IN THE SUPREME COURT OF OHIO

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Case No._____

Original Action in Mandamus

Peremptory and Alternative Writs Requested

STATE EX REL. TOLEDO WOMEN'S CENTER
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Relators,

v.

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MEMORANDUM IN SUPPORT OF
RELATORS' VERIFIED COMPLAINT FOR WRIT OF MANDAMUS

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INTRODUCTION

This action is brought by Preterm Cleveland, Planned Parenthood Southwest Ohio Region, Sharon Liner, M.D., Planned Parenthood of Greater Ohio, Women's Med Group Professional Corporation, Northeast Ohio Women's Center, LLC, and Toledo Women's Center ("Relators"), who petition this Court for a writ of mandamus on behalf of themselves and women of Ohio. At stake are Ohioans' fundamental rights, including the fundamental right to abortion, as guaranteed by the Ohio Constitution's broad protections for individual liberties under Article I, Sections 1, 16, and 21, and the equal protection guarantee under Article I, Section 2.

Senate Bill 23 ("S.B. 23") bans abortion after detection of embryonic cardiac activity, which occurs approximately six weeks into pregnancy and can occur as early as five weeks. 2019 Am.Sub.S.B. No. 23. This near-total ban on abortion denies Ohioans the ability to exercise fundamental rights guaranteed by the Ohio Constitution. This Court should therefore direct public officials to uphold the Ohio Constitution and abide by Ohio's pre-existing gestational age restriction—not S.B. 23.

Relators seek a writ of mandamus requiring David Yost, the Attorney General of the State of Ohio; Bruce. T. Vanderhoff, M.D., M.B.A., the Director of the Ohio Department of Health ("ODH"); Kim G. Rothermel, M.D., the Secretary of the State Medical Board of Ohio; Bruce R. Saferin, D.P.M., the Supervising Member of the State Medical Board of Ohio; and the County Prosecutor for each county where a Relator is located (Michael C. O'Malley, Cuyahoga County; Joseph T. Deters, Hamilton County; G. Gary Tyack, Franklin County; Mathias H. Heck, Jr., Montgomery County; and Julia R. Bates, Lucas County) ("Respondents"), and their employees, agents, and successors in office to abide by Ohio's former gestational age

restriction—which prohibits abortion beginning at 22 weeks from the first day of a woman's last menstrual period ("LMP")—and not enforce S.B. 23.

A federal district court preliminarily enjoined S.B. 23 on July 3, 2019, before it took effect, and that injunction was in place until it was dissolved by the court on June 24, 2022. *See Preterm-Cleveland v. Yost*, 394 F.Supp.3d 796, 804 (S.D.Ohio 2019) (decision enjoining S.B. 23); No. 1-19-cv-00360, Dkt. #100 (S.D.Ohio) (order dissolving injunction). In issuing the preliminary injunction, the court held, based on the United States Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and its progeny, that the plaintiffs were "certain to succeed on the merits of their claim that S.B. 23 is unconstitutional on its face." *Preterm-Cleveland v. Yost* at 800. The court found that "the obstacle Ohio women will face" in accessing abortion under S.B. 23 was "not merely 'substantial,' but rather, 'insurmountable.'" *Id.* at 801, quoting *Preterm-Cleveland v. Himes*, 294 F.Supp.3d 746, 754 (S.D.Ohio 2018), *aff'd*, 940 F.3d 318 (6th Cir.2019), *rev'd sub nom. Preterm-Cleveland v. McCloud*, 994 F.3d 512 (6th Cir.2021).

Within an hour of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* ("*Jackson Women's Health Organization*"), which overruled nearly 50 years of precedent in holding that the right to abortion is not protected by the federal Constitution, the *Yost* defendants filed an emergency motion to vacate the injunction. The district court granted the motion that same day, and S.B. 23 is now in effect. No. 1-19-cv-00360, Dkt. #96 (motion to vacate); *id.* Dkt. #100 (order dissolving the injunction). In the few days it has been in effect, S.B. 23 has already decimated abortion access in Ohio and, as the district court found, enforcement of S.B. 23 "will have the effect of preventing nearly all abortions in Ohio." *Preterm-Cleveland*, 394 F.Supp.3d at 801. Absent action from this Court, it will continue to

cause widespread and irreparable harm to Ohioans. Relators respectfully plead this Court to act expeditiously to protect the fundamental liberties guaranteed by the Ohio Constitution, and issue a writ of mandamus directing Respondents to abide by Ohio's former gestational age restriction and not enforce S.B. 23.

