June 20, 2023), I.1: Patient-Physician Relationship ("The patient–physician relationship is the central focus of all ethical concerns, and the welfare of the patient must form the basis of all medical judgments."); *id.* at I.2 ("The obstetrician-gynecologist should serve as the patient's advocate[.]"). For this and the other reasons outlined below, Appellees are in fact the "obvious claimant" and "least awkward challenger" best situated to bring this litigation. *See Craig*, 429 U.S. at 196-197.

b. Appellees' patients face hindrances to asserting their own rights.

Lastly, the State asserts that "[n]othing stops" patients from bringing their own claims, seemingly ignoring that the trial court found that patients face numerous obstacles to bringing such litigation based on the evidence before it:

> [P]atients denied abortion services because of S.B. 23 are often under great distress from, for example, not being able to obtain treatment for life threatening cancers, or from fearing job loss and an inability to provide for their families because they must arrange travel out of state on short notice, often without the resources to do so.

TRO Order at 9. The trial court observed that "[i]t is not surprising that individuals dealing with such situations do not hire lawyers and file lawsuits, but rather focus their energies on their health, keeping their jobs, caring for their families or keeping up with their educational studies." *Id.* at 9-10.

The trial court's findings were supported by ample Ohio and federal precedent chronicling the unique "obstacles" that prevent pregnant patients from bringing their own claims—such as "imminent mootness," and the distress caused by denial of abortion care. *See, e.g., Singleton*, 428 U.S. at 116-118; *Planned Parenthood Sw. Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A 2101148, at 5 (Apr. 19, 2021); *Planned Parenthood Sw. Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A. 2100870 at 3 (Jan. 31, 2022); *Akron Ctr. For Reproductive Health*, 9th Dist. Summit No. 12414, 1986 WL 7753, *2-3. These obstacles have long been found sufficient to support third-party standing. In particular, given the typical timeline for litigation, a patient has little incentive to pursue a claim where "[o]nly a few months, at the most, after the maturing of the decision to undergo an abortion, her right thereto will have been irrevocably lost." *Singleton*, 428 U.S. at 117. In contrast, abortion providers face the threat of criminal and civil penalties under S.B. 23, *see supra* 5, and thus "have every incentive to 'resist efforts at restricting their operations.'" *June Med.*, 140 S.Ct. at 2119 (quoting *Craig*, 429 U.S. at 195) (observing that abortion providers were "far better positioned than their patients" to pursue litigation).

Once again, the State fails to engage with both precedent and reality, instead arguing that because some patients—including juveniles seeking judicial bypass—have at times resorted to litigation, this demonstrates there is no hindrance to *any* patient bringing such a claim. State Br. 32-33. The State also asserts that the fact that prior litigants have proceeded pseudonymously means it "is plainly false" that patients "suffer a unique hindrance." *Id.* at 33. As an initial matter, even assuming that a patient could litigate under a pseudonym, that would not address the myriad remaining obstacles to patients' assertion of their rights detailed above. *Planned Parenthood Great Nw.*, 522 P.3d at 1160 ("[T]he use of a pseudonym does not obviate the other obstacles women face in bringing this type of challenge."). Moreover, patients may be reluctant to proceed with litigation given the need to testify to intimate details about private medical decisions. As the trial court explained—and as other courts have found—"the circumstances that lead women to seek an abortion can be intensely private." TRO Order at 10; *see also Singleton*, 428 U.S. at 117 (observing that a patient "may be chilled from [litigation] by a desire to protect the very privacy of her decision from the publicity of a court suit."). In litigation related to the Partial-Birth Abortion Ban Act, the Seventh Circuit observed that "[t]he natural sensitivity that people feel about the disclosure of their medical records" "is amplified" in the context of litigation related to abortion. *Northwestern Mem. Hosp. v. Ashcroft*, 362 F.3d 923, 928-929 (7th Cir. 2004). In particular, patients "are bound to be skeptical that redaction will conceal their identity":

> Some of these women will be afraid that when their redacted records are made a part of the trial record . . . , persons of their acquaintance, or skillful "Googlers," sifting the information contained in the medical records concerning each patient's medical and sex history, will put two and two together, "out" the . . . women, and thereby expose them to threats, humiliation, and obloquy.

