IN THE COURT OF APPEALS OF OHIO
FIRST APPELLATE DISTRICT
HAMILTON COUNTY

PRETERM-CLEVELAND, et al., Plaintiffs-Appellees, v. DAVE YOST, et al., Defendants-Appellants.	:	Case No. C 2400668 **REGULAR CALENDAR** On Appeal from the Hamilton County Court of Common Pleas Case No. A 2203203

BRIEF OF STATE DEFENDANTS-APPELLANTS

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ASSIGNMENTS OF ERROR

1. The trial court erred in enjoining enforcement of multiple statutes enacted in the same bill, Decision and Entry Granting Plaintiffs' Motion for Judgment on the Pleadings ("Op."), T.d. 145, at 46, when plaintiffs did not even identify the challenged statutes until a reply brief, and did not offer any substantive challenge to them.

2. The trial court erred in finding various statutes non-severable, when the provisions can stand alone, and some existed for years before being amended in a bill that also included an unconstitutional provision. *See* Op., T.d. 145, at 36, 37, 41, 42.

ISSUES PRESENTED FOR REVIEW

1. Does a plaintiff challenging multiple statutes have the duty to identify the statutory provisions that it challenges in its opening dispositive-motion brief, along with showing standing and providing a substantive analysis to each one? (Relates to First Assignment of Error.)

2. Does severability analysis require a court to review solely whether each provision *can* stand on its own functionally, or may it also look to a provision's potential constitutional concerns, even if those have not been raised or briefed? (Relates to Second Assignment of Error.)

INTRODUCTION

This case is about the duties of plaintiffs and the power of courts. In any constitutional challenge to statutes enacted by the People's representatives, plaintiffs shoulder the burden to identify the provisions they challenge, show their standing to challenge those provisions, and prove their substantive complaint about each one. That is especially true for plaintiffs who seek judgment on the pleadings. Courts may not complete that work for them. In other words, it is error for courts to rule on substantive claims that plaintiffs never raised. And by the same token, courts conducting a severability analysis must focus on whether separate statutory provisions *can* function on their own, not whether they *should* do so. The decision below absolved these Plaintiffs of their burden, deprived the State of any opportunity to defend multiple provisions of duly enacted law, and held invalid several other provisions the court itself rightly concluded were not unconstitutional based on a faulty severability analysis.

While the underlying suit started about a bill, 2019's S.B. 23, that involved a package of abortion regulations, this appeal is not about abortion. It is not about abortion legality or about any residual regulations after Ohio's voters enacted an abortion-rights amendment to Ohio's Constitution. The State has long conceded the obvious: The State's "Heartbeat Ban"—which banned abortions after a fetal heartbeat is detected—was overridden by the

new Abortion Amendment. Thus, the state is not defending that Heartbeat Ban. Nor is the State even trying, in this appeal, to defend the merits of any of the ancillary abortion regulations that were amended or enacted in the same bill as the heartbeat ban.

Rather, the State asks this Court to ensure that parties and courts follow the well-settled rules of litigation. What happened here broke all the rules. The plaintiffs filed a vague, unclear motion for judgment on the pleadings: That motion did not tell the State or the Court that Plaintiffs sought to enjoin *all* the statutes affected by the relevant bill, S.B. 23. It focused solely on the bill's core prohibition—what they called the "six-week ban"—and it said that "[T]his [Common Pleas] Court should grant Plaintiffs' Motion for Judgment on the Pleadings, declare S.B. 23's six-week ban unconstitutional, and permanently enjoin its enforcement." Motion for Judgment on the Pleadings ("MJP"), T.d. 141, at 15. The State *conceded that point* in response, but added, out of an abundance of caution, that the trial court should be careful not to enjoin other statutes. State Response to MJP ("State Resp."), T.d. 142, at 1–3. The State noted that Plaintiffs' Motion had not even *mentioned* the other provisions—it had not made a substantive case against them, nor had it argued that the entire bill was a nonseverable package. Plaintiffs' reply brief then swung for the fences, telling the court—and the State—for the first time that they sought to enjoin almost *all* the provisions of the bill (excluding

adoption and foster-care provisions, but including all items related to abortion). Reply in Support of Motion for Judgment on the Pleadings ("MJP Reply"), T.d. 143, at 1–2. Only then (when it was too late for the State to respond) did plaintiffs argue the other provisions were not "severable" from the Heartbeat Ban. *Id.*

The trial court started with the right principle, but it then went awry. The court said, rightly, that "it would be inappropriate" to do what Plaintiffs asked, and to reach severability as a *remedy* "without first considering whether those provisions"—*i.e.*, all but the core Heartbeat Ban—"are themselves constitutional." Op., T.d. 145, at 21. The court should have stopped there, because, as it also rightly noted, Plaintiffs simply did "not directly address whether any of these other provisions . . . are invalid[]." *Id.* They did not even show standing to challenge unmentioned provisions (standing the Plaintiffs lack, with respect to many parts of the law amended by S.B. 23). But the court inexplicably went on to substantively review every provision—raising sua sponte arguments that Plaintiffs had never even mentioned, let alone developed—and enjoining almost all the unchallenged provisions. That alone warrants reversal, as it violates the basic rule that plaintiffs must specify the relief requested and support that relief.

The court below compounded this error by purporting to analyze severability, while improperly merging severability analysis with the substantive

review just noted. It should have asked only whether the provisions *can* stand alone, not whether they *should*. Many provisions here plainly can, as they were law for years before S.B. 23 was enacted.

The State does not appeal here to revive any abortion laws. Indeed, most or all the relevant laws are already enjoined by separate litigation brought by the same parties and counsel. And if Plaintiffs believe that those laws need to be redundantly reviewed in *this* case, they can do so on remand. But they should do so by following the rules.

This Court should reverse the overbroad decision below.

STATEMENT OF THE CASE

Plaintiffs-appellees, five abortion clinics and one doctor who perform abortions, sued various State officials in 2022 to challenge an Ohio abortion law. Defendants-appellants include Attorney General Dave Yost, the Director of the Department of Health (Bruce Vanderhoff), and members of the Medical Board (Kim Rothermel and Bruce Saferin).

The trial court granted a preliminary injunction, which was appealed to this Court and to the Ohio Supreme Court. After voters amended the Ohio Constitution in November 2023, the Supreme Court dismissed the appeal and returned the case to the trial court. Plaintiffs amended their Complaint.

Plaintiffs moved for judgment on the pleadings, asking the court to "grant Plaintiffs' Motion for Judgment on the Pleadings, declare S.B. 23's six-

week ban unconstitutional, and permanently enjoin its enforcement." MJP, T.d. 141, at 15. Defendants conceded that an injunction against enforcing the provision that Plaintiffs call a "six-week ban" would appropriately end the case. Plaintiffs replied that enforcement of almost all provisions in S.B. 23 should be enjoined, and the court agreed and enjoined them. Defendants appealed. Notice of Appeal, T.d. 147.

STATEMENT OF JURISDICTION

This Court has jurisdiction under R.C. 2505.02, as the trial court entered judgment on the pleadings. That judgment, and its accompanying permanent injunction, is a final order that resolves the case. The State believes, however, that Plaintiffs have not shown standing to challenge all the provisions of S.B. 23.

PROCEDURAL POSTURE

As noted above, Plaintiffs moved for judgment on the pleadings and for a permanent injunction, both of which the Court granted. Thus, this appeal is from a final judgment.

STATEMENT OF THE FACTS

The relevant facts here include the General Assembly's enactment of the bill and summary of the provisions at issue, some of the previous procedure in the case, and the briefing that led to the decision that is now on appeal.

I. The General Assembly enacted S.B. 23 in 2019, which enacted the Heartbeat Ban and also enacted and amended other laws regarding abortion and other items.

The Ohio General Assembly enacted what it titled the Heartbeat Act—a collection of statutes that began as S.B. 23—in 2019. The core prohibition in the Act, and the one that is often loosely equated with the broader Act, is the "Heartbeat Ban,"—that is, a limit against performing most abortions after a fetal heartbeat is detected. R.C. 2919.195. Several other provisions were directly tied to this Ban. For example, a health exception was included in R.C. 2919.195 itself, but other provisions in different statutory sections further defined the exception, such as R.C. 2919.16(K). *See* R.C. 2919.195(B); *see also* R.C. 2919.19(A)(12), R.C. 2919.191. Other provisions enforced the ban, by providing criminal liability, medical-licensing consequences, civil actions, and more. R.C. 2919.195(A); R.C. 4731.22(B)(10), R.C. 2919.1912(A); R.C. 2919.199(A)(1), (B)(1). Another provision specified that the limits regulated only those who perform abortions on others, not the women who seek abortions. R.C. 2919.198.

The bill also amended and updated provisions that had long been part of Ohio law. Most notably, Ohio law had provided, since 2013, that a doctor performing an abortion must first check for a fetal heartbeat, and if one is present, the doctor must offer to the pregnant woman to see or hear it (and she could decline). *See* former R.C. 2919.191(A) (2015); *see Preterm-*

Cleveland, Inc. v. Kasich, 2018-Ohio-441, ¶6 (describing requirement and related provisions). S.B. 23 renumbered this "Check and Tell" provision to R.C. 2919.192, and it likewise updated some of the enforcement mechanisms tied to the underlying "Check and Tell" rule. Those included restricting performance without that Check and Tell, R.C. 2919.193, and enforcement mechanisms such as criminal penalties, medical-licensing consequences, and civil actions, R.C. 2919.193(A). R.C. 2919.194 requires doctors to have patients sign a form acknowledging receipt of the information about fetal-heartbeat detection.

S.B. 23 also enacted or amended provisions related to abortion that do not provide any restrictions on abortion. For example, R.C. 2919.171 requires doctors to report to the Department of Health various information about abortions that they perform, such as whether a fetal heartbeat was detected, gestational age, whether the abortion was performed to preserve a woman's health, and so on. R.C. 2919.196 requires recording the reason for the abortion, and to add that reason to the report required by R.C. 2919.171. R.C. 2919.191 provides that none of the other sections apply to an ectopic pregnancy.

S.B. 23 also included provisions that do not concern abortion at all. For example, R.C. 2919.197 confirms that nothing in the other sections limits contraception; R.C. 2919.1910 creates a joint legislative committee on

adoption promotion and support; and R.C. 5103.11 creates a fund for foster care and adoption initiatives.

II. Plaintiffs sued, the case had preliminary stages and appeals, and Ohio adopted a constitutional amendment.

Before SB 23's effective date, Plaintiffs sued in federal court, and they secured a preliminary injunction that lasted until June 24, 2022. *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796 (S.D. Ohio 2019). On that day, the U.S. Supreme Court decided *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), overruling *Roe v. Wade*, 410 U.S. 113 (1973), and the federal district court lifted the injunction immediately.

After briefly trying an original action in the Ohio Supreme Court, *see State ex. rel Preterm-Cleveland v. Yost*, No. 2022-0803 (June 29, 2022), Plaintiffs sued in the Hamilton County Court of Common Pleas. That Court granted a TRO and eventually a preliminary injunction. *See* Preliminary Injunction Order, Oct. 12, 2022, T.d. 105. It enjoined enforcement of nearly all the Act. *Id.* ¶134. Its order allowed the State to enforce only the Act's provisions relating to "adoption and foster care (R.C. 2919.1910 and R.C. 5103.11)"; "section 2919.193 naming the Act"; and "R.C. 2317.56(C)(2) regarding the internal Ohio Department of Health process for producing informed consent materials for the Department of Health." *Id.*

The State's appeal went to the First District and then to the Ohio Supreme Court on procedural issues, and it was pending there when the Amendment intervened. In November 2023, Ohio voters amended the Ohio Constitution to add a right to abortion, among other things. *See* Ohio Const., Art. I, §22. The Supreme Court dismissed the appeal "due to a change in the law." *See Preterm-Cleveland v. Yost*, 2023-Ohio-4570. Before that dismissal, in supplemental briefing, the State announced that "the core prohibition of the Heartbeat Act—the prohibition on performing an abortion after a fetal heartbeat is detected—is overridden by the new Amendment." Supp. Br. at 1, *Preterm-Cleveland v. Yost,* Ohio S.Ct. Case No. 2023-0004 (Dec. 7, 2023).

On remand, Plaintiffs amended their Complaint to add the new Abortion Amendment as a basis for the claim. *See* Second Amended Complaint ("SAC"), T.d. 132 at ¶85 (attached to Motion to File SAC, T.d. 132).

III. Plaintiffs moved for judgment on the pleadings as to "S.B. 23's six-week ban," citing no other provisions, but their reply brief asked to enjoin almost all the bill's provisions.

Plaintiffs moved for judgment on the pleadings. *See* MJP (filed Mar. 1, 2024), T.d. 141,. They expressly limited the basis for judgment to the Abortion Amendment, which was the complaint's first count: "Plaintiffs are not moving on, and this Court need not address, Plaintiffs' other claims, since a favorable ruling on their claim under Article I, Section 22 provides Plaintiffs all the relief they seek." MJP, T.d. 141, at 10 n.5.

The scope of relief sought is, apparently, now a matter of dispute, but the opening Motion appeared to the State to narrowly address only the Heartbeat Ban. That was so because the Motion's language repeatedly referred to just that ban—which Plaintiffs called the "six-week ban," and never cited other provisions. The Motion also referred at times to "S.B. 23," but that seemed to the State to be shorthand for the Heartbeat Ban alone.

That pattern began with the Complaint itself, with the Second Amended Complaint's Count One alleging that "[b]y prohibiting abortion as early as five to six weeks LMP, well before the point of fetal viability, and imposing severe criminal and other penalties on those that provide abortion care after that point, S.B. 23 'burden[s] … [the] right to abortion." SAC, T.d. 132, at ¶85 (attached to Motion to File SAC). Count One concludes that "[a]ccordingly, S.B. 23 violates Article 1, Section 22 of the Ohio Constitution." *Id.* at ¶87. But that broad "S.B. 23" usage in Paragraph 87 is limited by specifying that the constitutional violation is "prohibiting abortion." It does not cite any other statutory provision, either by code section or substantive description. (The remaining claims, while citing different constitutional bases, likewise describe only the Heartbeat Ban.)

The Motion, although using the term "S.B. 23" in some places, repeatedly identifies the Heartbeat Ban, either by description or by citation, R.C. 2919.195. It said:

- "S.B. 23 is a pre-viability ban," MJP, T.d. 141, at 11;

- "S.B. 23 prohibits abortion after the detection of embryonic or fetal cardiac activity," *id.*;

- "S.B. 23 prohibits abortion starting at a time when the embryo is still months away from having the physiological and functional structures necessary for sustained survival apart from the pregnant person's body," *id.*;

- "Banning abortion starting months before the point of fetal viability necessarily 'prohibit[s]' countless Ohioans from exercising their right to have a pre-viability abortion," *id.* at 12;

- "S.B. 23's pre-viability ban starting at approximately six weeks LMP starkly and directly violates Ohioans' constitutional rights protected by Article I, Section 22" *id.*;

- "[I]n singling out abortion providers for significant criminal, civil, and professional penalties if they provide care in violation of the six-week ban, S.B. 23 also 'burden[s],' 'penalize[s],' and 'discriminate[s] against' abortion providers," *id.*;

- "[T]here is no genuine dispute that S.B. 23 is a pre-viability abortion ban starting at approximately six weeks LMP," *id.*;

- "Defendants' repeated and unequivocal public admissions that S.B. 23's ban is unconstitutional," *id.* at 13; and

- "In sum, because S.B. 23 indisputably bans nearly all pre-viability abortion in Ohio," *id.* at 15.