I. FACTUAL BACKGROUND

A. S.B. 23 Is a Radical Departure from the Longstanding, Prior State of Abortion Access in Ohio.

Until June 24, 2022, abortion was legal and available in Ohio prior to 20 weeks post-fertilization, which is 22 weeks LMP. R.C. 2919.201; Verified Complaint ¶ 43. In accordance with existing law, Relators provided medication abortion (available up to ten weeks LMP), and/or procedural abortion (available up to 21 weeks and 6 days LMP), depending on the clinic. Verified Complaint ¶¶ 27-33.

S.B. 23 has caused a sea change. It radically restricts access to abortion with very limited exceptions. S.B. 23 requires providers to determine whether embryonic cardiac activity is present and, if cardiac activity is detected, makes it a crime to "perform or induce an abortion." 2019 Am.Sub.S.B. No. 23, Section 1, amending R.C. 2919.195(A). In a normally developing embryo, cardiac activity can be detected with an ultrasound at approximately six weeks LMP, and in some cases as early as five weeks. Verified Complaint ¶ 52. This is a very early point in gestation: the "cardiac activity" detected this early is from cells that form the basis for the development of the heart later in pregnancy. *Id.*

S.B. 23 provides for two very limited exceptions. It permits abortion after cardiac activity is detected only if the abortion is necessary to prevent (1) the "death of the pregnant woman," or (2) a "serious risk of the substantial and irreversible impairment of a major bodily function." 2019 Am.Sub.S.B. No. 23, Section 1, amending R.C. 2919.195(B). "Serious risk of

the substantial and irreversible impairment of a major bodily function" is defined in the statute narrowly to mean "any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function." R.C. 2919.19(A)(12) and 2919.16(K). A "medically diagnosed condition that constitutes a 'serious risk of the substantial and irreversible impairment of a major bodily function' includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes," but explicitly "does not include a condition related to the woman's mental health." *Id.*

A violation of S.B. 23 by a provider is a fifth-degree felony, punishable by up to one year in jail and a fine of $2,500. 2019 Am.Sub.S.B. No. 23, Section 1, amending R.C. 2919.195(A); R.C. 2929.14(A)(5), and 2929.18(A)(3)(e). In addition to criminal penalties, the state medical board may assess a forfeiture of up to $20,000 for each violation of S.B. 23, and limit, revoke, or suspend a physician's medical license. *See* 2019 Am.Sub.S.B. No. 23, Section 1, amending R.C. 2919.1912(A) and 4731.22(B)(10). Moreover, Relator clinics could face civil penalties and revocation of their ambulatory surgical center licenses for a violation of S.B. 23. R.C. 3702.32. A patient may also bring a civil action against a provider who violates S.B. 23 and recover damages in the amount of $10,000 or more. 2019 Am.Sub.S.B. No. 23, Section 1, amending R.C. 2919.199(B)(1).

B. S.B. 23 Bans Nearly All Abortion in Ohio.

A ban on abortion at six weeks allows only approximately two weeks—at most—after a missed period to obtain an abortion. Verified Complaint ¶ 54. Many women are not even aware they are pregnant by that time.[1] For example, many women do not have periods at precise,

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

regular intervals every four weeks, often due to their age or common medical conditions. Office on Women's Health, U.S. Dept. of Health & Human Servs., *Period Problems*, https://www.womenshealth.gov/menstrual-cycle/period-problems#2 (accessed June 28, 2022). *See also* Lucy Whitaker & Hilary O.D. Critchley, *Abnormal Uterine Bleeding*, 34 Best Practice & Research Clinical Obstetrics & Gynaecology 54 (July 2016) (finding that 14 to 25 percent of women have irregular menstrual cycles).