Id. at 929. Further, "[e]ven if there were no possibility that a patient's identity might be learned . . . there would be an invasion of privacy." *Id.* The trial court thus rightly concluded: "It is understandable that many women would be reluctant to place the deeply personal details of their experiences in the public record, *even under a pseudonym*, in such a highly charged and divisive matter." (Emphasis added) TRO Order at 9-10. The smattering of examples the State cites hardly serves as a refutation to the findings of the trial court and other courts described above. While the State observes that *Roe v. Wade* "was brought by a woman asserting her own rights" (State Br. 32), in the fifty years since, both federal and state courts have regularly recognized that pregnant people face hindrances in pursuing abortion litigation and have consistently allowed providers to sue on their patients' behalf.

Ignoring the numerous concrete barriers that prevent patients from pursuing litigation, the State focuses exclusively on patients' privacy concerns, claiming that they are not sufficient to justify third-party standing. State Br. 33. The State does not identify any basis in Ohio or federal law for this argument, rationalizing only that "[p]laintiffs in many areas of law would prefer to hide their identities." *Id.* As an initial matter, litigation related to the constitutionality

of abortion is "hardly a typical case in which medical records get drawn into a lawsuit." *Northwestern Mem. Hosp.*, 362 F.3d at 929 (noting that patients are "doubtless … aware that hostility to abortion has at times erupted into violence, including criminal obstruction of entry into abortion clinics, the firebombing of clinics, and the assassination of physicians who perform abortions"). Moreover, the State's argument is flatly wrong on the law. Third-party standing has never required that it be "impossible" for rights-holders to pursue litigation directly. *See, e.g., Singleton*, 428 U.S. at 116 (rights-holders must face a "genuine obstacle" to pursuing litigation, rather than an impossibility of doing so); *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936, 941 (Fla. 2002) (quoting *Singleton*, 428 U.S. at 115-116) (requiring only "some hindrance"); *see also Powers v. Ohio*, 499 U.S. 400, 414, 111 S.Ct. 1364, 113 L.E.2d 411 (1991) (criminal-defendant had third-party standing to assert jurors' equal protection rights regardless of the fact that individual jurors had on "rare" occasions sued to assert the same). Nor has the State suggested that this is the case. Indeed, in *Singleton*, a plurality of the Supreme Court rejected the argument that its "prior cases allow assertion of third-party rights only when such assertion by the third parties themselves would be 'in all practicable terms impossible.'" 428 U.S. at 116 fn.6. The Supreme Court recognized the possibility that a patient could bring a suit under a pseudonym, but concluded nonetheless that "it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." *Id.* at 117-118.

More broadly, the Supreme Court has found that in cases "which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court," the reasons to deny third-party standing "are outweighed by the need to protect the fundamental rights which would be denied[.]" *Barrows v. Jackson*, 346 U.S. 249, 257, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953); *see also Powers*, 499 U.S. at 411 (plaintiff had third-party standing to litigate a juror's right not to be discriminated against on the basis of race); *State v. Hernandez*, 63 Ohio St. 3d 577, 583, 589 N.E.2d 1310 (1992) (same). Here, where Appellees seek to protect their patients' constitutional rights to due process and equal protection, the reasons for granting third-party standing are equally compelling.

The State has provided no basis for departing from decades of precedent conclusively establishing that third-party standing is appropriate in circumstances such as these. Not only does the State ask that this Court make a radical departure from well-settled Ohio law, but it goes further, and asks that the Court vacate the PI Order—rather than merely remand to the First District—on the basis of its unsupported arguments. This Court should decline to do so.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court dismiss the instant appeal.

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Respectfully submitted,

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I hereby certify that on June 20, 2023, 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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