The Motion capped those description with this Conclusion: "[T]his Court should grant Plaintiffs' Motion for Judgment on the Pleadings, declare *S.B. 23's six-week ban* unconstitutional, and permanently enjoin *its* enforcement." *Id.* (emphases added). That conclusion, however, had a footnote

stating that Plaintiffs "do not seek to enjoin the enforcement of S.B. 23's provisions relating only to adoption and foster care (R.C. 2919.1910 and R.C. 5103.11), section 2912.193 naming S.B. 23, and R.C. 2317.56(C)(2) regarding the internal Ohio Department of Health process for producing informed consent materials for the Department of Health." *Id.* at n.9

The State responded by conceding that the Heartbeat Ban was unconstitutional: "Accordingly, the State cannot, and should not, oppose Plaintiffs' request that this Court declare invalid the" Heartbeat Ban, which its Response called the "core prohibition." State Resp., T.d. 142, at 1–2. The State noted, however, that the Motion was not clear, given the occasional use of "S.B. 23," and the footnote's exclusion of four provisions, leaving many other provisions unmentioned either way. *Id.* at 2. Thus, out of "an abundance of caution," the State urged the Court not to enjoin other provisions. *Id.* at 16.

Plaintiffs' reply brief was much different. It said that Plaintiffs wanted the Court to enjoin all provisions in S.B. 23, other than the footnoted ones, and said that this was required as a matter of "severability." Reply, T.d. 143, at 1–2. The reply criticized the State's response for not analyzing severability. *Id.*

IV. The trial court acknowledged that Plaintiffs made no substantive case against other provisions, but it did its own analysis of both constitutionality and severability, and enjoined almost all provisions in the bill.

The trial court's decision began with an extensive review of the case's litigation's history, the *Dobbs* decision, the Ohio amendment, provisions in S.B. 23, and more. *See* Op., T.d. 145, at 1-20. Its closer focus on the parties' positions and on each statutory section follows that background. *See id.* at 20.

The court began its analysis by noting and rejecting Plaintiffs' view of starting with the remedy of severability. The court summarized that "Plaintiffs seemingly argue that, because it is undisputed that R.C. 2919.195 [the Heartbeat Ban] is unconstitutional, the Court should move immediately to consider the severability of the remaining provisions of S.B. 23 without first considering whether those provisions are themselves constitutional." Op., T.d. 145, at 20. The court said that approach "would be inappropriate." *Id.* It explained that severability involved separating constitutional provisions from unconstitutional ones, so it "must first determine which provisions are unconstitutional before it can properly consider severability." *Id.* at 21. The court said it would "consider the constitutionality of each of the disputed provisions and then, if necessary, consider severability in turn." *Id.*

The court then did just that. It reviewed the text of the Abortion Amendment, and then it reviewed every provision in the bill. For each provision, it performed a substantive constitutional analysis, finding some provisions constitutional and others unconstitutional, and then examining severability only for the ones it found constitutional. Op., T.d. 145, at 28–45.

For many provisions, it relied on the analysis from another Ohio court, the Franklin County Court of Common Pleas. In March 2024, in the same month that Plaintiffs had filed the Motion at issue here, the same clinics, with the same counsel, also filed a case in that court, challenging a variety of abortion laws, including Ohio's 24-hour waiting period, and also including the Check and Tell provision and others amended or enacted in S.B. 23. In August 2024, that court preliminarily enjoined all the laws challenged there. *Preterm-Cleveland, et al. v. Dave Yost*, Franklin County Common Pleas Case No. 24-cv-2634, Decision (August 23, 2024).

The Hamilton County trial court combined the Franklin County court's analysis with its own in finding various provisions unconstitutional. For example, it concluded that R.C. 2919.171, requiring doctors to report various information to the Department of Health, is unconstitutional. *See* Op., T.d. 145, at 30–33. It therefore did not consider whether that provision, or any other that it found invalid, was severable from the Heartbeat Ban.

By contrast, when the court found some provisions constitutional, it turned to severability, and it found them non-severable. For example, it found that R.C. 2919.197, which preserves contraception rights, is "not, in its own right, unconstitutional." Op., T.d. 145, at 41. But it found that the provision "is not severable from the balance of S.B. 23's unconstitutional provisions." *Id.*

The State will not here repeat all the trial court's findings as to all provisions, but it will refer to them as needed in the Argument below.

STANDARD OF REVIEW

"Appellate review of a judgment on the pleadings involves only questions of law and is therefore de novo." *Cincinnati v. Rennick*, 2022-Ohio-1110, ¶5 (1st Dist.), quoting *New Riegel Loc. Sch. Dist. Bd. of Educ. v. Buehrer Grp. Architecture & Eng'g, Inc.*, 2019-Ohio-2851, ¶8. *See also Maternal Grandmother v. Hamilton Cnty. Dep't of Job & Fam. Servs.*, 2021-Ohio-4096, ¶13. This standard applies to both assignments of error.

ARGUMENT

I. First Assignment of Error:

The trial court erred in enjoining enforcement of multiple statutes enacted in the same bill, when plaintiffs did not even identify the challenged statutes until a reply brief, and did not offer any substantive challenge to them. Decision and Entry Granting Plaintiffs' Motion for Judgment on the Pleadings ("Op."), T.d. 145, at 46.

Issue Presented for Review

Does a plaintiff challenging multiple statutes have the duty to identify the statutory provisions that it challenges in its opening dispositive-motion brief, along with showing standing and providing a substantive analysis to each one?

Standard of Review

A de novo standard of review applies, as noted above (at 17). *See Cincinnati v. Rennick*, 2022-Ohio-1110, ¶5.

Argument

The trial court's first mistake was not in *how* it substantively reviewed the various provisions for compliance with Ohio's Abortion Amendment. Rather, its mistake was the more fundamental decision to conduct such review at all. That is so because of both Ohio law and common sense. As detailed below, a party urging a court to grant a dispositive motion must specify its claims and the bases for them. Plaintiffs' Motion failed to do that, and the State was not required to respond to arguments never raised in the Motion.

Thus, the trial court erred in providing, on its own, arguments that Plaintiffs never raised, and it further erred by then ruling based on those arguments.

A. Ohio law requires a party to specify the relief sought and the basis for each form of relief.

Because judgment on the pleadings "provides judicial resolution at an early stage of a case, the party seeking judgment on the pleadings shoulders a heavy burden of justification," and "[t]he moving party must demonstrate its entitlement to judgment in its favor." *Dist. No. 1, Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n, AFL-CIO v. Liberty Mar. Corp.*, 933 F.3d 751, 760 (D.C. Cir. 2019).

At the very minimum, then, a plaintiff seeking judgment as a matter of law, without a trial, must specify the basis for relief. That is so the defendant knows how to respond. This common-sense principle is frequently applied in summary-judgment cases. As the Ohio Supreme Court has held, a "party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond." *Mitseff v. Wheeler,* 38 Ohio St. 3d 112, syl. (1988); *see also Johnson v. Univ. of Cincinnati,* 68 Ohio App. 3d 141, 144 (1991).

While judicial application of that principle typically arises in summary-judgment cases, it applies with equal force to motions for judgment on the

pleadings. The same legal analysis governs a plaintiff's motion for judgment on the pleadings and a plaintiffs' motion for summary judgment. *Cf.* 5C Wright & Miller, Federal Practice and Procedure §1369, 261–62 (3d ed. 2004) ("Both the summary judgment procedure and the motion for judgment on the pleadings are concerned with the substance of the parties' claims and defenses and are directed towards a final judgment on the merits. Indeed, the standard applied by the court appears to be identical under both motions."). The only difference between such motions is whether the court must (rather than may) consider external evidence. *See Buchenroth v. City of Cincinnati*, 2019-Ohio-2560, ¶9 (1st Dist.). Importantly, judgment on the pleadings for plaintiffs may differ from judgment on the pleadings for defendants. Although the sparse case law on judgment for plaintiffs shows that some considerations are similar, *see* 85 James L. Buchwalter & Thomas Smith, Judgment and Judgment on the Pleadings, Ohio Jur. 3d §72 ("case law involving a plaintiff's motion for judgment on the pleadings may be sparse, presumably it would involve the same type of considerations used in resolving a defendant's motion."), the differing contexts mandate some differences. For example, defendants' motions for judgment on the pleadings are identical to motions to dismiss, other than that they are filed after an answer. *State ex rel. Lockard v. Wellston City Sch. Dist. Bd. of Edn.*, 2015-Ohio-2186, ¶6. But plaintiffs' motions must establish the typical elements of

a claim, such as standing and damages. *See Portfolio Recovery Assocs., L.L.C. v. VanLeeuwen,* 2016-Ohio-2962, ¶7 (2nd Dist.).

To determine whether a party has met its duty to "specifically delineate the basis" for judgment, *Mitseff,* 38 Ohio St. 3d 112 at syl., courts look to the party's briefing. For example, this Court, in *Johnson,* explained that the moving party's motion "and supporting memorandum address only the statute of limitations and fail specifically to address any other area of Johnson's claim." *Johnson*, 68 Ohio App. 3d at 144. "The motion and memorandum, therefore, did not confer a reciprocal burden upon Johnson" to respond to the unmentioned issue. *Id.* This rule extends to factual issues as well as legal ones, so a court may not rely on a factual point that the movant did not note. *Lindsey v. Summit Cty. Child. Servs. Bd.*, 2009-Ohio-2457, ¶12 (9th Dist.) (noting that court would "look to the" party's "motion to determine whether" the party noted it and thus whether "the trial court erred in relying on this fact.").

Of course, it follows that if a party must state the *basis* for a claim, legally and factually, it must first identify what that claims even is. With these rules in mind, the State turns to Plaintiffs' Motion here.

B. Plaintiffs' Motion did not challenge any provisions other than the Heartbeat Ban, and their conclusory attempt in the reply was not enough.

Plaintiffs' Motion for Judgment on the Pleadings did not meet its basic duty to "specifically delineate the basis upon which" it sought judgment on the pleadings as to any provisions outside the Heartbeat Ban itself, so it never gave the State "a meaningful opportunity to respond." *Mitseff,* 38 Ohio St. 3d 112 at syl.

First, its Motion did not even *mention* the other provisions in S.B. 23, as detailed in the facts above. Instead, the Motion referred specifically to the Heartbeat Ban, which the Motion called a six-week ban. It said that "*S.B. 23's pre-viability ban* starting at approximately six weeks . . . violates Ohioans' constitutional rights," MJP, T.d. 141, at 12, and it notably concluded by asking the court to "grant Plaintiffs' Motion for Judgment on the Pleadings, declare *S.B. 23's six-week ban* unconstitutional, and permanently enjoin its enforcement," *id.* at 15 (emphases added).

Second, while Plaintiffs did at some points suggest that "S.B. 23" is invalid, it also *equated* its term "S.B. 23" with the Heartbeat Ban, as opposed to other parts of the bill. For example, the Motion said that "there is no genuine dispute that S.B. 23 *is* a pre-viability abortion ban starting at approximately six weeks LMP." *Id.* at 12 (emphasis added). It also said that "in singling out abortion providers for" enforcement "if they provide care in

violation of the six-week ban, S.B. 23 also 'burden[s],' 'penalize[s],' and 'discriminate[s] against' abortion providers." *Id.* Nowhere in their references to "S.B. 23" do they describe it as a broader target that *includes* the Heartbeat Ban, among other things, but they instead said that the bill *is* the Ban.

Third, Plaintiffs' obligation to be specific was crystallized by the State's own briefing *before* the Motion was filed. When the Ohio Supreme Court ordered supplemental briefs about the Abortion Amendment's effect on that appeal, the State conceded the Heartbeat Ban's validity. But it also explained the rest of the provisions of law enacted through S.B. 23 were a separate issue. The State said that "a reviewing court with proper jurisdiction will be required to separate the obviously unconstitutional portions of State law from the parts that remain perfectly valid." State Supp. Br. at 5, *Preterm-Cleveland v. Yost,* Ohio S.Ct. Case No. 2023-0004 (Dec. 7, 2023).

Indeed, Plaintiffs' Motion even cited that Heartbeat-Ban-specific admission from the State's Supplemental Brief in the Supreme Court, along with similar language from a document that the Attorney General published before the vote on the Amendment. That citation only further equated the "S.B.23" language with the Heartbeat Ban. The State's Supplemental Brief in the Supreme Court said, "the core prohibition of the Heartbeat Act—the prohibition on performing an abortion after a fetal heartbeat is detected—is overridden by the new Amendment." State Supp. Br. at 1, *Preterm-Cleveland*

v. Yost, Ohio S.Ct. Case No. 2023-0004, 1 (Dec. 7, 2023) (emphasis added); *compare* MJP, T.d. 141, at 13 ("This is consistent with Defendants' position that S.B. 23's "prohibition on performing an abortion after a fetal heartbeat is detected . . . is overridden by the new Amendment."). The Attorney General's pre-election explainer likewise referred to the invalid law as the provision "which restricts abortions (with health and other exceptions) after a fetal heartbeat is detected, which is usually at about six weeks." Issue 1 on the November 2023 Ballot, A legal analysis by the Ohio Attorney General at 9, available at https://perma.cc/SGH5-2SWY.

Fourth, references to a "bill" cannot meet the specification requirement, because Ohio law provides for courts to review *statutory provisions,* not the *bills* that enact them. A "court's function in reviewing legislative enactments is limited to interpreting the meaning of statutory provisions and determining whether they are in accord with the federal and state Constitutions." *City of Toledo v. State*, 2018-Ohio-2358, ¶31. Indeed, that is true even when the alleged constitutional violation is a procedural one in *how* a bill was enacted, such as an alleged violation of the one-subject clause. In such cases, plaintiffs must still challenge specified provisions, and must even show standing as to each separate provision—plaintiffs do not get "billwide" standing or relief. *See Preterm-Cleveland, Inc. v. Kasich,* 2018-Ohio-441, ¶30 (requiring standing as to each statutory provision in single-subject

challenge); *State ex rel. Ohio Civ. Serv. Emps. Ass'n v. State*, 2016-Ohio-478, ¶22, (explaining that "the appropriate remedy when a legislative act violates the one-subject rule is generally to sever the offending portions of the act to cure the defect and save the portions of the act that do relate to a single subject"). Thus, a "bill" cannot violate the Constitution, regardless of whether the challenge is under the free-speech clause or the new Abortion Amendment. Only *statutory provisions* can violate the Constitution.

Finally, even if one grants, for argument's sake, that the Motion *identified* a challenge to provisions beyond the Heartbeat Ban—whether by using the language "S.B. 23" or otherwise—Plaintiffs still failed to meet their burden of specificity. Plaintiffs must both identify what they challenge and "specifically delineate the basis upon which" any such challenge rests. *Mitseff*, 38 Ohio St. 3d 112 at syl. So even if one spots Plaintiffs the threshold notion that it challenged, say, the Check and Tell Provisions, or any other section, the Motion nowhere gave a *basis* for any such challenge. The Motion never said that any other provision violated the Abortion Amendment substantively, nor did the Motion say that other provisions are dragged down as a matter of "severability." Moreover, any provision-by-provision review requires Plaintiffs to show standing for each provision, along with a merits challenge for each. *Preterm-Cleveland*, 2018-Ohio-441, ¶30. Several

provisions, such as the preservation of contraception, do not injure Plaintiffs or anyone.

Thus, Plaintiffs never gave the State "a meaningful opportunity to respond" as to any other provision other than the Heartbeat Ban itself. *See Mitseff,* 38 Ohio St. 3d 112 at syl. The reply's appeal to "severability" as a remedy was not enough, as it was too late for the State to respond at that point (and it mistakes the point the State was making in its response, which was about the scope of Plaintiffs' Motion). Nor can the Motion be read more broadly just because the State chose, out of an abundance of caution, to remind the court to cabin its injunction. That does not show that *Plaintiffs* "specifically delineated" the basis for relief.

C. The trial court erred in raising and arguing sua sponte issues that Plaintiffs never raised.

The above shows that the trial court erred in addressing other provisions substantively under the Abortion Amendment. The court even recognized the problem in part, saying that it "would be inappropriate" to jump straight to severability, as Plaintiffs belatedly asked in reply. Op., T.d. 145, at 21. The court rightly said that it "must first determine which provisions are unconstitutional before it can properly consider severability." *Id.* at 21. The court also noted that Plaintiffs had not offered any constitutionality arguments, saying that "Plaintiffs rely on a severability analysis and do not

directly address whether any of these other provisions, standing on their own, are invalidated by the Amendment." *Id.*

The court should have stopped there, as the outcome is a simple syllogism from combining the court's two recognitions: (1) a constitutionality analysis was required to reach other provisions, and (2) Plaintiffs did not offer any. That should have ended the court's analysis.