For those who do know they are pregnant, two weeks often is not sufficient time to decide to end a pregnancy and make necessary arrangements to receive abortion care. More time is often needed to obtain leave from work, arrange for childcare (since the majority of women who obtain abortions already have at least one child), find transportation to a provider, secure funds for the abortion and/or travel, and actually travel to a provider. *See* Verified Complaint ¶ 58.[2]

The delay these obstacles cause is compounded by Ohio's existing abortion regulations. Ohio law mandates that patients (1) make an in-person trip to a clinic at least 24 hours before obtaining an abortion; (2) comply with mandated counseling and consent procedures; (3) receive information on the "medical risks" associated with having an abortion, as well as the "probable gestational age of the zygote, blastocyte, embryo, or fetus"; (4) and sign a consent form certifying they have received this information. R.C. 2317.56.

On top of all this, Ohio law limits patients' access to public funds to cover abortion services, making it more difficult for women—particularly those who are poor or low-income—to obtain the money necessary to promptly access abortion care. *See* R.C. 9.04 and 3901.87

[2] The embryonic stage of pregnancy lasts from fertilization until approximately eight to ten weeks LMP—an embryo does not develop into a fetus until about 11 weeks LMP. Verified Complaint ¶ 53.

(prohibiting Medicaid and other public insurance programs, as well as private insurance plans listed on Ohio's federally run insurance exchange, from covering abortion); R.C. 5101.56 (providing that "[u]nless required by the United States Constitution or by federal statute, regulation, or decisions of federal courts, state or local funds may not be used for payment or reimbursement of abortion services" except in limited circumstances). For all of these reasons, it is extremely difficult to obtain an abortion before six weeks LMP. Indeed, before S.B. 23 went into effect, the vast majority of abortions in Ohio took place after six weeks LMP. For example, from January 1, 2022 through June 24, 2022, less than 1 percent of abortions performed at Planned Parenthood Southwest Ohio Region took place prior to 6 weeks LMP. Verified Complaint ¶ 61.

C. Absent Immediate Action from This Court, Access to Abortion in Ohio Will Remain Severely Limited.

S.B. 23 has drastically restricted Ohioans' access to abortion and will continue to do so absent action from this Court. For the many women who are unable to access abortion in Ohio within six weeks LMP, travel to another state may not be an option due to time and expense constraints. This is particularly true for those in low-income communities, which comprise the majority of patients seeking abortions. *See* Natl. Academies of Sciences, Eng. & Medicine, *The Safety and Quality of Abortion Care in the United States*, 6 (2018) (finding that 75 percent of women who obtain abortion care are "poor or low income"). Patients in these communities are more likely to be subjected to delays in seeking medical care because of associated costs. Bd. of Governors of the Fed. Res. Sys., *Report on the Economic Well-Being of U.S. Households in 2021* (May 2022), https://www.federalreserve.gov/publications/2022-economic-well-being-of-us-households-in-2021-dealing-with-unexpected-expenses.htm (accessed June 28, 2022) (finding

that 38 percent of people with family incomes of less than $25,000 went without some medical care because they couldn't afford it).

Obtaining out-of-state care will only become more difficult since neighboring states have enacted their own abortion bans. *See* Payal Chakraborty et al., *How Ohio's Proposed Abortion Bans Would Impact Travel Distance to Access Abortion Care*, 54 Perspect. Sex Reprod. Health 2022, 1–10 (Apr. 20, 2022) (finding that if *Roe* is overruled, the current average driving distance from an Ohio county to the nearest abortion facility would increase from 26 miles to 157 miles (best case) or 269 miles (worst case) given abortion restrictions in Ohio and neighboring states). As of the date of this filing, Ohio's neighbor Kentucky has enacted an abortion ban, making access even more difficult for those women who could conceivably travel to that state to receive care. Nationwide, seven states have banned abortion, with nine additional states expected to ban abortion in the coming days. *See Tracking the States Where Abortion Is Now Banned*, N.Y. Times (updated June 28, 2022 5:45 P.M.), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html. As a result, under S.B. 23, pregnant women who do not want to carry their pregnancies to term will be left with few options.

Women who cannot obtain abortion in Ohio and are unable to obtain care out of state will be forced to either carry to term and give birth against their will—incurring irreparable physical, economic, emotional, and psychological harms—or to resort to potentially unsafe methods of abortion. *See* Verified Complaint ¶ 78. *See also* Diana Green Foster, Ph.D, *The Turnaway Study: The Cost of Denying Women Access to Abortion* (2020) (examining the physical, mental, and socioeconomic consequences of receiving an abortion compared to carrying an unwanted pregnancy to term); Natl. Inst. of Child Health & Human Dev., *What Are Some Common*

Complications of Pregnancy?, https://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo/complications (accessed June 28, 2022) (identifying as "common complications of pregnancy" high blood pressure, gestational diabetes, infections, preeclampsia, preterm labor, depression and anxiety, pregnancy loss or miscarriage, and stillbirth).

