IN THE COURT OF COMMON PLEAS
FOR HAMILTON COUNTY, OHIO

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

THE STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

In April of 2019, Ohio's Legislature passed and Governor signed S.B. 23, a bill package which amended seven already existing laws, renumbered three others, and added ten new statutes to the Ohio Revised Code. Its core prohibition, now codified in R.C. 2919.195, would have banned most abortions, absent certain exceptions, after a fetal heartbeat was detected—usually around six weeks after conception.

Then in November 2023, shortly after the U.S. Supreme Court overturned *Roe v. Wade*, the People of Ohio, acting directly through a voter-approved initiative, passed an Amendment to the Ohio Constitution with the specific purpose of blocking enforcement of that core prohibition even after *Roe* was overturned. Not surprisingly, given this purpose, the language of the Amendment makes clear that the core prohibition *itself* is invalid under the latest version of the Ohio Constitution. "All political power is inherent in the people." Oh. Const. Art. I, § 2. Accordingly, the State cannot, and should not, oppose Plaintiffs' request that this Court declare invalid the core

prohibition.

But in their Motion for Judgment on the Pleadings, Plaintiffs leave open the possibility that they are demanding more than what the People of Ohio enacted through the Amendment. Through ambiguous and inconsistent phrasing in their Motion, Plaintiffs potentially demand invalidation of additional statutory provisions *beyond* the core prohibition itself, such as, for example, the preexisting requirement that doctors check for a heartbeat before performing an abortion—a requirement that existed before the core prohibition and that S.B. 23 merely recodified. In this endeavor, Plaintiffs reach too far for too much.

To be sure, Plaintiffs' Motion is unclear as to the precise relief they seek. On one hand, Plaintiffs often speak of enjoining only the core prohibition—what they call a "six-week ban"—as they do in their conclusion, asking for relief from "S.B. 23's six-week ban." MJP at 15. But on the other hand, Plaintiffs sometimes say more loosely that the Amendment "renders S.B. 23 invalid," although S.B. 23 enacted other provisions in addition to the core prohibition. While Plaintiffs rightly acknowledge that *some* parts of the bill are of course valid—such as adoption and foster-care provisions, *see* MJP at 15 n.9—that modest clarification leaves unaddressed several *other* provisions that were enacted or re-codified in S.B. 23.

To the extent Plaintiffs in this case seek to expand the Amendment beyond its language, they are not alone. Plaintiffs in other currently-pending cases likewise seek to commandeer the Amendment for their own purposes, claiming in the aggregate that the Amendment bars all laws that touch on abortion—and even some laws that have nothing to do with abortion or anything else the Amendment mentions. Just as it is the State Government's duty to respect the will of the People by conceding the invalidity of a statutory provision that conflicts with the current language of the

Ohio Constitution, it is also the State Government's duty to respect the will of the People by defending statutory provisions that the Amendment does *not* invalidate against meritless attack. Against such overreach, the State will stand fast.

All told, the Court should limit its injunction to the core prohibition, R.C. 2919.195, and those additional enforcement mechanisms created by reference to it in other statutory provisions, for several reasons. *First*, despite the ambiguity explained above, Plaintiffs do not clearly seek additional relief beyond invalidation of the core prohibition. *Second*, even if they asked, plaintiffs have made no *showing* as to any provision other than the core prohibition. Indeed, they have not shown how other provisions in S.B. 23 are in any way invalidated by the Amendment. For example, before S.B. 23 was adopted, Ohio law had already required physicians to follow the medical industry's common practice of checking for a heartbeat before performing an abortion, and S.B. 23's recodification and changed implementation of that requirement should stand. Courts review the enforceability of *statutory provisions,* not *bills*: 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,* 154 Ohio St.3d 41, 2018-Ohio-2358, ¶ 31. And of course, courts must sever any invalid provisions from valid ones. *See* R.C. 1.50. Thus, the core prohibition's conceded invalidity does not drag down other laws with it.

Thus, the Court should enjoin enforcement of the core prohibition, and not a thing more.

FACTUAL AND PROCEDURAL BACKGROUND

The Ohio General Assembly enacted what it titled the Human Rights and Heartbeat Protection Act ("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 core prohibition—that is, a limit against performing most abortions after a fetal heartbeat is detected.