But the court inexplicably provided its *own* constitutional arguments, sua sponte raising and resolving them for Plaintiffs. It spent 26 pages doing so, starting with its view of the Abortion Amendment's content, and then applying that view to every provision in the bill. For many provisions, the trial court did not use its constitutional analysis as a gateway to severability, but instead found that various provisions were unconstitutional and enjoined them based on that substantive finding. For example, the court said that the reporting requirements of R.C. 2919.171 and R.C. 2919.196 are unconstitutional: "Accordingly, this Court finds as a matter of law that R.C. 2919.196 violates Ohio's Constitution. Thus, S.B. 23's amendments to R.C. 2919.171 are unconstitutional." Op., T.d. 145, at 33. Those conclusions were based not on severability, but on direct constitutional review. *See id.* at 30–33. Likewise, the court found that R.C. 2919.194, which requires a form noting receipt of certain information, is unconstitutional. *Id.* at 39–40. And so on for many more provisions.

Notably, while the court did not again mention, in its provision-specific analyses, the *Plaintiffs'* failure to advance *any* affirmative arguments, it repeatedly criticized the *State* for not putting up a defense against that lack of offense. It said, for example, that the "State Defendants have not advanced any argument specifically addressed to section 2919.196." *Id.* at 32. It repeated that formula, saying things like:

> The State Defendants make no argument to support the constitutionality of this provision [R.C. 2919.19]. Nor have they indicated in any way in their Answer to the Amended Complaint or in response to the motion for judgment on the pleadings that this provision satisfies the Amendment's exceptions. Accordingly, this Court finds as a matter of law that R.C. 2919.19(B)(2)-(3) violate Ohio's Constitution.

Id. at 36. But the court did not explain *why* the State would be expected to argue such defenses in the face of no challenge by Plaintiffs against such provisions. Again, recall that the court rightly acknowledged that Plaintiffs "do not directly address whether any of these other provisions, standing on their own, are invalidated by the Amendment." *Id.* at 21.

Consequently, the trial court erred in enjoining *any* provisions based on a finding of unconstitutionality using sua sponte arguments that Plaintiffs never raised. All the Court's injunctions through that path should be reversed.

Notably, that is not to say that those provisions will be upheld against challenge, whether in this case or, for several provisions, in the Franklin

County case. For starters, if this Court reverses, as it should, all the overlapping provisions will remain enjoined by the Franklin County court. On remand here, perhaps Plaintiffs will not even pursue further relief, and defer to the Franklin County case—after all, they did ask this Court to stay this appeal in favor of that case. *See* Motion to Stay. Or, if they do go forward in Hamilton County, they or the State might prevail in a proper provision-by-provision challenge. The point is, the State is not asking this Court to review the merits of the trial court's constitutionality decisions, but only to enforce the normal rules of litigation.

II. Second Assignment of Error:

The trial court erred in finding various statutes non-severable, when the provisions can stand alone, and some existed for years before being amended in a bill that also included an unconstitutional provision. Op., T.d. 145, at 36, 37, 41, 42.

Issue Presented for Review:

Does severability analysis require a court to review solely whether each provision can stand on its own functionally, or may it also look to a provision's potential constitutional concerns, even if those have not been raised or briefed?

Standard of Review

A de novo standard of review applies, as noted above (at 17), because severability is a legal issue, and because this severability occurred in the

context of a motion for judgment on the pleadings. *See Cincinnati v. Rennick*, 2022-Ohio-1110, ¶5.

Argument

While the trial court enjoined enforcement of many provisions based on its assessment of those provisions' constitutionality on the merits, it also enjoined several provisions based on severability. That is, for several provisions, the court found that the given provision *was* constitutional, but said that it had to be enjoined anyway, because the provision was not "severable" from the invalid Heartbeat Ban. In doing so, the court went beyond the actual standard—which asks if the General Assembly intended the provision to survive on its own, and if such survival is functionally possible—and looked to normative notions of whether it *should* survive, in the court's view. That was wrong.

A. Severability is the default under Ohio law, and this bill stressed that with its own severability provision.

Ohio's law on severability is straightforward:

> If any provision of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.

R.C. 1.50. Notably, that command from the General Assembly is so strong that it calls for courts to slice thinly *within* a statute, preserving even other

"provisions or applications of *the section*" at issue, along with "related sections." Indeed, that command, by starting with either a section or "related sections" as the baseline, does not even contemplate having other code sections invalidated merely by the happenstance of being enacted or amended in the same bill, unless they qualify as "related sections."

Here, the General Assembly even added a special severability provision to S.B. 23, on top of R.C. 1.50's baseline:

> If any provision of this section or sections 2919.171 or 2919.191 to 2919.1913 of the Revised Code is held invalid, or if the application of such provision to any person or circumstance is held invalid, the *invalidity of that provision does not affect any other provisions* or applications of this section and sections 2919.171 and 2919.191 to 2919.1913 of the Revised Code that can be given effect without the invalid provision or application, *and to this end the provisions of this section and sections 2919.171 and 2919.191 to 2919.1913 of the Revised Code are severable as provided in section 1.50* of the Revised Code. In particular, it is the intent of the general assembly that any invalidity or potential invalidity of a provision of this section or sections 2919.171 or 2919.191 to 2919.1913 of the Revised Code is not to impair the immediate and continuing enforceability of the remaining provisions. It is furthermore the intent of the general assembly that the provisions of this section and sections 2919.171 or 2919.191 to 2919.1913 of the Revised Code are not to have the effect of repealing or limiting any other laws of this state, except as specified by this section and sections 2919.171 and 2919.191 to 2919.1913 of the Revised Code.

R.C. 2919.19(B)(4) (emphasis added).

Ohio Supreme Court precedent recognizes and implements the General Assembly's strong preference for severability, and uses the *Geiger* test to help assess whether severability is feasible. *See State v. Noling*, 2016-

Ohio-8252, ¶¶ 34–35, citing *Geiger v. Geiger*, 117 Ohio St. 451 (1927). That test asks

> (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself?
>
> (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out?
>
> (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

Geiger, 117 Ohio St. at 466 (quotation omitted). Severability is proper "when the answer to the first question is yes and the answers to the second and third questions are no." *Noling*, 2016-Ohio-8252 at ¶35.

B. The trial court erred in finding various provisions not severable.

As noted above, Plaintiffs did not even raise severability until their reply brief, so this Court need not even reach this issue. Plaintiffs' failure to meet its burden, standing alone, warrants reversal. *See* above at 17–28. But if the Court reaches severability, it should find all the provisions, except those conceded by the State, to be severable.

As an initial matter, the State notes that the trial court reached severability only for some provisions, as it invalidated many on the basis of its own section-specific constitutional review. Some of those provisions, although

invalidated for a different reason, are especially strong examples of severable provisions.

Take, for example, the Check and Tell Provision. As all agree, that provision was enacted in 2013, and S.B. 23 merely re-numbered it and modified it in minor ways. That easily clears the severability test—of course the provision *can* stand by itself, without the invalid Heartbeat Ban in place, as it *did actually stand separately* for years. Indeed, the trial court and Plaintiffs agree that the court's injunction of the newer version simply "revives" the older version—further confirming that the substance of the law *can* stand on its own. Neither the court nor plaintiffs offered any reason—nor could they—why the newer version somehow could not likewise stand alone. Likewise, the provision is not "so connected" to the invalid Heartbeat Ban, again, because it predated it by years. Finally, the courts would not need to "insert words" to achieve that separate functionality, for the same reason: it worked fine on its own with the words it had. This provision is especially important to the analysis because, as explained below, its restoration serves as an anchor to give meaning to other provisions.

In addition to that example, all the provisions that the court invalidated on nonseverability grounds can stand alone, and do not "need" the Heartbeat Ban to hold them up. True, some might not seem to achieve much—such as the express protection of contraception—but they also do not

harm Plaintiffs by staying in place, and even if they merely state the General Assembly's intent as to contraception and the like, that is no small thing. One critical representative function of any legislature is to codify the moral judgments of the community, including moral approval—here, of contraceptives. "Law is the principal institution through which a society can assert its values." Alexander Bickel, The Morality of Consent 5 (1975).

Further, several provisions might not seem to have a purpose *after* the trial court enjoined the Check and Tell provisions in addition to the Heartbeat Ban. But once the Check and Tell is restored—again, because Plaintiffs offered no challenge to it, and it is plainly severable—then some of the ancillary provisions still function by interacting with *that* provision. For example, R.C. 2919.191 provides that R.C. 2919.192 to 2919.195 apply only to intrauterine pregnancies, *i.e.*, ectopic pregnancies are exempt. The court rightly found that "[t]here is nothing facially unconstitutional about this exception." Op., T.d. 145, at 37. But it enjoined it because, it said, "this provision cannot stand on its own since it depends entirely upon its reference to the balance of S.B. 23 for any meaningful application." *Id.* However, if part of that "balance" is the Check and Tell provision, then the ectopic-pregnancy exemption serves to cancel the duty to even check for a fetal heartbeat in ectopic-pregnancy cases. That comports with both medical and common sense and needs no words to be inserted to work. Likewise, the health-exception definition

still works, if the Check and Tell provision survives, because it, too, provides an exception from the duty to check for a heartbeat.

That pattern continues. Definition sections, reporting requirements, and more can all work on their own without a Heartbeat Ban. To the extent that the trial court concluded that those freestanding laws *should not* be left standing after the Heartbeat Ban is severed, because of some unconstitutional effect, that flows from its mistaken consideration of the non-raised substantive claims.

The State freely concedes that some provisions are non-severable. As the State noted in its Response in the trial court, a few provisions incorporate the Heartbeat Ban itself, R.C. 2919.195, by reference: 2919.171(A)(1) & (A)(2), 2919.198, 2919.199, 2919.1912(A). The State does not contest that on appeal. But the State concedes nothing more on severability.

Consequently, if the Court reaches any issues of severability—although it should not, as reversal is warranted on the First Assignment of Error—it should reverse the trial court as to those provisions as well.

* * *

A final reminder: The State reiterates that this appeal is not about abortion. It is about following the rules of litigation. And again, reversing here, and enforcing the rules of the road, will not cause harm to Plaintiffs or anyone else. The relevant provisions are either redundantly enjoined by the

Franklin County case, or they are provisions that impose no burden, such as definition sections, protection for contraception, and the like. So this Court can and should vindicate the litigation rules now.

CONCLUSION

The Court should reverse the judgment below as to all provisions except the Heartbeat Ban itself and those few provisions that incorporate R.C. 2919.195 by reference: 2919.171(A)(1) & (A)(2), 2919.198, 2919.199, 2919.1912(A). The injunction and the judgment on the pleadings should be reversed as to all other provisions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the word-count provision set forth in First District Local Rule 19(B)(1). This Brief is printed using Times New Roman or Georgia 14-point typeface using Microsoft Word word processing software and contains 7,887 words.

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CERTIFICATE OF SERVICE

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Attachment

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ENTERED
OCT 24 2024

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PRETERM-CLEVELAND, *et al.*,	:	
	:	Case No.: A2203203
Plaintiffs,	:	
	:	
v.	:	Judge Christian A. Jenkins
	:	
DAVID YOST, *et al.*,	:	
	:	**Decision and Entry Granting Plaintiffs' Motion for Judgment on the Pleadings**
Defendants.	:	
	:	
	:	

I. Introduction

Reversing *Roe v. Wade* and eliminating nationwide federal protection of the right to abortion, Justice Samuel Alito wrote for the Supreme Court majority that, "[i]t is time to heed the Constitution and return the issue of abortion to the people's elected representatives." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 232 (2022). Fifty-seven pages later Justice Alito made clear that:

> Our decision returns the issue of abortion to those [state] legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office.

Id. at 289. Presciently, and perhaps a little gratuitously, Justice Alito then noted that "[w]omen are not without electoral or political power." *Id.*

Ohio's Attorney General evidently didn't get the memo. For even after a large majority of Ohio's voters (i.e. 56.78 percent) – presumably both women and men – approved an amendment to the Ohio Constitution protecting the right to pre-viability abortion on November 7, 2023, the

Attorney General urges this Court to leave "untouched" all but one provision of the so called "Heartbeat Act" clearly rejected by Ohio voters.

This dispels the myth that the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.* merely returns the issue of abortion to the states. The premise of this myth is that, in states where the voters adopt abortion protection measures, those rights will in fact be protected by the state and its officers. Not so in Ohio. Despite the adoption of a broad and strongly worded constitutional amendment, in this case and others, the State of Ohio seeks not to uphold the constitutional protection of abortion rights, but to diminish and limit it.

If Ohio courts adopted the State Defendants' arguments, Ohio doctors who provide abortion care would continue to be at risk of felony criminal charges, $20,000 fines, medical license suspensions and revocations, and civil claims for wrongful death. Patients seeking abortion-care would still be required to make two in-person visits to their provider, wait twenty-four hours to receive abortion care, receive state-mandated information designed to discourage abortion and have the reason for their abortion recorded and reported. Unlike the Ohio Attorney General, this Court will uphold the Ohio Constitution's protection of abortion rights. The will of the people of Ohio will be given effect.

II. Background

A. S.B. 23

On April 10, 2019, the Ohio General Assembly passed 2019 Am.Sub.S.B. No. 23 ("S.B. 23" or "the Act"), also known as the "Human Rights and Heartbeat Protection Act" or the "Heartbeat Act" for short. S.B. 23 created ten new sections of the Ohio Revised Code,[1] amended

[1] R.C. 2919.193 making it a fifth-degree felony and creating a civil claim for compensatory and exemplary damages as well as professional discipline for performing an abortion without first checking for a fetal heartbeat except in an emergency; R.C. 2919.195 making it a fifth-degree felony to perform an abortion where a fetal heartbeat is detected except where necessary to prevent death or "irreversible impairment of

seven existing sections, and renumbered three existing sections. The result is a statutory scheme of abortion regulations generally providing that, if a pregnancy is located in the uterus, the provider who intends to perform an abortion is required to determine whether there is cardiac activity.[2] R.C. 2919.192(A). The provider checking for cardiac activity is required to provide the patient with the option to "view or hear" the detected activity and to record in the patient's medical record estimated gestational age, the method used to test for cardiac activity, the date and time of the test

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a major bodily function, with no exception for rape or incest; R.C. 2919.196 requiring abortion care providers to document whether or not "the purported reason for the abortion is to preserve the health of the pregnant woman" and to maintain such a record for seven years; R.C. 2919.199 creating a civil wrongful death claim for abortions that violate R.C. 2919.193(A), 2919.194 or 2919.195(A); R.C. 2919.1912 allowing the state medical board to assess a civil forfeiture of up to $20,000 against a physician that fails to comply with the abortion restrictions or related information provisions and record keeping requirements; R.C. 2919.191 limiting Ohio's abortion restrictions to intrauterine pregnancies and thereby excluding ectopic pregnancies; R.C. 2919.197 excluding contraception from Ohio's abortion restrictions; R.C. 2919.1910 creating a joint legislative committee on adoption promotion and support; R.C. 2919.1913 naming the act as the "Human Rights and Heartbeat Protection Act"; R.C. 5103.11 creating the foster care and adoption initiatives fund.