The consequences of S.B. 23 will be disproportionately felt by communities of color. In 2020, 48.1 percent of Ohioans who obtained abortions were Black, while the Black community represented only 13.1 percent of Ohio's population; 12.1 percent of Ohioans who obtained abortions were from other communities of color (Indigenous (American Indian), Asian/Pacific Islander, Multiracial, and Hispanic Ohioans) while those communities made up only 9.3 percent of Ohio's population. Ohio Dept. of Health, *Induced Abortions in Ohio*, https://odh.ohio.gov/know-our-programs/vital-statistics/resources/vs-abortionreport2020 (accessed June 28, 2022); U.S. Census Bureau, *Quick Facts: Ohio*, https://www.census.gov/quickfacts/OH (accessed June 28, 2022). The maternal mortality rate in Ohio is also significantly higher for Black women, further exacerbating the impact of S.B. 23. In Ohio, Black women are two and a half times more likely to die from a cause related to pregnancy than white women. Ohio Dept. of Health, *A Report on Pregnancy-Associated Deaths in Ohio 2008 - 2016*, https://tinyurl.com/bk6yphh3 (accessed June 28, 2022) (Black women in Ohio have a maternal mortality rate of 29.5 deaths per 100,000 births compared to 11.5 deaths per 100,000 births for white women).

Absent expeditious action from this Court, S.B. 23 will continue to inflict serious and irreparable harm on pregnant women in Ohio.

II. ARGUMENT

A. A Writ of Mandamus Is an Appropriate Mechanism for Relators' Challenge to S.B. 23.

This is an original action in mandamus commenced pursuant to this Court's original jurisdiction under Article IV, Section 2 of the Ohio Constitution and Chapter 2731 of the Ohio Revised Code. The claims arise from Respondents' current and ongoing violation of Ohioans' constitutional rights through enforcement of S.B. 23. *See infra* Section II.D-E.

This Court has "consistently construed" mandamus actions that "challenge the constitutionality of a statute" as "squarely within [the Court's] original mandamus jurisdiction." *State ex rel. Ethics First-You Decide Ohio Political Action Commt. v. DeWine*, 147 Ohio St.3d 373, 2016-Ohio-3144, 66 N.E.3d 689, ¶ 11 ("*Ethics First*"). *See also State ex rel. Zupancic v. Limbach*, 58 Ohio St.3d 130, 133, 568 N.E.2d 1206 (1991) ("[A] mandamus action may test the constitutionality of a statute."); *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717, 780 N.E.2d 981, ¶ 12 (granting writs of mandamus and prohibition to find law permitting warrantless drug testing of workers unconstitutional).

This matter thus falls "squarely within [the Court's] original mandamus jurisdiction." *See Ethics First* at ¶ 11. Relators seek a writ of mandamus ordering Respondents to abide by the gestational age restriction in place in Ohio prior to S.B. 23—specifically, R.C. 2919.201, which restricts abortion beginning at 22 weeks LMP—and not enforce S.B. 23. Such a request is appropriately made in mandamus, and this Court views challenges such as these as "seeking a mandatory injunction to compel the respondent public official to abide by the provisions of preexisting law." *Ethics First* at ¶ 11.

Additionally, a writ of mandamus is an appropriate remedy where the challenged statute affects "fundamental" or "core" rights of Ohio citizens and the circumstances "demand early

resolution." *Ohio Bur. of Workers' Comp.* at ¶ 12. Such is the case here. S.B. 23 violates Ohioans' fundamental right to abortion, guaranteed by the substantive due process and equal protection provisions of the Ohio Constitution, both of which are "so fundamental as to be contained in [Ohio's] Bill of Rights." *Id.*; *see infra* Section II.D-E. An immediate resolution is necessary because, absent a writ, Ohioans will continue to be subjected to irreparable harm; specifically, they will continue to be denied their fundamental rights secured by the Ohio Constitution and forced to continue pregnancies against their will, at risk to their health and well-being. *See Magda v. Ohio Elections Comm.*, 2016-Ohio-5043, 58 N.E.3d 1188, ¶ 38 (10th Dist.), quoting *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir.2001) ("A finding that a constitutional right has been threatened or impaired mandates a finding of irreparable injury").