R.C. 2919.195. Specifically, R.C. 2919.195(A) forbids anyone to "knowingly and purposefully perform or induce an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the unborn human individual the pregnant woman is carrying and whose fetal heartbeat has been detected."

That core prohibition, as enacted and briefly implemented, has several limits and exclusions. It regulates only those who perform abortions on others, not the women who seek abortions. R.C. 2919.198. It also has life or health exceptions that allow a doctor to perform an abortion, when necessary, within the doctor's reasonable medical judgment to preserve a woman's life or health. The health exception applies when there is "a serious risk of the substantial and irreversible impairment of a major bodily function," R.C. 2919.195(B), which is further defined to cover specific conditions as well as a catchall regarding "the substantial and irreversible impairment of a major bodily function." R.C. 2919.16(K); *see* R.C. 2919.19(A)(12), R.C. 2919.191. Enforcement includes criminal provisions, medical-licensing consequences, civil actions, and more. R.C. 2919.195(A); R.C. 2929.14(A)(5), R.C.2929.18(A)(3)(e); R.C. 4731.22(B)(10), R.C. 2919.1912(A) R.C. 2919.199(A)(1), (B)(1).

Before the core prohibition took effect, its enforcement was enjoined in federal litigation from 2019 through June 24, 2022. *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796 (S.D. Ohio 2019). On the latter date, 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 returning the issue of abortion to the States. That same day, the federal district court lifted the injunction, allowing the core prohibition to go into effect. Plaintiffs here first sought to challenge the core prohibition, and perhaps the entire Heartbeat Act, by filing an original action in the Ohio Supreme Court. *State ex. rel Preterm-*

Cleveland v. Yost, No. 2022-0803 (June 29, 2022). Then they changed approach and filed with this Court.

This Court granted a TRO and eventually a preliminary injunction. *See* Order Granting Preliminary Injunction, Oct. 12, 2022 ¶¶ 73–80. It enjoined nearly all of the Act. *Id.* ¶ 134. Its order allows 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. Last November, Ohio voters amended the Ohio Constitution to add a right to abortion and other reproductive rights. *See* Art. I, § 22. The Supreme Court dismissed the appeal "due to a change in the law." *See* 2023-Ohio-4570 (Dec. 15). 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 in Case No. 2023-0004.

Plaintiffs have now asked this Court for judgment on the pleadings.

LEGAL STANDARD

Plaintiffs' motion triggers two legal standards, as they seek both judgment on the pleadings and a permanent injunction. After pleadings are closed, a motion for judgment on the pleadings should be granted when a court, drawing all reasonable inferences from the material allegations of the complaint in favor of the nonmoving party, concludes that no set of facts would allow the nonmoving party to prevail. *See, e.g., Calhoun v. Supreme Court of Ohio*, 61 Ohio App.2d 1, 6, 399 N.E.2d 559 (10th Dist.1978). Next, for that judgment to lead to an injunction, Plaintiffs must show that

"the injunction is necessary to prevent irreparable harm and that the party does not have an adequate remedy at law" by clear and convincing evidence. *P&G v. Stoneham*, 140 Ohio App.3d 260, 268, 747 N.E.2d 268 (1st Dist.2000).

ARGUMENT

The State agrees that Ohio's new Amendment overrides the Heartbeat Act's core prohibition. Thus, the State does not oppose a declaration specifying that that core prohibition, R.C.2919.195, is now unconstitutional under Ohio's new Amendment. The State likewise does not oppose an injunction against enforcement of that law. To the extent that Plaintiffs seek only that, the parties agree, and thus the Court should enter such an order and end this case.

But the Court should go no further, and it should not enjoin a five-year-old bill, "S.B. 23," or use any wording that suggests that the State's officers are enjoined from enforcing anything other than the core prohibition. Of course, the Court should not order more than Plaintiffs seek, so if Plaintiffs seek only that narrow relief—as they seem to do—the Court should not go beyond that. And even if Plaintiffs request is unclear, and if they seek additional relief, the Court should not grant anything more. That is so because Plaintiffs have not even attempted to show that any other statutory provisions enacted by the bill that began as S.B. 23 are unconstitutional. Indeed, other provisions of law modified or enacted by S.B. 23, even beyond those that Plaintiffs expressly concede are valid, remain consistent with the Amendment.