[2] S.B. 23 employs the term "fetal heartbeat," which it defines as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac." R.C. 2919.19(A)(4). The Act requires providers to determine whether there is a "detectable fetal heartbeat." R.C. 2919.192(A). The use of the words "fetal" (i.e., to refer to a fetus) and "heartbeat" are potentially misleading. The heart organ consisting of four chambers and valves develops at approximately ten weeks after conception. However, the tissues that will eventually form the heart begin to develop during the embryonic stage, prior to the existence of a fetus, such that limited cardiac activity can be detected as early as five or six weeks. *See* Cleveland Clinic Health Library "Fetal Development" last updated 3/19/24, ("The cells that will form the fetal heart begin to cluster around five to six weeks and can pulse.") (available at: https://my.clevelandclinic.org/health/articles/7247-fetal-development-stages-of-growth); Jorg Manner "When Does the Human Embryonic Heart Start Beating? A Review of Contemporary and Historical Sources of Knowledge about the Onset of Blood Circulation in Man," Journal of Cardiovascular Development and Disease (6/9/2022) ("[A] tubular embryonic heart mechanically cannot work in the same way as the mature four-chambered heart of human beings. Thus, if we use, in the context of the early embryonic heart activity, the term 'heartbeat', which is used to describe "*the regular movement that the heart makes as it sends blood around your body*", we should be aware of the fact that we deal with a kind of heart movement that differs considerably from the movement of the mature four-chambered heart.") (emphasis in original) (available at: https://www.mdpi.com/2308-3425/9/6/187). The choice to employ such language may be designed to lend credence to nascent arguments in support of so called "fetal personhood." *See e.g. Kotkowski-Paul v. Paul*, 2022-Ohio-4567, ¶¶104-131 (Lynch, J. dissenting) (attempting to establish legal rights of frozen embryos). Indeed, S.B. 23 defines and employs the term "unborn human individual," presumably for the same purpose. R.C. 2919.19(A)(15). Intriguing as this issue may be to some, the voters of Ohio have rendered it entirely academic such that it is of no legal consequence whatsoever by amending the Ohio Constitution to expressly protect the right to abortion until viability.

and the results of the test. *Id.*

Performing an abortion without first determining whether there is cardiac activity is a fifth-degree felony and grounds for a civil action for compensatory and punitive damages, as well as a basis for professional disciplinary action. R.C. 2919.193(A). This requirement is subject to an exception in the event of a medical emergency that "so complicates the woman's pregnancy as to necessitate the *immediate* performance or inducement of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman that delay in the performance or inducement of the abortion would create." R.C. 2919.193(B) and 2919.16(F) (emphasis added).

A provider that performs an abortion without checking for cardiac activity due to a medical emergency is required to make written notations in the patient's medical record of the "physician's belief that a medical emergency necessitating the abortion existed" and the "medical condition of the pregnant woman that *assertedly* prevented compliance with" the requirement to check for cardiac activity before performing an abortion. R.C. 2919.193(C) (emphasis added).

If cardiac activity is detected, 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).[3] S.B. 23 provides two limited exceptions allowing abortion after detection of cardiac activity only if it is necessary (1) to prevent the woman's death, or (2) to prevent a "serious risk of the substantial and irreversible impairment of a major bodily function." S.B. 23, Section 1, amending R.C. 2919.195(B). The statute defines "'[s]erious risk of the substantial and irreversible impairment of a major bodily function' [to mean] any medically diagnosed condition that so

[3] Cardiac activity typically occurs approximately six weeks into pregnancy (as measured from the first day of a patient's last menstrual period, or "LMP") but can occur as early as the fifth week LMP. This is often before a pregnant person is aware of the pregnancy.

complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function." R.C. 2919.16(K). 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 "does not include a condition related to the woman's mental health." *Id.* There is no exception for pregnancy resulting from rape or incest.

Before proceeding with an abortion under one of the exceptions – unless there is a medical emergency requiring an "immediate" abortion – providers are required to: 1) inform the patient in writing that "the unborn human individual" "has a fetal heartbeat," 2) inform the patient of the statistical probability of bringing "the unborn human individual . . . to term," and 3) obtain from the patient a signed form acknowledging that she has received this information from the provider. R.C. 2919.194(A). Under this same section, an abortion cannot be performed until at least twenty-four hours after the three requirements are met.

A physician who performs an abortion under one of the exceptions is further required to prepare a written declaration stating that an abortion is necessary to prevent the death of the patient or "serious risk of substantial and irreversible impairment of a major bodily function." R.C. 2919.195(B). In the written declaration, the physician is required to specify the medical condition that the abortion is "asserted to address" and state "the medical rationale for the physician's conclusion" that abortion was necessary to prevent the patient's death or serious risk of substantial and irreversible impairment of a major bodily function. *Id.* The written declaration must be placed in the patient's medical record and a copy must be maintained by the physician for seven years. *Id.*

Violation of R.C. 2919.193 (requiring providers to check for cardiac activity) or 2919.195 (prohibiting abortion after detection of cardiac activity) is a fifth-degree felony, punishable by up to one year in prison and a fine of $2,500. In addition to criminal penalties, the state medical board may assess a forfeiture of up to $20,000 for each violation, and limit, revoke, or suspend a physician's medical license based on a violation of S.B. 23. Clinics providing abortion care also face civil penalties and revocation of their ambulatory surgical facility licenses for a violation. R.C. 3702.302; R.C. 3702.30(A)(2)(a).

An abortion care patient who receives an abortion in violation of R.C. 2919.193 (requiring providers to check for cardiac activity), R.C. 2919.195 (prohibiting abortion after detection of cardiac activity), R.C. 2919.194(A)(1)-(2) (requiring written notification that there is cardiac activity and the probability of carrying to term), or R.C. 2919.194(A)(3) (requiring the patient's written acknowledgement of receipt of state-mandated information), may bring a civil action for wrongful death against a provider and recover statutory damages in the amount of $10,000, or more if awarded by the trier of fact, plus court costs and statutory attorney fees. R.C. 2919.199(B).

B. Prior Litigation Enjoining S.B. 23

S.B. 23 was passed by the Ohio General Assembly on April 10, 2019. It was signed into law by Governor Mike DeWine the next day and was set to go into effect on July 11, 2019. A federal lawsuit seeking to enjoin the enforcement of S.B. 23 was filed on May 15, 2019. On July 3, 2019, the U.S. District Court for the Southern District of Ohio issued a preliminary injunction enjoining the enforcement of S.B. 23 in its entirety, reasoning that "[t]his Court concludes that S.B. 23 places an 'undue burden' on a woman's right to choose a pre-viability abortion." *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 803 (S.D. Ohio 2019).

C. *Dobbs v. Jackson Women's Health Organization*

The Southern District's injunction remained in effect until June 24, 2022. On that day, the U.S. Supreme Court announced its decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022) overruling *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Dobbs* held that there is no federal Constitutional right to abortion whatsoever, and that "[t]he permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Dobbs,* 597 U.S. at 232.[4]

Later on the day of the *Dobbs* decision, Ohio's Attorney General filed an emergency motion with the District Court seeking to dissolve the preliminary injunction entered on July 3, 2019. The District Court granted the motion and dissolved the injunction that same day. *See Preterm-Cleveland v. Yost*, 2022 U.S. Dist. LEXIS 112700 (S.D. Ohio Case No. 1:19-cv-00360 June 24, 2022).

D. Initial Proceedings Before the Ohio Supreme Court

Five days after the decision in *Dobbs* was announced, the Plaintiffs in this case filed a complaint in mandamus with the Ohio Supreme Court challenging S.B. 23 under the Ohio

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[4] Notably, Chief Justice Roberts concurred in the judgment only. The Chief Justice succinctly describes how the issue presented in *Dobbs* was inaccurately represented in the majority opinion authored by Justice Alito as a Hobson's choice between upholding *Roe* or eliminating entirely the federal right to choose. In seeking review by the Supreme Court, Mississippi asked simply "whether abortion prohibitions before viability are always unconstitutional" and made clear that it was *not* asking the Court "to repudiate entirely the right to choose whether to terminate a pregnancy." *Dobbs,* 597 U.S. at 352. The Chief Justice urged the Court to follow its own precedent requiring judicial restraint and decide the case on the narrowest basis needed for disposition rather than "overruling *Roe* all the way down to the studs." *Id.* at 353. The Chief Justice would have retained the essence of a woman's right to choose and extended it so long as necessary "to ensure a reasonable opportunity to choose," eliminating the viability standard. But the bare majority of five justices declined to exercise the restraint recommended by the Chief Justice, eliminated a Constitutional right that had endured for 49 years, and cast the issue to the political process in the states. Since then, every time American voters have been asked to pass on the issue, they have supported abortion rights by significant margins, putting opponents of abortion rights such as the State Defendants in the unenviable position of having to ask a Court to usurp the will of the people, directly contrary to the mandate of *Dobbs*.

Constitution. Ohio S.Ct. Case No. 2022-0803. Plaintiffs requested an emergency stay enjoining the enforcement of S.B. 23. The Ohio Supreme Court denied Plaintiffs' request for emergency stay on July 1, 2022.

On July 20, 2022, the respondents – the State Defendants in this case – filed a motion to dismiss arguing that the Supreme Court of Ohio lacked jurisdiction and that Plaintiffs must proceed in the Court of Common Pleas. On September 2, 2022, Plaintiffs filed an application to dismiss the mandamus action because they would be filing an action in an Ohio Common Pleas Court as urged by respondents. That same day, Plaintiffs filed this action in this Court. The Supreme Court dismissed the mandamus action on September 12, 2022.

E. Temporary Restraining Order Proceedings

Plaintiffs filed their verified complaint, motion for temporary restraining order enjoining the enforcement of S.B. 23 and supporting affidavits on September 2, 2022. The State Defendants filed their opposition on September 7, 2022. Plaintiffs filed a reply on September 8, 2022. The Court heard arguments on the motion for temporary restraining order on September 8, 2022. At argument, the State Defendants raised an issue not addressed in the briefing contending that the Common Pleas Court lacked jurisdiction because the matter was still pending in the Ohio Supreme Court, even though the State had argued the exact opposite (i.e., that the Supreme Court did not have jurisdiction and that the case belonged in a Common Pleas Court). The State Defendants also argued that Plaintiffs lacked third-party standing, and that Plaintiffs were unlikely to succeed because there was no right to abortion under the Ohio Constitution.

On September 14, 2022, this Court issued its decision and entry granting Plaintiffs' motion for temporary restraining order. The Court rejected the State Defendants' jurisdictional argument and held that Plaintiffs have third-party standing because "the evidence presented at this stage of

the proceedings sufficiently establishes circumstances that would hinder aggrieved patients from advancing the claims presented by [P]laintiffs on their behalf . . ." Decision and Entry dated September 14, 2022 p. 10.[5] The Court then analyzed Ohio authorities and the plain language of a 2011 constitutional amendment prohibiting legislation that limits Ohio's power to regulate the purchase of "health care" except "to deter fraud or punish wrongdoing in the health care industry." Ohio Constitution, Article I, Section 21. Based on this analysis, the Court held that Ohio law recognizes a fundamental right to freedom and privacy in health care decision-making which includes the right to abortion. The Court further held that "[o]n the record before the Court . . . S.B. 23 is in effect a ban on abortion after six weeks LMP" such that S.B. 23 fails constitutional scrutiny and is unconstitutional. Decision and Entry dated September 14, 2022 p. 16.[6]

Based on these conclusions, the Court enjoined enforcement of S.B. 23 in its entirety for fourteen days. On September 27, 2022, the Court extended the temporary restraining order for an additional fourteen days until October 12, 2022.

F. Preliminary Injunction Proceedings

The Court allowed the parties to conduct expedited discovery in preparation for a preliminary injunction hearing on October 7, 2022. Five witnesses testified at length during the hearing. Plaintiffs presented the testimony of the following witnesses:

1) Dr. Sharon Liner, M.D., a board-certified family physician with nineteen years of experience in women's health who is licensed to practice medicine in Ohio.

[5] The Court's September 14, 2022 Decision and Entry is available at: www.courtclerk.org.
[6] The Court also found that S.B. 23 violates the Ohio Constitution's Equal Protection and Benefit Clause by unlawfully discriminating against women in the exercise of their fundamental right to privacy, procreation, bodily integrity and freedom of choice in health care decision making. Decision and Entry dated September 14, 2022 pp. 16-19.

2) Dr. Steven J. Ralston, M.D., M.P.H., a board-certified obstetrician/gynecologist and maternal-fetal medicine specialist with more than twenty years of experience in abortion care, high-risk pregnancy, prenatal diagnosis and fetal therapy. Dr. Ralston serves as a clinical professor of Obstetrics at the University of Maryland School of Medicine and as director of the Obstetric Care Unit.

3) Dr. Steven Joffe, M.D., M.P.H., a professor and chair of the Department of Medical Ethics and Health Policy and Chief of the Medical Ethics Division at the University of Pennsylvania Perelman School of Medicine.

The Court accepted Plaintiffs' witnesses as experts in their respective fields. The State Defendants presented the testimony of the following witnesses:

1) Dr. Dennis Sullivan, M.D., M.A., a physician licensed to practice medicine in Ohio from 1978 until 2020 and a retired Professor Emeritus who served as the director of Cedarville University's Center for Bioethics from 2006 to 2019.

2) Dr. Michael S. Parker, M.D., a board-certified obstetrician/gynecologist licensed to practice medicine in Ohio who serves as medical advisor for the Women's Care Center of Columbus, an anti-abortion crisis pregnancy center.

The Court accepted the State Defendants' witnesses as experts in their respective fields. Numerous exhibits, including expert reports prepared by the witnesses, were admitted into evidence. The Court then heard arguments of counsel on the motion for preliminary injunction. After a brief break, the Court delivered its ruling from the bench holding that S.B. 23 is

unconstitutional under the Ohio Constitution.[7] On October 12, 2022, the Court issued its Preliminary Injunction Order, including findings of fact and conclusion of law.[8] The Court enjoined enforcement of S.B. 23 in its entirety, excluding only provisions relating to adoption and foster care (R.C. 2919.1910 and R.C. 5103.11), section 2919.193 naming the Act, and R.C. 2317.56(C)(2) relating to the Ohio Department of Health's ("ODH") process for producing informed consent materials. The Court's Preliminary Injunction Order has remained in effect continuously until the present time.

G. First District Court of Appeals

The Court's Preliminary Injunction Order noted that the parties had only been afforded a limited opportunity to conduct expedited discovery in preparation for the preliminary injunction hearing and expressly anticipated that this Court would conduct additional proceedings to consider a permanent injunction. Preliminary Injunction Order p. 1 n. 1. Nonetheless, the day after the Court issued its Preliminary Injunction Order, the State Defendants filed a Notice of Appeal from that decision to the First District Court of Appeals. On December 16, 2022, the First District Court of Appeals dismissed the State Defendants' appeal holding that this Court's Preliminary Injunction Order was not a final appealable order under Ohio law.

H. Proceedings Before the Ohio Supreme Court

On January 3, 2023, the State Defendants filed a Notice of Appeal to the Ohio Supreme Court.[9] Although the First District Court of Appeals only considered whether this Court's

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[7] A transcript of the Court's bench ruling is available at: www.courtclerk.org.
[8] A copy of the Court's Preliminary Injunction Order is available at: www.courtclerk.org.
[9] Although the State Defendants are now urging this Court to limit the effect of an amendment to the Ohio Constitution adopted by a clear majority of Ohio voters, the opening lines of the State Defendants' argument in support of jurisdiction to the Ohio Supreme Court began by noting that "[a]ll political power is inherent in the people" (citing Ohio Constitution, Article I, Section 2), and that the State exercises the peoples' power by "enforcing the constitution Ohioans ratified and the laws 'they and their representatives enacted.'"

Preliminary Injunction Order was a final appealable order and did not reach the merits of this case, the State Defendants urged the Ohio Supreme Court to take up the merits in "the interests of judicial economy." Memorandum in Support of Jurisdiction of Appellants Dave Yost, et al., Ohio Sup. Ct. Case No. 2023-0004, January 3, 2023, p.7. The State Defendants advanced three propositions of law: 1) this Court's Preliminary Injunction Order is immediately appealable; 2) abortion providers do not have standing to challenge S.B. 23; and 3) the Ohio Constitution does not protect a right to abortion care. *Id.* pp. 9-15.