This Court has consistently used mandamus actions to determine the constitutionality of statutes that have a widespread effect. *See Ohio Bur. of Workers' Comp.* at ¶ 12 ("[The challenged law] affects virtually everyone who works in Ohio."). The effect here is widespread: S.B. 23 is currently harming and will continue to harm the countless pregnant Ohioans who, for the reasons set forth above, *see supra* Section I.B-C, are not able to obtain an abortion before six weeks. The uniquely uniform and wide-reaching relief that only this Court can provide is necessary to expeditiously stop the ongoing violation of Ohioans' constitutional rights.

B. The Verified Complaint Meets the Requirements for a Writ of Mandamus.

Relators meet each of the requirements for bringing a writ of mandamus: (1) "a clear legal right to the relief requested," (2) "a clear legal duty to perform the requested act on the part of the respondent," and (3) "no plain and adequate remedy at law." *State ex rel. Parker v. Lucas Cty. Job & Fam. Servs.*, 176 Ohio App.3d 715, 2008-Ohio-3274, 893 N.E.2d 558, ¶ 9 (6th Dist.), *cause dismissed*, 120 Ohio St.3d 1529, 2009-Ohio-717, 901 N.E.2d 247.

First, as established above, Relators have a clear legal right to the requested relief. S.B. 23 is unconstitutional, *see infra* Section II.D-E, and Relators, who have standing to bring this action on behalf of their patients, "have a clear legal right to have respondents proceed under the former [statute]."[3] *See Zupancic*, 58 Ohio St.3d at 134, 568 N.E.2d 1206. This Court can grant the necessary relief by directing Respondents to uphold the Ohio Constitution and abide by preexisting law.

Second, Respondents have a clear legal duty to perform the requested acts and to uphold the Ohio Constitution. The Ohio Attorney General and prosecuting attorneys have taken oaths of office to be faithful to the Ohio Constitution. *See* R.C. 3.23 ("The oath of office of every . . . officer, deputy, or clerk shall be to support the constitution of the United States and the constitution of this state, and faithfully to discharge the duties of the office."). *See also* R.C. 309.03 (requiring prosecuting attorneys to take the oath). Likewise, the Director of the Ohio Department of Health, and the Secretary and Supervising Members of the State Medical Board

[3] It is well established in Ohio that parties may rely on third-party standing in circumstances such as these. *See State v. Madison*, 160 Ohio St.3d 232, 2020-Ohio-3735, 155 N.E.3d 867, ¶ 95 (recognizing that defendants may rely on "third-party standing to challenge on equal-protection grounds the exclusion of petit jurors on the basis of race or sex"), *reconsideration denied*, 160 Ohio St.3d 1410, 2020-Ohio-4574, 153 N.E.3d 116 (Table), ¶ 20, *cert. denied sub nom. Madison v. Ohio*, 141 S.Ct. 2597 (Mem), 209 L.Ed.2d 733 (2021); *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 49, quoting *Kowalski v. Tesmer*, 543 U.S. 125, 129-130, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004). Moreover, Ohio courts follow federal standing law, *Brinkman v. Miami Univ.*, 12th Dist. Butler No. CA2006-12-313, 2007-Ohio-4372, ¶ 43 (observing that Ohio courts "regularly" follow federal precedent "on matters of standing"), and federal courts have consistently held that abortion providers have standing to raise claims to protect their patients' fundamental right to access abortion. *See June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118, 207 L.Ed.2d 566 (2020) (plurality opinion) (collecting cases). *See also E. Liverpool v. Columbiana Cty. Budget Comm.*, 114 Ohio St.3d 133, 2007-Ohio-3759, 860 N.E.2d 705, ¶ 22 (adopting the federal test for third-party standing), citing *Kowalski*, 543 U.S. at 129-130. *Jackson Women's Health Organization* does not implicate the Court's long established third-party standing doctrine.

of Ohio—state officials appointed by the Governor—are required to uphold the Ohio Constitution in discharging their duties. *See* R.C. 3.22 ("Each person chosen or appointed to an office under the constitution or laws of this state…shall take an oath of office before entering upon the discharge of his duties.").