Thus, the Court should limit its injunction to the core prohibition, R.C. 2919.195, and the State opposes the Court doing anything more.

A. The core prohibition is unconstitutional, and its enforcement should be enjoined, but Plaintiffs have not shown any other relief is requested or proper.

The State does not oppose an injunction against the core prohibition, R.C. 2919.195. That

ends the case, as it seems that Plaintiffs seek only that. Nevertheless, because Plaintiffs are sometimes unclear regarding their requested relief, the State explains below in Part B why no broader relief is warranted here. But most important is to confirm that Plaintiffs' request is best read as seeking to enjoin only the core prohibition, R.C. 2919.195—the provision that generally bars abortions after a heartbeat is detected.

First, Plaintiffs' narrow approach is shown by reading the current motion along with the First Amended Complaint. Plaintiffs' motion is expressly limited to the first count of that operative complaint: "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 at 10 n.5. That count, in turn, alleges 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 violates Article 1, Section 22 of the Ohio Constitution." Thus, although that allegation concludes with the broad phrase, "S.B. 23 violates," it 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. (It bears noting that the remaining claims, while citing different constitutional bases, likewise challenge only the core prohibition.)

Second, the Motion, despite the broad use of "S.B. 23" in some places, repeatedly identifies as its target only the core prohibition, R.C. 2919.195. It says:

- "S.B. 23 is a pre-viability ban," MJP 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;

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

- "[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.*

Third, Plaintiffs rely heavily on the State's concessions in the Ohio Supreme Court, and in the Attorney General's earlier public explanation of the law. Those concessions were limited to the core prohibition itself. 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." Supp. Br. of Appellants, *Preterm-Cleveland v. Yost*, Case No. 2023-0004, 1 (Ohio S.Ct. Dec. 7, 2023) (emphasis added); *compare* MJP 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*,

https://www.ohioattorneygeneral.gov/SpecialPages/FINAL-ISSUE-1-ANALYSIS.aspx (last accessed 03/28/2024).

Finally, the Motion is limited to the core prohibition itself because it nowhere identifies any *other* specific provision as causing any alleged legal harm. For example, and as further detailed in Part B below, R.C. 2919.192 requires a doctor to check for a heartbeat and inform the pregnant woman about it. That requirement—based on the most common practice in the industry—was already the law in 2013, originally codified in R.C. 2919.191, but S.B. 23 renumbered the statutory provisions and amended the details in ways not relevant here. Plaintiffs nowhere even allege, let alone show, that this mere "check and tell" provision is invalid (it is not). As another example, like other medical recordkeeping requirements in the Revised Code, R.C. 2919.196 requires certain recordkeeping regarding abortions, and Plaintiffs do not challenge that expressly. Those provisions are good examples of the provisions that would be improperly swept into any injunction of "S.B. 23" as a whole, or any injunction that excludes only the few itemized provisions that Plaintiffs specifically identify as unchallenged. *See* MJP at 6 n.2 (identifying provisions that "remain outside the scope of this litigation" to include R.C. 2919.1910 and R.C. 5103.11, R.C. 2919.1913 naming the Act, and R.C. 2317.56(C)(2)). Indeed, that latter express exclusion, combined with the loose references to "S.B. 23," generate any ambiguity that exists regarding plaintiffs' request.

In sum, the only proper result is to specify that an injunction is aimed *only* at enforcement of the core prohibition itself, R.C. 2919.195, and its reference in other enforcement statutes within the broader Heartbeat Act, and not at the "bill" or "S.B. 23."

B. Even if Plaintiffs construe ambiguities in their request to include broader relief against enforcement of other unspecified statutory provisions, no such broader relief is justified.

If the Court agrees, as it should, that Plaintiffs seek only an injunction against enforcement of the core prohibition, despite the loose usage of "S.B. 23"—especially if Plaintiffs clarify that in reply—then the Court can and should stop there. But if the Court somehow considers broader relief, or if Plaintiffs reply by expanding their request to truly challenge all statutory provisions affected by the passage of "S.B. 23" five years ago, the Court should say no.