On March 14, 2023 the Ohio Supreme Court announced its decision to grant review in this case on the first and second propositions advanced by the State Defendants (i.e., appealability and standing), but not the third proposition on whether Ohio's Constitution protects a right to abortion. Ohio Sup. Ct. Case Announcements, 2023-Ohio-758 (March 14, 2023). Thus, the Ohio Supreme Court agreed to hear an issue not considered by the First District Court of Appeals – whether abortion care providers have standing to challenge a law potentially exposing them to criminal penalties.

I. Amendment of the Ohio Constitution

The appeal to the Ohio Supreme Court was fully briefed in early July 2023 and oral argument was held on September 27, 2023. In the meantime, however, a coalition of reproductive health, rights and justice organizations known as Ohioans United for Reproductive Rights began the process to amend the Ohio Constitution by filing an initiative petition. In February 2023, the Coalition filed its petition proposing an Amendment to the Ohio Constitution titled "The Right to Reproductive Freedom with Protections for Health and Safety." More than 700,000 signatures from all 88 Ohio counties were presented to the Ohio Secretary of State on July 5, 2023. On July

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(citation omitted). Memorandum in Support of Jurisdiction of Appellants Dave Yost, et al., Ohio Sup. Ct. Case No. 2023-0004, January 3, 2023, p.4.

25, 2023, the Ohio Secretary of State certified that sufficient authentic signatures were submitted such that the measure would appear on the November 2023 ballot as Issue One.[10] The official results of the election confirmed that 56.78 percent of Ohioans casting ballots on November 7, 2023 supported adoption of the amendment.[11]

As a result of the passage of the initiative, Article I section 22 (also referred to herein as the "Reproductive Rights Amendment" or the "Amendment") of the Ohio Constitution became effective on December 7, 2023. The complete text of the Amendment reads as follows:

The Right to Reproductive Freedom with Protections for Health and Safety

A. Every individual has a right to make and carry out one's own reproductive decisions, including but not limited to decisions on:
1. contraception;
2. fertility treatment;
3. continuing one's own pregnancy;
4. miscarriage care;
5. abortion;

B. The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either:
1. An individual's voluntary exercise of this right; or
2. A person or entity that assists an individual exercising this right,

Unless the State demonstrates that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care. However, abortion may be prohibited after fetal viability. But in no case may such an abortion be prohibited if in the professional judgment of the pregnant patient's treating physician it is necessary to protect the pregnant patient's life or health.

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[10] The five-judge majority in *Dobbs* held that abortion rights would to be returned to the democratic process in the states. Before the measure could be considered by Ohio's voters in November 2023, Ohio's General Assembly placed a separate measure before Ohio voters at a special election on August 8, 2023 which, if passed, would have raised the bar for passage of the reproductive rights initiative in November 2023 from a bare majority of votes cast to 60 percent. This proposal did not specifically reference abortion rights, but the clear purpose of putting this measure to the voters at a special election prior to the November 2023 election (when the reproductive rights initiative would be on the ballot) was to frustrate the passage of the reproductive rights initiative. The measure failed 57.11 to 42.89 percent. *See* https://www.ohiosos.gov/elections/election-results-and-data/2023-official-election-results/.

[11] https://www.ohiosos.gov/elections/election-results-and-data/2023-official-election-results/.

C. As used in this section:
1. "Fetal viability" means "the point in a pregnancy when, in the professional judgment of the pregnant patient's treating physician, the fetus has a significant likelihood of survival outside the uterus with reasonable measures. This is determined on a case-by-case basis."
2. "State" includes any governmental entity and any political subdivision.

D. This Section is self-executing.

Ohio Constitution, Article I, Section 22.

J. Post-Amendment Proceedings

On November 16, 2023, the Ohio Supreme Court ordered the parties to file supplemental briefs addressing "the effect on this cause, if any, of the passage of Issue 1." Plaintiffs urged the Supreme Court to dismiss the appeal and remand to this Court. The State Defendants argued that the Supreme Court should retain jurisdiction and address the issues of law that it had taken up – appealability of this Court's Preliminary Injunction Order and third-party standing.

Meanwhile, on December 14, 2023, Plaintiffs filed a motion for leave to file before this Court a second amended complaint adding a new claim that S.B. 23 violates Article I, Section 22 of the Ohio Constitution on its face. The motion was granted.

On December 15, 2023, the Ohio Supreme Court *sua sponte* dismissed the appeal pending before it "due to a change in the law" and remanded the matter to this Court. This Court held a case management conference on January 24, 2024. The parties advised the Court that they were attempting to negotiate an agreed entry resolving this matter. The Court established a schedule for the parties to follow if they were unable to finalize an agreed resolution. No agreement was reached. Defendants filed an answer to the second amended complaint on February 2, 2024. Plaintiffs filed a motion for judgment on the pleadings on March 1, 2024. The State Defendants responded on March 29, 2024, and Plaintiffs filed a reply on April 12, 2024. Plaintiffs' motion is now ripe for decision.

III. Discussion

A. The Parties' Positions and Supporting Arguments

1. Plaintiffs and State Defendants agree R.C. 2919.195 is unconstitutional.

The State Defendants acknowledge that the "core" provision of S.B. 23 – R.C. 2919.195 making it a felony to knowingly perform an abortion after the detection of embryonic cardiac activity unless an exception applies – is unconstitutional under the Reproductive Rights Amendment and should be permanently enjoined. The State Defendants also acknowledge that references to this provision should be deleted from other sections. However, this appears to be the end of the parties' agreement.

2. The State Defendants argue that the remainder of S.B. 23 should be "untouched."

The State Defendants contend that only R.C. 2919.195 and "additional enforcement mechanisms created by reference to it in other statutory provisions" should be enjoined. State Defendants' Memo. In Opp. dated March 29, 2024, p. 3. The State Defendants then go on to list fourteen provisions that they contend are constitutional should not be enjoined. *Id.* pp. 14-16. The State Defendants argue that the Court should not enjoin provisions enacted by S.B. 23 other than R.C. 2919.195 because Plaintiffs have not specifically identified each provision that should be enjoined. The State Defendants also argue that Plaintiffs have made no showing about any other provision of S.B. 23. *Id.* p. 3. By advancing these arguments, the State Defendants seemingly ignore that the U.S. District Court enjoined the entirety of S.B. 23 in 2019 when *Roe v. Wade* was the law of the land. There is no good faith basis to dispute that the Reproductive Rights Amendment, at the very least, restores the protections of *Roe* in Ohio (i.e., the right to abortion up to viability). In fact, it goes much further. The State Defendants argue that the Court should not enjoin provisions of S.B. 23 other than R.C. 2919.195 because it cannot use the injunction power

to repeal or erase a bill or statutory section, but rather only to enjoin the enforcement of specific statutory provisions. In support, the State Defendants allude to the doctrine of severability citing to *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6230 and R.C. 1.50. *Id.* p. 10. As an example of the "many statutory provisions beyond the core prohibition" that the State Defendants contend should be retained, they offer up R.C. 2919.192, which requires providers to check for cardiac activity before performing an abortion. *Id.* p. 12.

However, the State Defendants do not conduct a severability analysis under the factors prescribed by the Ohio Supreme Court in *Geiger v. Geiger*, 117 Ohio St. 451 (1927). Rather, the State Defendants argue that the Court should not enjoin enforcement of R.C. 2919.192 because, even if it is enjoined, the prior version enacted in 2013 would be effectively reactivated. *Id.* p. 13, citing *Kljun v. McCloud*, 156 Ohio St.3d 419, 2019-Ohio-1334, ¶ 17 ("[w]hen a court invalidates a statutory amendment, the statute reverts to its previous version."). The prior version was R.C. 2919.191, which was renumbered as 2919.192 by S.B. 23. It required providers to check for cardiac activity before performing an abortion and to offer the patient the option to view or hear the heartbeat. In essence, the State Defendants argue that it would be pointless to enjoin R.C. 2919.192 because the requirement would persist.

The State Defendants then go on to list fourteen provisions that should be essentially "untouched" by the Court's decision in this case. *Id.* pp. 14-16. Among the provisions the State Defendants urge the Court to leave untouched are:

R.C. 2919.193. A new section created by S.B. 23 that makes it a fifth-degree felony to perform an abortion without first checking for cardiac activity except in an emergency that prevents performing such a check. This section further requires physicians to make and retain a record of any emergency that prevents checking for cardiac activity. The State Defendants argue

that this provision merely enforces R.C. 2919.192's requirement to check for cardiac activity before performing an abortion. The State Defendants contend that this provision is valid and that any measure enforcing such a requirement is also valid. *Id.* p. 15.

R.C. 2919.194. This section was renumbered from R.C. 2919.192 by S.B. 23. The prior section required a provider to inform the patient seeking abortion care in writing that a "fetal heartbeat" was detected and of the "statistical probability" of bringing the pregnancy to term. S.B. 23 added a new requirement that the patient must sign a form acknowledging receipt of the information that the provider is required to provide by the section. Failure to comply with the requirements of the section is a misdemeanor of the first degree on a first offense, and a felony of the fourth degree on any subsequent offense. Likewise, under R.C. 2919.199, failure to comply with this section subjects the provider to a civil action for wrongful death of the unborn child. The State Defendants argue without any analysis that the new requirement that the patient sign a form is inconsequential.

R.C. 2919.196. This section newly created by S.B. 23 requires providers to make a written record of the "purported reason" for an abortion if it is to "preserve the health of the pregnant woman." The provider is required to record the "medical condition . . . asserted" and the "medical rationale" for the provider's judgment that abortion is necessary. In all other cases, the provider is required to make a record that maternal health "is not a reason of the abortion." Providers are required to retain such records for seven years. And under R.C. 2919.1912 (another new section created by S.B. 23), a failure to make the required record is punishable by a forfeiture of up to $20,000.

R.C. 2919.199. This section newly created by S.B. 23 creates a civil cause of action for wrongful death "of her unborn child" for a woman who receives an abortion in violation of R.C.

2919.193 (requiring providers to check for cardiac activity before performing an abortion), R.C. 2919.195(A) (criminalizing abortion care after detection of cardiac activity), or without receiving the disclosures and signing the form required by R.C. 2919.194. A prevailing plaintiff in such an action is entitled to recover $10,000 or such amount as the trier of fact determines, plus costs and attorney fees. The State Defendants argue that, because R.C. 2919.193 and 2919.194 are both valid (which the State Defendants seemingly assume to be the case), this section should not be enjoined because "the General Assembly can create a cause of action for a legal remedy for violation of a valid law." *Id.* p. 15.

R.C. 2919.1912. This section newly created by S.B. 23 provides that the state medical board may assess a forfeiture of up to $20,000 against anyone for each violation of R.C. 2919.171, 2919.192, 2919.193, 2919.194, 2919.195 or 2919.196. The State Defendants acknowledge that enforcement of the reference to R.C. 2919.195 should be enjoined, but contend without analysis or support that "the rest of the statute cannot be enjoined because 2919.171, 2919.192, 2919.193, 2919.194 and 2919.196 are valid and constitutional" and "there is nothing improper about the General Assembly's choice to create an administrative remedy for violation of those laws." *Id.* pp. 15-16.

R.C. 4731.22. S.B. 23 added subsection (B)(47) to this provision, which allows the state medical board to limit, revoke or suspend a provider's license for failure to comply with 2929.192(A), 2919.193(C), 2919.195(B) or 2919.196.

3. Plaintiffs argue that all provisions of S.B. 23 should be enjoined except the few that are unrelated to abortion.

Plaintiffs contend that all provisions enacted by S.B. 23 other than the few that are completely unrelated to abortion are not severable and should be permanently enjoined. Plaintiffs devote the majority of their briefing to the severability analysis to be applied under *Geiger*, 117

Ohio St. 451. Plaintiffs note that several provisions in S.B. 23 are renumbered amendments of pre-existing statutes (i.e., the requirement to check for cardiac activity before performing an abortion) such that, if this Court invalidates those provisions, their predecessors come back into effect. Plaintiffs' Reply dated April 12, 2024 p. 14. Plaintiffs also indicate that they are not challenging the constitutionality of the predecessor provisions in this case as they are already the subject of separate litigation. *Id.* n. 9. According to Plaintiffs, this means that, if this Court rejects Plaintiffs' severability arguments, it should not consider the constitutionality of the pre-existing statutory provisions amended and renumbered by S.B. 23.

B. Standard of Review

Civil Rule 12(C) provides that "[a]fter the pleadings are closed but within such time as not to delay trial, any party may move for judgment on the pleadings." When considering a motion for judgment on the pleadings, the Court should construe all material facts in the nonmoving party's pleading as true and determine whether the nonmoving party can prove no set of facts that would entitle it to prevail. *New Riegel Local School District Board of Education v. Buehrer Group Architecture & Engineering, Inc.*, 157 Ohio St.3d 167, 2019-Ohio-2851, ¶ 8. However, "a legal conclusion couched as a factual allegation need not be accepted as true." *Waters v. Ohio State Univ.*, 2016-Ohio-5260, P47 (Ohio Ct. Claims) (citations omitted). Motions under "Civ. R. 12(C) are specifically for resolving questions of law." *State ex rel. Midwest Pride IV v. Pontious*, 75 Ohio St. 3d 565, 570 (1996). A statute's constitutionality is a question of law. *See State v. Lynch*, 2021-Ohio-4094, ¶ 14 (1st Dist.).

By the time Plaintiffs filed their motion for judgment on the pleadings in this case, the Court had conducted a hearing on their motion for temporary restraining order, an evidentiary hearing on their motion for preliminary injunction, and the Court had issued findings of facts as

part of its Preliminary Injunction Order.[12] However, on remand from the Ohio Supreme Court, Plaintiffs amended their Complaint to add a new claim based on the Reproductive Rights Amendment and brought their motion for judgment on the pleadings as a facial challenge to S.B. 23 arguing that the Amendment invalidates S.B. 23 as a matter of law. Plaintiffs' Motion for Judgment on the Pleadings filed March 1, 2024, p. 9. There is some authority that would seem to support the Court's consideration of matters of record beyond the pleadings when considering Plaintiffs' motion.[13] The Court finds this unnecessary in this case and has limited its consideration to the pleadings and matters of which it may properly take judicial notice in considering Plaintiffs' motion.

C. The Court Must Consider Constitutionality Before Severability.

Acts of the General Assembly are ordinarily entitled to a "strong presumption of constitutionality." *State v. Romage*, 138 Ohio St.3d 390, 2014-Ohio-783, ¶ 7. In this case, however, the State Defendants concede that what they describes as the "core" provision of S.B. 23 (i.e., R.C. 2919.195) is unconstitutional.

The State Defendants maintain that the remaining provisions of S.B. 23 are constitutional.

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[12] The Court's findings include many facts potentially germane to consideration of the constitutionality of S.B. 23, including generally that: 1) abortion care is safe health care often necessitated by a variety of medical and other personal conditions such as cancer treatment that cannot proceed while pregnant, lethal fetal anomalies, rape, incest, and domestic abuse; 2) S.B. 23 effectively bans virtually all abortions in Ohio; 3) the exceptions to S.B. 23's near total ban are inadequate and result in inappropriate and harmful denials of abortion care; 4) criminalizing the provision of abortion care by S.B. 23 results inappropriate and harmful denials of abortion care; 5) because of S.B. 23 many women were unable to receive abortion care in Ohio (including a ten-year-old rape victim); and 6) many women suffered serious harm as a result of S.B. 23.

[13] Considering Fed. R. Civ. P. 12(C), upon which Ohio Civ. R. 12(C) is modeled, the U.S. District Court for the Southern District of Ohio recently noted that the Court could properly consider "public records, items appearing of record in the case and exhibits attached to a defendant's motion" and "take judicial notice of other court proceedings" on a Rule 12(C) motion. *Franks v. Chairperson & Members of the Ohio Adult Parole Auth.*, 2023 U.S. Dist. LEXIS 20085, *9 (S.D. Ohio Feb. 6, 2023). This does not appear entirely consistent with Ohio law on this issue. *See State ex rel. McCarley v. Dep't of Rehab. & Corr.*, 2024-Ohio-2747, P13 ("It is axiomatic that a court's determination of a Civ.R. 12(C) motion for judgment on the pleadings must be restricted solely to the allegations in the pleadings.").