Because S.B. 23 is unconstitutional, Respondents must abide by Ohio's prior gestational age restriction to uphold their obligations to the Ohio Constitution. *See Zupancic*, 58 Ohio St.3d at 133, 568 N.E.2d 1206 (noting that the court "will necessarily have to address the constitutionality" of the challenged statute to determine the merits of relators' request for "respondent to abide by a former statute"). *See also Ethics First*, 147 Ohio St.3d at 376, 2016-Ohio-3144, 66 N.E.3d 689, ¶ 11 ("The fact that adjudicating the case requires the court also to prohibit the official from acting under the current version of the statute is 'only ancillary' and does not alter the fundamental nature of the relief sought."), quoting *Zupancic*, 58 Ohio St.3d at 133, 568 N.E.2d 1206. The "essence" of Relators' request is that Respondents be ordered to "abide by a former statute," which allows abortion up to 22 weeks LMP. *See Ethics First* at ¶ 11. The Court has analyzed requests that a law be declared unconstitutional and respondents be commanded to abide by preexisting law as requests for a "mandatory injunction" coupled with a declaratory judgment. *See id.* ("When confronted with complaints that challenge the constitutionality of a statute, we have consistently construed them as seeking a mandatory injunction to compel the respondent public official to abide by the provisions of preexisting law[.]"). Such requests are appropriate before the Court on a mandamus action. *See id.*

Third, absent a writ, Relators have no plain and adequate remedy at law. Relators' only avenue for complete, timely, state-wide relief is through a writ from this Court. Given that S.B. 23 affects the overwhelming majority of Ohioans seeking abortions, there are no other

practicable means of protecting the rights of all Ohioans affected by S.B. 23. Without action from this Court, S.B. 23 may be subject to piecemeal and duplicative litigation, which could result in temporary remedies and inconsistent rulings. For example, women and healthcare providers in counties throughout Ohio—including providers who are not relators in this action—may seek injunctive relief from trial courts in different counties, and those cases may result in different outcomes. Additionally, in the confusion surrounding the sudden enforcement of the law, county prosecutors may bring criminal charges against Relators and individual providers.

Without a clear, binding, state-wide ruling from this Court, there is a significant risk of inconsistent rulings by the lower courts and patchwork enforcement of S.B. 23. Patients may be denied their right to abortion both because of these inconsistent rulings, as well as providers' resulting uncertainty in the face of conflicting decisions of unpredictable duration. *See Zupancic*, 58 Ohio St.3d at 134, 568 N.E.2d 1206 ("[T]he alternative remedy would not be as complete as a writ of mandamus."). Moreover, the availability of a declaratory judgment from a lower court does not defeat a complaint for a writ of mandamus. *See id.* at 133 ("[W]here declaratory judgment would not be a complete remedy unless coupled with ancillary relief in the nature of mandatory injunction, the availability of declaratory injunction is not an appropriate basis to deny a writ to which the relator is otherwise entitled.").

A writ of mandamus is appropriate and necessary to ensure complete, uniform, and timely relief from the unconstitutional enforcement of S.B. 23 and protect all Ohioans' ability to exercise their fundamental rights.

C. The Ohio Constitution Protects the Fundamental Right to an Abortion.

The Ohio Constitution's broad protections for individual liberties under Article I, Sections 1, 16, and 21 include the right to abortion. As this Court has acknowledged, "the Ohio

Constitution is a document of independent force," and this Court can (and routinely does) interpret the Ohio Constitution more broadly than its federal counterpart. *See Arnold v. Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993). *See also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982) ("[A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution . . . ."); *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 21 ("Federal opinions do not control [the Court's] independent analyses in interpreting the Ohio Constitution, even when [it looks] to federal precedent for guidance."). Key textual differences between the Ohio and federal constitutions, as well as their different historical contexts, make evident that the Ohio Constitution is a stronger source of protection for individual liberties and guarantees Ohioans' right to abortion.

1. The Ohio Constitution Provides Broad Protections for Individual Liberties That are Independent of the United States Constitution.