Such specificity is required by Ohio Civ. R. 65(D). That Rule provides that an "order granting an injunction and every restraining order shall . . . describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding upon the parties to the action." As that language makes clear, an injunction does not alter the passage of a bill or the text of codified law, but merely compels or prevents acts that enforce the written law. Under Ohio's separation of powers doctrine, courts do not have the power to "repeal" or erase a bill or even a code provision. Instead, a court can only enjoin the enforcement of the specified provisions, while leaving the enactment itself unaffected. As the Supreme Court has explained:

> We do not imply that the legal effect of a judicial decision "severing" a statutory provision from the remainder of the statute is to actually repeal the invalid statutory language. Only the General Assembly, the lawmaking branch of our constitutional government, has authority to repeal, as well as to enact, statutory language. Rather, a statutory provision that is held to be legally invalid, as here, becomes definitively unenforceable, and it is said to be "severed" in order to distinguish it from the remaining portion of the statute, which remains valid and enforceable.

State v. Hodge, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, ¶ 25 n.6 (citing R.C. 1.50 ("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")). "A court can no more prohibit the General Assembly from enacting a law than it could compel the legislature to enact, amend, or repeal a statute—the judicial function does not begin until after the legislative process is completed." *City of Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, ¶1. The inability of any court to prevent, or to undo, the enactment of legislation by the General Assembly demonstrates that it is not a "bill" that can be addressed, but only the *enforcement* of relevant *provisions* of code.

That fundamental principle makes all the difference here because Plaintiffs have not shown any problem with any provisions of S.B. 23, other than the core prohibition.

1. Not only have Plaintiffs failed to identify other provisions in S.B. 23 in general, but also, they have not shown how they are harmed by any such statutes or why relief is warranted.

Even if Plaintiffs did intend to seek a much broader injunction, they have failed to prove they are entitled to such an injunction as a matter of law. The Second Amended Complaint, on its face, does not plead any facts necessary to prove that any remaining statutes (other than the core prohibition) are unconstitutional. Likewise, the Motion, although it refers broadly to "S.B. 23," does not even refer to most of the statutory provisions enacted by that bill. Nothing proves by clear and convincing evidence that they are entitled to relief from enforcement of those statutes as a matter of law.

Plaintiffs only assert that there are "no material factual disputes to be resolved" in this case, MJP at 3, because they have only pleaded facts to challenge the Heartbeat Act's core prohibition, R.C. 2919.195. *See* MJP at 9 ("[T]here is no factual dispute that could alter the inevitable legal conclusion that *S.B. 23's six-week ban is unconstitutional* as a matter of law because it violates the

plain language of Article I, Section 22 of the Ohio Constitution.") (emphasis added). Indeed, they unequivocally assert that "Plaintiffs are entitled to judgment as a matter of law and a permanent injunction because: (1) it is indisputable that S.B. 23 imposes a near-total ban on abortion starting well before the point of fetal viability, and (2) Defendants have admitted that that the ban is unconstitutional and cannot (and do not) claim that a near-total abortion ban is the least restrictive means to advance patient health." But that prohibition is created by a single statute enacted as part of the larger legislative scheme of S.B. 23.

In sum, Plaintiffs are not entitled to judgment as a matter of law as to any statute other than R.C. 2919.195.

2. One significant example of a valid and unchallenged law in S.B. 23 is R.C. 2919.192's requirement to check for a fetal heartbeat, which has been valid law since 2013.

While S.B. 23 includes many statutory provisions beyond the core prohibition—itemized below in Part B-3—the State stresses one here. The requirement to check for a fetal heartbeat before an abortion is the type of law that remains valid, as it does not prevent performing an abortion, and indeed, Plaintiffs have long admitted that they easily complied with that law for years. But it is the type of statutory provision that could be caught up in an overbroad sweep of enjoining "S.B. 23" rather than specifying the limited code provision of the core prohibition, R.C. 2919.195. Specifically, R.C. 2919.192 renumbers and modifies a check-and-tell provision that was previously found in R.C. 2919.191:

> A person who intends to perform or induce an abortion on a pregnant woman shall determine whether there is a detectable fetal heartbeat of the unborn human individual the pregnant woman is carrying. The method of determining the presence of a fetal heartbeat shall be consistent with the person's good faith understanding of standard medical practice, provided that if rules have been adopted under division (C) of this section, the method chosen shall be one that is consistent with the rules.