Plaintiffs rely on a severability analysis and do not directly address whether any of these other provisions, standing on their own, are invalidated by the Amendment. As a practical matter, it seems abundantly clear that the Amendment was intended to invalidate S.B. 23 and all of its enforcement measures and that proponents and opponents alike anticipated as much.[14] However, this Court is bound by Ohio law to presume the constitutionality of statutes passed by the General Assembly. *See e.g. City of Akron v. State*, 2015-Ohio-5243, ¶ 11 ("it is reversible error for a trial court to fail to apply the presumption of constitutionality before declaring that a legislative enactment is unconstitutional."); citing *State v. Barnes*, 9th Dist. Lorain Nos. 13CA010502, 13CA010503, 2014-Ohio-2721, ¶ 10; *N. Olmsted v. N. Olmsted Land Holdings, Ltd.*, 137 Ohio App.3d 1, 7, 738 N.E.2d 1 (8th Dist.2000); *F.M.D. Ltd. Partnership v. Medina*, 9th Dist. Medina No. 2755-M, 1999 Ohio App. LEXIS 374, 1999 WL 66201, * 2 (Feb. 9, 1999). Thus, with respect to the provisions of S.B. 23 the State Defendants claim are constitutional, the Court cannot just assume otherwise. The constitutionality of such provisions must be adjudicated.

Plaintiffs seemingly argue that, because it is undisputed that R.C. 2919.195 is unconstitutional, the Court should move immediately to consider the severability of the remaining provisions of S.B. 23 without first considering whether those provisions are themselves constitutional. As easy as this course might seem to be, it would be inappropriate. Ohio law

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[14] Prior to adoption of the Amendment, Ohio's Attorney General issued a public statement that "Passage of Issue 1 would invalidate the Heartbeat Act, which restricts abortions (with health and other exceptions) after a fetal heartbeat is detected, which is usually about six weeks." Issue 1 on the November 2023 Ballot: A Legal Analysis by the Ohio Attorney General, available at https://www.ohioattorneygeneral.gov/SpecialPages/FINAL-ISSUE-1-ANALYSIS.aspx#:~:text=Viability%20is%20generally%20thought%20to,viability%20limit%20would%20be%20allowed. Additionally, proponents of Issue 1, Ohioans United for Reproductive Rights, explained to voters that voting yes on Issue 1 would end the "extreme" abortion bans in effect in Ohio (i.e. S.B. 23). Ohioans United for Reproductive Rights Release First Television Ad, YES ON 1 (Sept. 12, 2023), available at https://ohioansunitedforreproductiverights.win/ohioans-united-for-reproductive-rights-releases-first-television-ad-reminds-voters-they-can-end-ohios-extreme-abortion-ban-in-november/.

provides that statutory provisions are presumptively severable. *See* R.C. 1.50. The first step of a severability analysis is to determine "are the constitutional and unconstitutional parts capable of separation so that each may be read and may stand by itself." *State ex rel. Sunset Estate Props., LLC v. Village of Lodi*, 142 Ohio St. 3d 351, 356 (2015). Moreover, the Ohio Supreme Court has made it clear that Ohio courts should "respect the role of the legislature by limiting our severance to only those unconstitutional portions of the statute" by adopting remedies that 'delete[] the words of the unconstitutional provision but neither adds words to nor removes words from the constitutional portions.'" *State v. Noling*, 149 Ohio St. 3d 327, 338.[15] The Court must first determine which provisions are unconstitutional before it can properly consider severability.[16] Accordingly, the Court will consider the constitutionality of each of the disputed provisions and then, if necessary, consider severability in turn.

D. Any Provision that Directly or Indirectly Burdens, Penalizes, Prohibits, Interferes With or Discriminates Against The Right to Pre-viability Abortion Is Presumptively Invalid Under Article I Section 22 of the Ohio Constitution.

When considering constitutional text that was ratified by direct vote, Ohio Courts must consider how the language would have been understood by the voters who adopted the amendment. *See City of Centerville v. Knab*, 162 Ohio St. 3d 623, 2022-Ohio-4298, ¶ 22. The Court generally applies the same rules when construing the Constitution as it does when it construes a statute,

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[15] Although we are concerned here with Ohio law, this is consistent with well-established principles. *See e.g. Barr v. Am. Ass'n of Political Consultants*, 591 U.S. 610, 626-628 (2020) ("The Court's power and preference to partially invalidate a statute . . . has been firmly established since *Marbury v. Madison*. . . . if any part of an Act is 'unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution . . . Constitutional litigation is not a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute.") (citations omitted).

[16] Indeed, the second step of a severability analysis under Ohio law asks the question "is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause is taken out?" *State ex rel. Sunset Estate Props., LLC v. Village of Lodi*, 142 Ohio St. 3d 351, 356 (2015). Such an analysis cannot be meaningfully performed without first identifying all the unconstitutional provisions in an act.

beginning with the plain language of the text. *Id.*, citing *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68, ¶ 14. However, to ascertain the understanding of the voters who approved an amendment, the court's inquiry must often include the purpose and history of its adoption. *Id.*, citing *State ex rel. Swetland v. Kinney*, 69 Ohio St.2d 567, 570, 433 N.E.2d 217 (1982).

In this case the plain language of the Amendment makes short work of this analysis. Ohioans now have the right to "make and carry out one's own reproductive decisions, including . . . decisions on . . . abortion." Ohio Constitution, Article I, Section 22. "The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against" an individual's exercise of the right to pre-viability abortion. *Id.*, Section B. The Amendment specifically extends this protection to anyone who "assists an individual exercising this right" (i.e., reproductive health care providers, including those that provide abortions). *Id.*, Section (B)(2).

The Amendment provides for two exceptions. First, abortion may be prohibited after fetal viability. *Id.* But there is an exception to this exception – post-viability abortion cannot be prohibited if "in the professional judgment of the pregnant patient's treating physician it is necessary to protect the pregnant patient's life or health." *Id.* And second, the State can regulate pre-viability abortion care if "the State demonstrates that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care." *Id.*, section (B)(2). Thus, the State can regulate the provision of abortion care, but if it chooses to do so it bears the burden of proving that such regulations satisfy the requirements of the exception (i.e., least restrictive means to protect the health of pregnant patients, not embryos or fetuses, and supported by genuine medical evidence and the prevailing standards of medical care).

Interestingly, the structure of the Amendment places the right to abortion in Ohio on par with the right to possess a firearm under the U.S. Supreme Court's decision in *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 597 U.S. 1 (2022). Like the Reproductive Rights Amendment in the abortion context, *Bruen* places the burden on State and other governmental bodies to prove that gun regulations are consistent with this nation's historical tradition of firearm regulation by showing that analogous provisions prevailed when the Second Amendment was adopted in 1791 or when the Fourteenth Amendment was adopted in 1868:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.

N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. at 18.

The plain language of the Reproductive Rights Amendment dictates the same approach to measures that regulate abortion in Ohio (i.e., "[t]he State shall not, directly or indirectly, burden, penalize, prohibit, interfere with [the exercise of an individual's right to abortion]" "unless the State demonstrates that it is using the least restrictive means . . ."). Thus, the State of Ohio bears the burden to demonstrate that any measure that impinges upon the exercise of the right to pre-viability abortion satisfies the Amendment's narrow exception. *See Bruen*, 597 U.S. at 19 ("the government must *affirmatively prove* that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.") (emphasis added). As discussed at length below, most of the provisions of S.B. 23 directly or indirectly burden, penalize or interfere with the exercise of the right to abortion as a matter of law. In such instances, the State of Ohio must "affirmatively prove" that its regulations employ the least restrictive means to advance the individual's health and are backed by widely accepted evidence-based standards of care. The State

Defendants have made no effort to carry this burden. Indeed, they do not appear to even argue that any of the provisions enacted by S.B. 23 satisfy the Amendment's exceptions.

The Court recognizes that this approach might at first glance seem inconsistent with the principle that Ohio courts should afford statutes a strong presumption of constitutionality. But it is not, and it should be noted that there are exceptions to presumptive constitutionality. *See e.g. State v. Romage*, 2014-Ohio-783, ¶ 8 (discussing overbreadth exception). This mode of analysis is dictated by the plain language of the Reproductive Rights Amendment, which expressly prohibits the State (i.e., "The State shall not . . .") from directly or indirectly burdening, penalizing, prohibiting, interfering with or discriminating against an individual's voluntary exercise of the right to pre-viability abortion or anyone who assists in the exercise of that right.

Consistent with the basic principles of constitutional interpretation, the Court is required to accord meaning to the words chosen by the drafters of the Amendment. *City of Rocky River v. State Empl Rels. Bd.*, 43 Ohio St. 3d 1, 539 N.E.2d 103, 115 (1989) ("Where the language of a statute or constitutional provision is clear and unambiguous, it is the duty of the courts to enforce the provision as written."). The Court finds it significant that the Amendment prohibits both direct and indirect infringement. Yet the State Defendants concede only that R.C. 2919.195, which *directly* prohibits abortion prior to viability, is unconstitutional, and urge the Court to leave "untouched" a provision such as R.C. 2919.199, which creates a claim for wrongful death against abortion care providers who, among other things, fail to obtain an acknowledgment form from an abortion patient. This provision does not directly impair voluntary exercise of the right to abortion, but one would have to suspend all sense of reality to ignore the obviously burdensome effect of such a provision on the exercise of the right, albeit indirectly, by discouraging providers from providing abortion care. Yet the State Defendants maintain that this provision is constitutional

even under the Reproductive Rights Amendment. Such a construction effectively reads out of the Amendment the word "indirectly," contrary to Ohio law requiring the Court to give meaning and effect to the words of the Ohio Constitution. *See Boley v. Goodyear Tire & Rubber Co.*, 2010-Ohio-2550, 125 Ohio St. 3d 510, 929 N.E.2d 448, ¶ 21 (2010) ("Our role . . . is to evaluate a statute 'as a whole and giv[e] such interpretation as will give effect to every word and clause in it.'").

Moreover, the Amendment is unequivocal and attaches no qualitative or quantitative limitations to its prohibition. The Amendment does not provide that the State is prohibited from *substantially* or *materially* burdening or interfering with the right to pre-viability abortion. Such modifiers are expressly reserved for application of the exceptions (i.e., *least restrictive* means and *widely accepted* standards of care), on which the State bears the burden. The words chosen and the structure employed by the drafters of the Amendment are clear – *any* State measure that directly or indirectly burdens, penalizes, etc., the voluntary exercise of the right to pre-viability abortion violates the Amendment *unless* the State proves that an exception applies.[17]

This is illustrated by comparing the lone provision the State Defendants concede is unconstitutional (R.C. 2919.195) with R.C. 2919.193, which prohibits and makes it a felony to perform an abortion without first determining if there is cardiac activity. On its face, this provision prohibits and penalizes pre-viability abortion unless a state-imposed requirement (i.e., checking for cardiac activity) is satisfied. Put simply, it is a regulation of abortion care. Under the language of the Reproductive Rights Amendment, the State bears the burden to demonstrate that this requirement satisfies the exceptions as "the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care." It may be that the requirement to check for cardiac activity before performing an abortion is the least restrictive

[17] Review of the Ohio Constitution and its Bill of Rights indicates that the Reproductive Rights Amendment is unique in employing such a burden shifting structure.

means to protect the pregnant individual's health and that it is consistent with widely-accepted and evidence-based standards of care. Indeed, the State Defendants assert without support in their memorandum that this requirement is "the most common practice in the industry." State Defendants' Memo in Opp. p. 9. But this is not demonstrated from the pleadings, and the State does nothing to carry the burden imposed upon it by the Amendment in this regard.

To give effect to the plain language of the Reproductive Rights Amendment, any regulation that directly or indirectly burdens, penalizes, prohibits, interferes with or discriminates against the voluntary exercise of the right to pre-viability abortion in Ohio presumptively violates the Amendment. To be sure, the Court will afford any statutory measure a presumption of constitutionality, but under the language of the Amendment, that presumption ends when, upon consideration of the text and the effect of the measure, it in any way infringes upon the voluntary exercise of the right to pre-viability abortion in Ohio.

Finally, the language of the Amendment is clear and simple, so it is not strictly necessary to refer to the purpose and history of its adoption. However, consideration of the Amendment's genesis only reinforces the undeniable conclusion that Ohio's voters intended to approve a sweeping and decisive rejection of S.B. 23. A direct throughline can be easily traced from the reversal of *Roe v. Wade* in the *Dobbs* decision in June 2022, to the fight in this case over whether S.B. 23 violated the Ohio Constitution in September and October 2022, to the mobilization of supporters of abortion rights in 2022 and 2023 to collect sufficient petition signatures to put the Amendment on the November 2023 statewide ballot.[18] Ohio's voters delivered a resounding

[18] Supporters had to do much more than simply convince a majority of Ohio voters to pass the Amendment. They had to craft the language of the Amendment, gather a huge number of legitimate signatures, overcome litigation efforts to stop the measure from appearing on the ballot, and even win a "special election" in August 2023 which sought to raise the bar for passage of the Amendment to 60 percent. Despite these many challenges, the measure appeared on the ballot and was passed by a clear majority. Statewide Issue History, OHIO SECRETARY OF STATE, available at https://www.ohiosos.gov/elections/election-results-and-data/historical-election-comparisons/statewide-issue-history/.

rebuke to efforts to restrict abortion rights and clearly rejected S.B. 23 in its entirety.

E. Review of Constitutionality and Severability of Provisions Enacted by S.B. 23.

With the above principles in mind, the Court considers each of the provisions enacted by S.B. 23, including those that Ohio's Attorney General urges the Court to leave "untouched."

1. R.C. 2317.56

R.C. 2317.56 was amended by S.B. 23. Prior to S.B. 23, R.C. 2317.56 required physicians to conduct an in-person informational meeting with the patient twenty-four hours prior to the performance of the abortion. It also required state agencies to provide information and resources to patients and the public regarding abortion and abortion alternatives.

The State Defendants contend that S.B. 23 only amended R.C. 2317.56 to renumber a reference to another statute that was renumbered by S.B. 23 (State Defendants' Memo. In Opp. p. 14), but this is not entirely accurate. Prior to S.B. 23, R.C. 2317.56(C)(2) required the ODH to publish informational materials about the "probably anatomical and physiological characteristics of the zygote, embryo, or fetus at two week gestational increments," but "only after consulting with the Ohio State Medical Association and the Ohio section of the American College of Obstetricians and Gynecologists." S.B. 23 eliminated the requirement to consult with the professional organizations and substituted "independent health care experts," thus allowing the ODH, if it is so inclined, to ignore the guidance of recognized medical professional organizations in favor of other "experts" with no specific requirements regarding their credentials, biases or competing interests.

Another Ohio court has already considered several elements of R.C. 2317.56 that were not amended by S.B. 23. On August 23, 2024, Judge Young of the Franklin County, Ohio Court of Common Pleas held that the twenty-four-hour waiting period "directly or indirectly burdens,

prohibits, interferes with, and discriminates against a pregnant patient's voluntary exercise of their reproductive rights."[19] The court reasoned that the mandatory delay exacerbates costs, prolongs wait time, and potentially prevents a patient from receiving the type of abortion they prefer. Further, the delay could increase the medical risk to the patient's health and/or cause emotional harm. Finally, the court reasoned that the waiting period directly or indirectly burdens providers of abortion care by forcing them to depart from their ethical duty to act in accordance with their patients' best interests because they may be required to deny time sensitive care for a specified minimum period.

Judge Young also held that the in-person visit requirement creates economic burdens on patients who must arrange time off work, childcare, transportation for each visit, in addition to paying for the medical care. The requirement is especially burdensome to patients facing intimate partner violence who may need to conceal their visits. Additionally, the in-person visit burdens the medical providers because it requires them to send patients away for no medical reason and against their best judgment.