> The person who determines the presence or absence of a fetal heartbeat shall record in the pregnant woman's medical record the estimated gestational age of the unborn human individual, the method used to test for a fetal heartbeat, the date and time of the test, and the results of the test. The person who performs the examination for the presence of a fetal heartbeat shall give the pregnant woman the option to view or hear the fetal heartbeat.

R.C. 2919.191(A) (2013). In fact, the current statutory language as amended by S.B. 23 is identical to that of the prior law, except that (C) was replaced with (B) to reflect renumbered subsequent subsections within the statute. Because Plaintiffs have not challenged this requirement, the Court should not enjoin enforcement of it. But the State also notes that even if this law were challenged, it would survive, as it was valid for years before *Dobbs* overruled *Roe* under that previous standard for one simple reason: it does not prevent anyone from obtaining a previability abortion. Further, this check-and-record requirement is standard medical practice and promotes a pregnant woman's own health, as a doctor almost always must assess how far along a pregnancy is before determining, for example, whether medication abortion is available, or if surgery is needed instead.

Further, even if the Court were to improperly enjoin "S.B. 23," and to sweep in the re-codified R.C. 2919.192, it would not eliminate the requirement to check for a fetal heartbeat, because the previous 2013 version would remain. "When a court invalidates a statutory amendment, the statute reverts to its previous version." *Kljun v. McCloud*, 156 Ohio St.3d 419, 2019-Ohio-1334, 128 N.E.3d 203, ¶ 17, citing *Stevens v. Ackman*, 91 Ohio St.3d 182, 191, 2001- Ohio 249, 743 N.E.2d 901 (2001). Such an injunction would thus have no practical legal effect, much less a remedial one as required for any permanent injunction.

That is just one of many provisions in S.B. 23 that should survive. For completeness, the State next identifies below the many other provisions that survive the invalidation of the core prohibition.

3. S.B. 23 enacted many provisions that are unchallenged and should survive even if challenged.

While no doubt should remain that only the core prohibition should be enjoined, the State nonetheless itemizes here the many still-valid statutory provisions enacted or amended by S.B. 23, so that there is no doubt why the State is stressing so heavily the distinction between the core prohibition and "S.B. 23." S.B 23 amended seven statutes already codified as law in Ohio and enacted ten new ones. As the bill notes, it also amended "for the purpose of adopting new section numbers as indicated in parentheses, sections 2919.191 (2919.192), 2919.192 (2919.194), and 2919.193 (2919.198)." 2d Am. Compl., Ex. A at 1. But the Complaint mentions only five of those statutes: R.C. 2919.1912 (¶¶ 20, 51); R.C. 2919.192 (¶ 46); R.C. 2919.199 (¶ 53); R.C. 2317.56 (¶ 59); and R.C. 4371.22 (¶ 51). In their Motion, Plaintiffs expressly cite only R.C. 2919.195 and R.C.2919.192, MJP at 4, other than citation in footnotes of code sections that they acknowledge to be outside of the scope of this litigation. MJP at 6 n. 2; *id.* at 9 n. 9.

The statutes that should be untouched, although enacted or modified by parts of S.B. 23, include:

- R.C. 2317.56, which was amended to renumber a statute renumbered by the Act. Because renumbering a statute has no force of law, the amended statute cannot be enjoined.

- R.C. 2919.171, which was amended to reflect the renumbering of statutes by S.B 23. It adds 2919.192, 2919.193, 2919.195, and 2919.196 to reporting requirements; requires any person other that the physician to follow all reporting requirements; and strikes a previous date for Ohio Department of Health rulemaking provided in the prior statutory language from the statute. With the exception of 2919.195 in (A)(1), a provision the state agrees can no longer be enforced, enforcement of these amendments should not be enjoined.

- Subsection (A) of R.C. 2919.19, which adds five new definitions to ten existing definitions already in the statute and renumbers those definitions, and subsection (B) of R.C. 2919.19, which provides the General Assembly's intent for passing S.B. 23 together with its intent for how challenges to the law and other changes in the law will affect the statutes created or amended in S.B. 23. Given that definitions have no force of law on their own, and the

General Assembly's intent is directed at the judiciary and not Plaintiffs, enforcement of this section cannot be enjoined.