Judge Young also generally addressed the subsection of R.C. 2317.56 regarding the mandatory provision of information on "the probable anatomical and physiological characteristics of the zygote, blastocyte, embryo or fetus . . ." (i.e., R.C. 2317.56(C)) that was amended by S.B. 23 to eliminate the requirement to consult with the preeminent medical professional organizations when preparing informational materials. S.B. 23's change to this provision implicates (B)(2) of the Amendment, which requires any infringement to be the least restrictive means to advance the individual's health "in accordance with widely accepted and evidence-based standards of case."

Judge Young considered these provisions under the recently passed Amendment and found

[19] *Preterm-Cleveland, et al. v. Dave Yost*, Franklin County Common Pleas Case No. 24-cv-2634, Decision dated August 23, 2024 pp. 18-20.

no evidence to support that these methods are the least restrictive means to advance an individual's health in accordance with widely accepted and evidence-based standards of care. As a result, the Court issued a preliminary injunction enjoining the enforcement of these provisions. This ruling renders S.B. 23's amendment of R.C. 2317.56(C)(2) immaterial, because such information is no longer required to be provided to abortion care patients as a result of Judge Young's order.

The case before this Court concerns only S.B. 23. Many of the portions of R.C. 2317.56 considered by Judge Young are not before this Court. However, S.B. 23 and its amendment of R.C. 2317.56 are before this Court and were so long before the Franklin County case was filed. Indeed, at the time of Judge Young's August, 23, 2024 ruling, this Court had already preliminarily enjoined the enforcement of S.B. 23, but not its amendment of R.C. 2317.56(C)(2). And while it seems somewhat troubling that the State would prepare information for distribution to abortion care patients without consulting the preeminent scientific and medical professional organizations, the pleadings do not demonstrate that the resulting information prepared by ODH violated any provision of the Amendment. Accordingly, R.C. 2317.56(C) remains preliminarily enjoined under Judge Young's order at this time, but this Court declines to find S.B. 23's amendment of R.C. 2317.56(C)(2) facially unconstitutional.

2. R.C. 2919.171

Prior to S.B. 23, R.C. 2919.171 required physicians performing abortions to report certain limited information to the ODH, which was required to prepare an annual statistical report on abortion care in Ohio. S.B. 23 amended R.C. 2919.171 to add to the list of information that physicians and those who maintain their records must report to the State, including:

1) A report of whether a "fetal heartbeat" was detected, the detection method used, the date and time of the test, and estimated gestational age (R.C. 2919.192(A) and (C));

2) In cases of abortions performed without checking for a "fetal heartbeat" due to a medical emergency, a statement of the medical condition that "assertedly prevented compliance" with the requirement to check for a fetal heartbeat (R.C. 2919.193(C));

3) In cases of abortions performed to save the woman's life or prevent serious risk of irreversible impairment, a written "declaration" by the physician stating the medical condition and "the medical rationale for the physician's conclusion that the medical procedure is necessary" to prevent death or serious permanent physical injury (R.C. 2919.195(B)); and

4) For all abortions, a statement of whether the "purported reason" for the abortion is to preserve the health of the pregnant woman, and, if so, "the medical rationale" for the conclusion that abortion is necessary (R.C. 2919.196(A)).

The State Defendants argue that the amendments to R.C. 2919.171 should remain "untouched" except for the reference to R.C. 2919.195(B), which the State Defendants agree is unconstitutional. However, it makes no sense to require the reporting of information under other sections if those other sections are themselves unconstitutional. The State Defendants acknowledge that R.C. 2919.195 is unconstitutional. And two of the other sections to which R.C. 2919.171 refers (i.e., 2919.192 and 2919.193) have already been found unconstitutional and preliminarily enjoined by Judge Young of Franklin County in his August 23, 2024 decision.[20]

Judge Young did not specifically address the various specific components of these sections and their requirements, but rather considered them generally under the categories of twenty-four-hour waiting period, in-person visit requirement, and state-mandated information requirements. Judge Young found that all three requirements violate the Reproductive Rights Amendment because they directly or indirectly burden, penalize, prohibit, interfere with, or discriminate against individuals exercising the right to pre-viability abortion or providers of abortion care.

With respect to R.C. 2919.171's reference to 2919.196(A), that section was not addressed

[20] Again, to the extent these two sections were amended by S.B. 23, which they largely were, they were already and remained until the date of this Entry subject to this Court's Preliminary Injunction Order.

by Judge Young, and the State Defendants argue that it should be "untouched." Section 2919.196 was created by S.B. 23. It states that "[t]he provisions of this section are wholly independent of the requirements of sections 2919.192 to 2919.195 of the Revised Code." The section goes on to require providers to document in the patient's medical records whether "a purported reason for the abortion is to preserve the health of the pregnant woman," and if so "the medical condition that the abortion is asserted to address and the medical rationale" for the provider's conclusion that the abortion is necessary to address that condition. In cases where the health of the patient is not the "purported reason" for the abortion, the provider is required to record that "maternal health is not a reason for the abortion." In other words, the provider is effectively required to record whether the abortion is elective. By necessity, therefore, the provider will be required to elicit such information from the patient.

This provision clearly falls within the purview of the Reproductive Rights Amendment. Individuals may now exercise the right to obtain an abortion prior to viability without being directly or indirectly burdened, penalized or interfered with. Their medical care providers have the right to assist patients in the exercise of such rights unimpeded except for the least restrictive requirements that advance individual patients' health based on widely accepted and evidence-based standards of care. A provision that effectively requires medical providers to elicit and record the reason for an abortion necessarily "burdens" the exercise of that right. And requiring the recording of that information is highly likely to further interfere with that exercise.

The State Defendants have not advanced any argument specifically addressed to section 2919.196. Nor have they indicated in any way in their Answer to the Second Amended Complaint or in response to the motion for judgment on the pleadings that this provision promotes the individual patient's health and is the least restrictive means to do so in accordance with widely

accepted and evidence-based standards of care. Accordingly, this Court finds as a matter of law that R.C. 2919.196 violates Ohio's Constitution. Thus, S.B. 23's amendments to R.C. 2919.171 are unconstitutional.

3. R.C. 2919.19

S.B. 23 amended R.C. 2919.19(A) adding five new defined terms: conception, contraceptive, DNA, intrauterine pregnancy, and spontaneous miscarriage. The State Defendants argue that these amendments cannot be enjoined because they "have no force of law on their own." State Defendants' Memo. In Opp. p. 14. The State Defendants cite no authority for this proposition, and it is nonsensical on its face. S.B. 23 added these definitions to the chapter so that the terms could be used in the operative provisions also being added by S.B. 23, which clearly have the "force of law." If those operative provisions are enjoined, the definitions become superfluous. A review of how the newly defined terms are employed in the statute confirms as much.

The term conception does not appear in any other provision of the chapter, but it is used in other definitions in R.C. 2919.19(A). Contraceptive is defined as a "drug, device, or chemical that prevents conception." R.C. 2919.19.(A)(2). S.B. 23 used the term "contraceptive" in the new section R.C. 2919.197, which provides that S.B. 23 does not prohibit the sale or use of drugs or devices for contraceptive purposes. The term "fetus" was already defined in R.C. 2919.19(A) when S.B. 23 was passed, but it also employs the term conception which was not previously defined: "Fetus means the human offspring developing during pregnancy from the moment of conception and includes the embryonic stage of development." The term "conception" appears elsewhere in the Ohio Revised Code, but R.C. 2919.19 specifically limits the applicability of its definitions to R.C. 2919.191 to 2919.1910.

S.B. 23 added a definition of "intrauterine pregnancy" in R.C. 2919.19(A)(8), which corresponds to another section created by S.B. 23 – R.C. 2919.191. This section provides that "[s]ections 2919.192 to 2919.195 of the Revised Code apply only to intrauterine pregnancies." The intent of this section is clear – S.B. 23 did not intend to subject ectopic pregnancies (i.e., non-intrauterine pregnancies) to the provisions of the "Heartbeat Protection Act."[21]

Standing on their own, the Court can find nothing facially unconstitutional about the definitions added by S.B. 23. However, with the remainder of S.B. 23's provisions enjoined as unconstitutional, the definitions, which apply only within the chapter, become meaningless – they cannot stand on their own. Thus, the other facially unconstitutional provisions of S.B. 23 cannot be severed from the definitions. *See State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 523 (1994) ("In order to sever a portion of a statute, we must first find that such a severance will not fundamentally disrupt the statutory scheme of which the unconstitutional provision is a part."); *Village of Lodi*, 142 Ohio St. 3d at 356 ("Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself?") (Citations omitted); *City of Tipp City v. Dakin*, 2010-Ohio-1013, ¶¶ 64-67 (2nd Dist.) (declining to sever portions of an ordinance because "the fundamental problem with [severance] is that the sign ordinance would be reduced to a shell of itself . . . further severing the sign ordinance to comply with our ruling would fundamentally disrupt the scheme.")

The same is true of R.C. 2919.19(B), which was created by S.B. 23. This provision

[21] Evidence presented during the temporary restraining order and preliminary injunction proceedings showed that some hospital systems refused to provide medication abortions for ectopic pregnancies. Affidavit of David Burkons, M.D., filed Sept. 2, 2022. One argument advanced for this refusal was that a simultaneous intrauterine pregnancy could not be ruled out, such that providing a medication abortion for an ectopic pregnancy could still violate Ohio law. The results were extremely deleterious for some women who were denied medication abortions for ectopic pregnancies and later experienced ruptures and needed surgical procedures that put their well-being and future fertility at risk. This evidence plays no role in the Court's consideration of Plaintiffs' motion for judgment on the pleadings.

anticipated that S.B. 23 would likely be found unconstitutional upon its passage under the then-controlling law of *Roe v. Wade*. With this in mind, the drafters of S.B. 23 included a provision authorizing the Ohio Attorney General of Ohio to seek to dissolve any injunction enjoining S.B. 23 if the law changed in the future. Indeed, the drafters seemed to foresee the possibility of "an amendment to the United States Constitution restoring, expanding, or clarifying the authority of states to prohibit or regulate abortion entirely or in part." R.C. 2919.19(B)(2). The drafters even anticipated the possibility that a future Ohio Attorney General (which is a statewide elected office) might decline to seek to dissolve an injunction against S.B. 23, and authorized any county prosecutor to do so if the Attorney General did not. R.C. 2919.19(B)(3). The drafters also included a comprehensive severability clause in anticipation of future constitutional disputes over S.B. 23. R.C. 2919.19(B)(4).

The State Defendants argue that these provisions are directed at the judiciary and, therefore, cannot be enjoined. Again, the State Defendants cite no authority for this proposition. And they are wrong when they describe this provision as merely a statement of intent. As noted, this provision empowers the Ohio Attorney General, and potentially any county prosecutor from one of Ohio's eighty-eight counties, to bring an action seeking to revive S.B. 23 if there is a future change in "the authority of states to prohibit or regulate abortion entirely or in part." It does not appear from the text that the drafters anticipated what has transpired here – the people of Ohio amended the state constitution to protect abortion rights and prohibit any state measure that directly or indirectly burdens, penalizes, prohibits, interferes with, or discriminates against that right or anyone who assists in the exercise of that right.

Ohio's officers such as the Attorney General and its elected prosecutors, including the undersigned judicial officer, take an oath and are duty bound to uphold the Ohio Constitution. *See*

Ohio Const. Art. XV sec. 7; R.C. 3.23. Thus, Ohio's Attorney General and its elected county prosecutors must uphold the abortion rights now enshrined in Ohio's Constitution.[22] R.C. 2919.19(B)(2)-(3) effectively authorizes such officers to do otherwise without any reference to the duty to support and uphold Ohio's Constitution, which now protects abortion rights. A provision that authorizes elected officers of the State of Ohio to bring actions intended to undermine rather than uphold the rights protected by the Reproductive Rights Amendment falls squarely within the purview of that Amendment, which expressly prohibits "interference" with the exercise of the right to abortion.

The State Defendants make no argument to support the constitutionality of this provision. Nor have they indicated in any way in their Answer to the Amended Complaint or in response to the motion for judgment on the pleadings that this provision satisfies the Amendment's exceptions. Accordingly, this Court finds as a matter of law that R.C. 2919.19(B)(2)-(3) violate Ohio's Constitution.

Finally, the Court is not bound by a severability clause in a legislative enactment. *See State ex rel. English v. Industrial Com.*, 160 Ohio St. 215, 219-220 (1953) ("Although consideration must be given to the fact that an act contains a separability clause, such a clause is not conclusive"). Nonetheless, this Court has endeavored to consider each provision separately as urged by the State Defendants. There is nothing facially unconstitutional about R.C. 2919.19(B)(4), but it cannot stand on its own such that severance is not appropriate.

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[22] The Attorney General is Ohio's chief law enforcement officer (R.C. 109.02) and is duty bound to uphold the Ohio and U.S. Constitutions, but he is not obligated to defend the constitutionality of an Ohio statute that conflicts therewith as he has done in this case by conceding the unconstitutionality of R.C. 2919.195. *See e.g. Cicco v. Stockmaster*, 89 Ohio St. 3d 95, 99 (2000) (R.C. 2721.12's requirement to serve the AG in every case challenging the constitutionality of a statute was "intended that the Attorney General have a reasonable amount of time in which to evaluate the issues and determine whether to participate in this case."); *see also* Zoeller, Gregory (2015) "Duty to Defend and the Rule of Law," Indiana Law Journal: Vol. 90: Iss. 2, Article 2; 73 Op. Att'y Gen. 73-117.

4. R.C. 2919.191

R.C. 2919.191 provides that R.C. 2919.192 to 2919.195 apply only to intrauterine pregnancies. This provision was included in S.B. 23 to exempt ectopic pregnancies from the restrictions imposed by the Act. There is nothing facially unconstitutional about this exception. However, this provision cannot stand on its own since it depends entirely upon its reference to the balance of S.B. 23 for any meaningful application. Accordingly, severance is not appropriate.

5. R.C. 2919.192

S.B. 23 renumbered prior section R.C. 2929.191 as R.C. 2919.192, which requires abortion care providers to check for a "detectable fetal heartbeat" before performing an abortion. If a heartbeat is detected, a provider must record in the woman's medical record the estimated gestational age. R.C. 2929.192(A). Subsection (B) required the Ohio director of health to adopt rules regarding the method for checking for a heartbeat. S.B. 23 merely renumbered this section and adjusted the deadline for issuance of rules by the director of health. Thus, the substance of the provision is not before this Court, which is only concerned with S.B. 23. As discussed above, the Franklin County Court of Common Pleas issued a preliminary injunction enjoining the enforcement of R.C. 2919.192, for clearly violating Ohio's constitutional amendment enshrining abortion rights.

6. R.C. 2919.193

S.B. 23 created section R.C. 2919.193. Subsection (A) of this provision creates a new fifth-degree felony criminal offense for knowingly and purposefully performing an abortion without first determining whether there was a "detectable heartbeat" as required by R.C. 2919.192. Subsection (A) also provides that a violation can provide the basis for a civil action for compensatory and exemplary damages and disciplinary action from the Ohio Medical Board.

Subsection (B) provides an exception if there was a medical emergency that prevented compliance with the requirement to check for cardiac activity. Subsection (C) requires any physician who performs an abortion without checking for a heartbeat under the emergency provision of subsection (B) to record the basis for that decision in the patient's medical records and to retain a copy in the physician's records for seven years.

Fifth-degree felonies are punishable by up to twelve months in prison and a fine of up to $2,500 under Ohio law. The State Defendants argue that this provision remains valid because, according to the State Defendants, the requirement to check for a fetal heartbeat remains valid and the General Assembly has the authority to codify crimes, citing *State v. Daniel*, 2023-Ohio-4035, ¶ 77. State Defendants' Memo. In Opp. p. 15. The citation to *State v. Daniel* is misplaced. First, the State Defendants cite to a *dissenting* opinion by Justice Fischer without identifying it as such. Second, and more significantly, the issue in *State v. Daniel* was whether a statute limiting a court's sentencing discretion based on the recommendation of the prosecutor and the investigating law enforcement agency violated the separation of powers doctrine. Writing for the majority, Justice DeWine concluded that the statute at issue was constitutional. *State v. Daniel*, 2023-Ohio-4035, ¶ 27.

The holding in *State v. Daniel* does nothing to inform the Court's consideration of the issue presented in this case. After passage of the Reproductive Rights Amendment, the Ohio Constitution expressly limits the State's authority to infringe upon the exercise of the right to abortion. R.C. 2919.193 criminalizes the provision of pre-viability abortion care. The State Defendants make no argument that R.C. 2919.193 satisfies the exception for abortion limitations that use "the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care." Ohio Constitution, Art. I, Section 22(B)(2).

Applying the language of the Amendment, this provision "directly . . . penalize[s] . . . a person or entity that assists an individual exercising this right" "to carry out one's own reproductive decisions, including . . . abortion." The Court need not look any further than to this plain and unambiguous language. R.C. 2919.193 is unconstitutional.

The Court notes that Judge Young of the Franklin County Court of Common Pleas addressed R.C. 2919.193 in his August 23, 2024 decision. It appears, however, that Judge Young limited his preliminary injunction to "(1) Ohio's waiting period; (2) the in-person visit requirement; and (3) the state-mandated information requirements for abortion care." *Preterm-Cleveland, et al. v. Dave Yost*, Franklin County Common Pleas Case No. 24-cv-2634, Decision dated August 23, 2024, p. 2. R.C. 2919.193 was created by S.B. 23. Thus, this section was before this Court from the inception of this case and was first temporarily and then preliminarily enjoined by this Court's order since its entry on October 12, 2022. Accordingly, notwithstanding Judge Young's decision, it is within this Court's authority to address the constitutionality of this provision. *State ex. rel. Ohio Acad. of Trial Lawyers v. Sheward,* 1999-Ohio-123, 86 Ohio St. 3d 451, 715 N.E.2d 1062, 1084 ("unconstitutionality of a statute does not deprive a court of the initial jurisdiction to proceed to its terms . . . ."). As noted in the standard of review discussion above, under the plain language of the Amendment, the State bears the burden to establish that this section satisfies an exception to the Reproductive Rights Amendment. The State Defendants have done nothing to carry this burden. The Court finds R.C. 2919.193 to be an unconstitutional infringement upon the right to abortion now enshrined in the Ohio Constitution.

7. R.C. 2919.194

S.B. 23 renumbered prior section 2919.192 to 2919.194 and added subsection (A)(3), which requires abortion care providers to have patients sign a form acknowledging receipt of

information "that the unborn human individual the pregnant woman is carrying has a fetal heartbeat and that the pregnant woman is aware of the statistical probability of bringing the unborn human individual the pregnant woman is carrying to term." In this way, S.B. 23 not only requires physicians to provide this information to abortion-care patients, but the patient is required to acknowledge receipt of such information in writing.

The State Defendants argue that the new provision added by S.B. 23 is constitutional because it only requires the patient to sign a form proving that she received all the required information. The State Defendants ignore, however, that under another provision enacted by S.B. 23 discussed below (i.e., R.C. 2919.199(C)), failure to obtain this written acknowledgment gives rise to a potential claim for wrongful death against the provider.

Again, it appears that this section was addressed by Judge Young in his August 23, 2024 decision, and that it falls within the "state-mandated information requirements" that he enjoined. However, R.C. 2919.194(A)(3) was enacted by S.B. 23 and was therefore properly before this Court and preliminarily enjoined prior to the filing of the Franklin County case. If it violates the Ohio Constitution to require providers to provide state-mandated information to abortion-care patients as Judge Young has held, then it also violates the Ohio Constitution to require abortion-care patients to acknowledge the receipt of such state-mandated information. Moreover, the State Defendants make no argument that this provision satisfies an exception to the Reproductive Rights Amendment. The Court finds that this section impermissibly burdens and interferes with the voluntary exercise of the right to pre-viability abortion and is therefore unconstitutional.

8. R.C. 2919.195

R.C. 2919.195 was newly enacted by S.B. 23 and is described by the State Defendants as the "core" provision of S.B. 23. It prohibits the performance of an abortion after detection of a

"fetal heartbeat" and makes a violation punishable as a fifth-degree felony. The State Defendants acknowledge that this provision violates the Ohio Constitution.

9. R.C. 2919.196

S.B. 23 created R.C. 2919.196. This section requires that, independent of R.C. 2919.192 to 2919.195, a person performing an abortion create a record of the reason for performing the abortion. The Court considered this section in its discussion of R.C. 2919.171 above and found it to be unconstitutional.

10. R.C. 2919.197

S.B. 23 created R.C. 2919.197, which provides that nothing in R.C. 2919.19 to 2919.196 prohibits the sale, use, prescription, or administration of contraceptives. The State Defendants argue that this provision "reinforces, rather than impedes, the new Amendment's protection of the rights (sic) to contraception." The State Defendants are correct insofar as they mean to argue that this section is not, in its own right, unconstitutional. However, as discussed above, when applying a severability analysis, the Court must first ask whether severance fundamentally disrupts the statutory scheme, and then whether the constitutional provision can stand on its own. Revised Code section 2919.19 to 2919.196 have been largely enjoined by this Court and by the Franklin County Court of Common Pleas. Thus, R.C. 2919.197 provides for a limitation on the scope of other provisions that are no longer enforceable, which renders the provision entirely meaningless and superfluous. Moreover, the Amendment to the Ohio Constitution provides for an expansive constitutional right to contraception. The Court finds that R.C. 2919.197 is not severable from the balance of S.B. 23's unconstitutional provisions.

11. R.C. 2919.198

S.B. 23 renumbered prior section 2919.193 as R.C. 2919.198. This section provides that a

pregnant woman on whom an abortion is performed in violation of R.C. 2919.193, 2919.194 or 2919.195 is not guilty of violating those sections or attempting, conspiring or being complicit in the violation of those section, nor subject to any civil penalty for a violation of those sections. This provision predated S.B. 23, but S.B. 23 amended the references to other sections of the Revised Code to correspond to the new provisions enacted by S.B. 23. The three referenced sections have been enjoined by either this Court and/or the Franklin County Court of Common Pleas. Without these references, the section becomes utterly meaningless and cannot stand on its own such that severance is not appropriate.

12. R.C. 2919.199

S.B. 23 enacted a new section, R.C. 2919.199, which creates a statutory civil cause of action for wrongful death on behalf of a patient who has had an abortion that violated R.C. 2919.193(A) (prohibiting performing an abortion without checking for a heartbeat subject to an emergency exception), R.C. 2919.195(A) (prohibiting abortion after detection of a "fetal heartbeat" subject to limited exceptions), or R.C. 2919.194(A) (prohibiting abortion without providing state-mandated information and obtaining the patient's written acknowledgement of receipt of such information). Under this section a civil claim may be maintained against the abortion-care provider for which the patient may recover $10,000 or such other amount awarded by the trier of fact, plus court costs and reasonable attorney fees. R.C. 2919.199(B). A defendant that prevails under this section may be entitled to attorney fees, but only if the court finds the claim to be frivolous and that the defendant was adversely affected by the frivolous conduct, but not because of any holding that R.C. 2919.193, .194 or .195 are unconstitutional.

The State Defendants argue that, with the exception of the reference to R.C. 2919.195, this section is constitutional "because R.C. 2919.193 and R.C. 2919.194 are both valid and

constitutional" and "the General Assembly can create a cause of action for legal remedy for a violation of a valid law." The State Defendants ignore the mandate of the Amendment, which plainly prohibits any measure that directly or indirectly burdens, penalizes or interferes with the exercise of the right to pre-viability abortion or anyone assisting in the exercise of that right. Subjecting medical providers to civil lawsuits for providing lawful pre-viability abortion care to their patients would as a matter of law discourage providers from providing abortion care. This clearly runs afoul of the Amendment. The State Defendants do not contend that this section satisfies an exception to the Amendment. Nor have they done anything to carry the State's burden on such a claim. Accordingly, this section is unconstitutional.

13. R.C. 2919.1910

S.B. 23 enacted this new section that creates a joint legislative committee on adoption promotion and support. This committee is empowered to "review or study any matter that it considers relevant to the adoption process in this state, with priority given to the study or review of mechanisms intended to increase awareness of the process, increase its effectiveness, or both." R.C. 2919.1910(A). Plaintiffs do not request that the Court enjoin this section, and on its face, it does not infringe the right to abortion.

14. R.C. 2919.1912

R.C. 2919.1912 was newly enacted by S.B. 23. This provision allows the state medical board to assess a forfeiture of up to $20,000.00 for each separate violation of R.C. 2919.171 (requiring abortion providers to report abortions and the reasons therefore to the State), R.C. 2919.192 (requiring providers to check for a "fetal heartbeat" before performing an abortion), R.C. 2919.193 (making it a crime to perform an abortion without first checking for a "detectable heartbeat"), R.C. 2919.194 (requiring the provision of state-mandated information and written

acknowledgment of receipt), R.C. 2919.195 (making it a crime to perform an abortion after detection of a "fetal heartbeat"), and R.C. 2919.196 (requiring abortion care providers to make a record of the reason for an abortion). The forfeiture provided for in this section may be in addition to any criminal penalties.

The State Defendants argue that R.C. 2919.1912 should only be enjoined with respect to its reference to R.C. 2919.195. Under this approach, a physician could be subject to a fine of up to $20,000 for failing to record whether maternal health was the reason for an abortion (R.C. 2919.196), failing to provide state-mandated information to an abortion care patient, or failing to obtain a written acknowledgment from a patient that the patient received information about the statistical probability of carrying the pregnancy to term (R.C. 2919.194). Exposure to such potential financial liability burdens, penalizes, and interferes with the exercise of the right to pre-viability abortion. The State Defendants do not contend that this section satisfies an exception to the Amendment's prohibition. Nor have they done anything to carry the State's burden on such a claim. Accordingly, this section is unconstitutional.

15. R.C. 2919.1913

R.C. 2919.1913 was newly enacted by S.B. 23 and names R.C. sections 2919.171, 2919.19 to 2919.1913, and 4731.22 the "Human Rights and Heartbeat Protection Act." The parties agree that this section does not infringe upon right to abortion.

16. R.C. 4731.22

S.B. 23 amended R.C. 4731.22, which generally addresses the state medical board's authority to limit, revoke or suspend licenses to practice medicine in Ohio. Subsection (B) of R.C. 4731.22 contains a lengthy list of infractions for which the medical board may sanction a physician by suspending or revoking a license to practice medicine. S.B. 23 substantially revised subsection

(B)(47) by adding references to R.C. sections 2919.192(A), 2919.193(C), 2919.195(B), and 2919.196(A) as grounds for which a physician's license can be suspended or revoked. The State Defendants argue that only the reference to R.C. 2919.195 in this section should be enjoined. However, in the same way exposure to a $20,000 fine (i.e., R.C. 2919.192) unlawfully burdens, penalizes, and interferes with physicians assisting individuals in the exercise of the right to pre-viability abortion, this section also runs afoul of the rights now enshrined in the Ohio Constitution. The State Defendants do not contend that this section satisfies an exception to the Amendment's prohibition. Nor have they done anything to carry the State's burden on such a claim. Accordingly, this section is unconstitutional.

17. R.C. 5103.11

S.B. 23 enacted this new section creating the "foster care and adoption initiatives fund." Under this section the Department of Job and Family Services is directed to allocate money in the fund fifty percent to foster care services and initiatives and fifty percent to adoption services and initiatives. The parties agree that this section is constitutional and should not be enjoined.

F. Permanent Injunctive Relief Enjoining Enforcement of Unconstitutional Statutes Is Appropriate.

Having reviewed each of the provisions enacted by S.B. 23, and found many of them to violate the rights now embodied in Ohio's Constitution, the Court must also consider the other requirements of Rule 65. This can be easily done. Under Ohio law, injunctive relief enjoining the enforcement of an unconstitutional statutory provision is appropriate under Civ. R. 65. *See UAW Local Union 1112 v. Philomena,* 121 Ohio App. 3d 760, 781 700 N.E.2d 936 (1998) ("Injunctive relief is warranted when a statute is unconstitutional, enforcement will infringe upon constitutional rights and cause irreparable harm, and there is no adequate remedy at law."). The irreparable harm requirement is satisfied as a matter of law and no bond is required. *See Magda v. Ohio Elections*

Comm'n, 2016-Ohio-5043, 58 N.E.3d 1188, ¶ 38 (10th Dist.) ("A finding that a constitutional right has been threatened or impaired mandates a finding of irreparable injury as well."); *see also Vanguard Transp. Sys. Inc. v. Edwards Transfer & Storage Co., Gen Commodities Div.,* 109 Ohio App.3d 786, 793, 673 N.E.2d 182 (10th Dist.1996) ("a court has the power to set the bond at nothing.") (citations omitted). Accordingly, the Court hereby permanently enjoins enforcement of all provisions enacted by S.B. 23 with the exception of the provisions relating only to adoption and foster care (i.e., R.C. 2919.1910 and R.C. 5103.11), section 2919.193 naming the Act, and R.C. 2317.56(C)(2). The Court's injunction applies to all defendants and their agents, employees, servants, successors, and any person in active concert or participation with them. An Order of the Court shall follow.

IV. Conclusion

Ohio voters have spoken. The Ohio Constitution now unequivocally protects the right to abortion. The State cannot properly undermine this right unless it satisfies an exception set forth in the Amendment by using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care. Article I section 22 of the Ohio Constitution is unambiguous. To give meaning to the voice of Ohio's voters, the Amendment must be given full effect, and laws such as those enacted by S.B. 23 must be permanently enjoined. This is what the Court does today by holding that all provisions enacted by S.B. 23 except R.C. 2919.1910, R.C. 5103.11, R.C. 2919.193, and R.C. 2317.56(C)(2) are unconstitutional and their enforcement is hereby permanently enjoined.

So Ordered.

Date: October 24, 2024

/s/ Christian A. Jenkins
Judge Christian A. Jenkins

ENTER

OCT 24 2024

HON. CHRISTIAN A. JENKINS

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PRETERM-CLEVELAND, *et al.*,	:	
	:	Case No.: A2203203
Plaintiffs,	:	
	:	
v.	:	Judge Christian A. Jenkins
	:	
DAVID YOST, *et al.*,	:	
	:	**JUDGMENT ENTRY**
Defendants.	:	
	:	

This matter is before the Court upon Plaintiffs' Motion for Judgment on the Pleadings (filed March 1, 2024), in which they seek the relief prayed for in Count I of their Second Amended Complaint (filed December 14, 2023).

Pursuant to the Court's Decision and Entry Granting Plaintiffs' Motion for Judgment on the Pleadings (issued October 24, 2024), the Court finds that all provisions enacted by 2019 Am.Sub.S.B. No. 23 ("S.B. 23") except R.C. 2919.1910, R.C. 5103.11, R.C. 2919.1913, and R.C. 2317.56(C)(2) violate Article I Section 22 of the Ohio Constitution.

IT IS THEREFORE ORDERED that all Defendants, as well as their agents, employees, servants, and successors, and any person in active concert or participation with them, are HEREBY PERMANENTLY ENJOINED, from undertaking any action to enforce or otherwise implement, or to threaten to enforce or otherwise implement any provision enacted by S.B. 23 except R.C. 2919.1910, R.C. 5103.11, R.C. 2919.1913, and R.C. 2317.56(C)(2), and/or any other Ohio statute or regulation that could be understood to give effect to these provisions, including undertaking any

future enforcement action premised on conduct that occurred while the Court's Preliminary Injunction was in effect.[1]

It is further ordered that, in light of the equities of the case, the Court will exercise its discretion and not require the posting of an injunctive bond or, alternatively, set such bond at zero dollars ($0.00).

All court costs shall be taxed to the Defendants. This entry is a final and appealable judgment of this Court. There is no just reason for delay.

So ordered.

Date: 10/29/24

Judge Christian A. Jenkins

[1] The Court's Decision and Entry Granting Plaintiff's Motion for Judgment on the Pleadings contains a typographical error on pages 11 and 46 where references are made to R.C. 2919.193. Those references should be to R.C. 2919.1913 and are hereby corrected.