- R.C. 2919.191, which provides that sections 2919.192 through 2919.195 apply only to intrauterine pregnancy. As this statute also has no force of law on its own, it cannot be enjoined.

- R.C. 2919.192, which retains the earlier requirement to check for a fetal heartbeat. The State explained its validity above in Part (B)(2).

- R.C. 2919.193, which enforces R.C. 2919.192's requirement to check for a fetal heartbeat. Because the underlying requirement is valid, its enforcement is too. *See State v. Daniel*, 2023-Ohio-4035, ¶ 77.

- The majority of R.C. 2919.194, which was already the law before S.B. 23. Its only new requirement is that the patient sign a form proving that she received all the required information before obtaining an abortion.

- R.C. 2919.196, which requires, independent of 2919.192-2919.195, that a record be made of the reason for an abortion.

- R.C. 2919.197, which provides that "[n]othing in sections 2919.19 to 2919.196 of the Revised Code prohibits the sale, use, prescription, or administration of a drug, device, or chemical for contraceptive purposes." This provision clearly reinforces, rather than impedes, the new Amendment's protection of rights to contraception.

- R.C. 2919.198, which immunizes pregnant women from criminal prosecution under sections 2919.193-2919.195. While no longer relevant once enforcement of the core prohibition is enjoined, it does not conflict with the Amendment.

- R.C. 2919.199, which allows for a patient to initiate a civil lawsuit for a physician's failure to comply with the requirements of 2919.193, 2919.194, or 2919.195. While the enforcement of 2919.195 should be enjoined in this Court's order, the rest of the statute cannot be enjoined because 2919.193 and 2919.194 are both valid and constitutional, and the General Assembly can create a cause of action for a legal remedy for violation of a valid law.

- R.C. 2919.1912, which allows the state medical board to assess a forfeiture against an abortionist for each separate violation or failure to comply with sections 2919.171, .192, .193, .194, .195, or .196. The money collected through this procedure shall be deposited in the foster care and adoptions initiatives created under R.C. 5103.11. While the enforcement of 2919.195 in this statute should be enjoined in this Court's order, the rest of the statute cannot be enjoined because 2919.171, 2919.192, 2919.193, 2919.194 and 2919.196 are valid

and constitutional. There is nothing improper about the General Assembly's choice to create an administrative remedy for violation of those laws.

- R.C. 2919.1913, which names sections 2919.171, 2919.19 through 2919.1913 and 4731.22 the "Human Rights and Heartbeat Protection Act," and is neither enforceable nor subject to injunction.

- R.C. 4731.22, which only renumbers certain statutes that are renumbered by S.B. 23. Because the renumbering of code sections does not have any substantive effect, such renumbering cannot be enjoined. In addition, because the parties agree that 2919.195 should be enjoined, Plaintiffs cannot be penalized under subsection (B)(11) as subject to forfeiture for each violation of 2919.195 if that statute cannot be enforced as a crime.

Again, none of these statutes are even at issue because Plaintiffs have not put them at issue. To reiterate, nothing in the Motion or even the Complaint identifies any challenge to any of these provisions. It is only out of an abundance of caution that the State lists them because the broad use of "S.B. 23," along with the express-but-incomplete listing of a few unchallenged provisions, might threaten the possibility of an overbroad injunction. The State again acknowledges that the core prohibition should be enjoined, and a properly narrowed injunction will end the case. The State does not seek to prolong this litigation and hopes that Plaintiffs will clarify that they share that goal by agreeing to the only proper result: an injunction against the enforcement of the core prohibition that the voters sought to repeal at the ballot box. The State thus respectfully urges the Court not to prolong this case further with an overbroad injunction, so that this case can be closed once and for all.

CONCLUSION

For these reasons, the Court should declare R.C. 2919.195 to be unconstitutional, based on the new Amendment, and it should permanently enjoin enforcement of that section. In addition, the Court should enjoin enforcement of statutes that incorporate R.C. 2919.195 by reference: 2919.171(A)(1) & (A)(2), 2919.198, 2919.199, 2919.1912(A).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify the foregoing was served upon the following via electronic mail this 29 day of March, 2024.

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