State courts "are unrestricted in according greater civil liberties and protections to individuals and groups" than their federal counterparts. *Arnold*, 67 Ohio St.3d at 42, 616 N.E.2d 163. As such, this Court has held in numerous contexts that the Ohio Constitution is more protective of individual rights than the federal Constitution, including: free exercise of religion, *Humphrey v. Lane*, 89 Ohio St.3d 62, 728 N.E.2d 1039; juveniles' right to counsel, *State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156; government appropriation of private property, *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115; exclusion of physical evidence obtained due to unmirandized statements, *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985; warrantless arrests for minor misdemeanors, *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175. By refusing to "delegate[] its final authority to interpret the Ohio [Constitution] to the United States

Supreme Court" in these cases, this Court has upheld its duty of interpreting the Ohio Constitution separate and apart from its federal counterpart. *See Stolz v. J & B Steel Erectors, Inc.*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, ¶ 42 (Fischer, J., concurring) (treating state and federal constitutional provisions as functionally equivalent represents an "'upward delegation' of [this Court's] duty to interpret the Ohio Constitution [which] is improper under our federal system and unconstitutional under the Ohio Constitution") (citing Article IV, Section 1, Ohio Constitution). *See also* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law*, 187-188 (2018) ("A grave threat to independent state constitutions… is lockstepping: the tendency of some state courts to diminish their constitutions by interpreting them in reflexive imitation of the federal courts' interpretation of the Federal Constitution.").

This Court has made clear that it is appropriate to depart from prior decisions and find the Ohio Constitution provides greater protections for individual rights, particularly when the United States Supreme Court has narrowed the scope of corresponding federal rights. In *Humphrey*, this Court held that the Ohio Constitution's Free Exercise Clause is broader than its federal counterpart, expressly departing from the United States Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). In so doing, the *Humphrey* court explained that the *Smith* decision prompted it to analyze the differences between the state and federal Free Exercise Clauses and deviate from prior decisions in which it "mirrored federal jurisprudence as to protection of religious freedom." *Humphrey* at 67. *See also State v. Hackett*, 164 Ohio St.3d 74, 2020-Ohio-6699, 172 N.E.3d 75, ¶ 26 (Fischer, J., concurring) (encouraging parties to "not presume that the rights afforded to a person under the United States Constitution are the only

rights or are the same rights as those afforded to a person under the Ohio Constitution . . . even when this court has previously ruled that the state and federal Constitutions are coextensive"); *Bode* at ¶¶ 23-24.

2. The Ohio Constitution Protects the Right to Abortion.

Significant textual and historical differences between the Ohio Constitution and the United States Constitution demonstrate that the Ohio Constitution's substantive due process protections are broader, and encompass the fundamental right to abortion. Ohio's Due Course of Law Clause provides more expansive protections of substantive due process rights than the United States Constitution's Due Process Clause, and other distinctive provisions in the Ohio Constitution that protect the right to liberty and autonomy in medical decision-making also encompass the right to abortion. Additionally, the history of the Ohio Constitution demonstrates the State's commitment to protecting individual rights and rejecting governmental intrusions on individual liberties.

a. The Ohio Constitution's Due Course of Law Clause Protects the Substantive Due Process Right to Abortion.

The Ohio Constitution's Due Course of Law Clause provides:

> All courts shall be open, and every person, for an injury done him in his land, goods, *person*, or reputation, *shall have remedy by due course of law*, and shall have justice administered without denial or delay….Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

(Emphasis added.) Ohio Constitution, Article I, Section 16. This provision protects substantive as well as procedural due process rights. *See Stolz*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, at ¶ 13, citing *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶¶ 48-49. Ohio courts recognize the breadth of the Ohio Constitution's substantive due process protections, finding that they extend to "matters involving privacy,

procreation, bodily autonomy, and freedom of choice in health care decision making." *Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A 2101148, at 8 (Apr. 19, 2021) ("*Planned Parenthood Southwest Ohio I*"), citing *Stone v. City of Stow*, 64 Ohio St.3d 156, 160-163, 593 N.E.2d 294 (1992) (referencing a right to privacy protected by the Ohio Constitution). *See also State v. Boeddeker*, 1st Dist. Hamilton No. C-970471, 1998 WL 57234, *2 (Feb. 13, 1998) (substantive due process under the Ohio Constitution includes a right to privacy that, in the context of "sexual and reproductive matters," is "fundamental"); *Planned Parenthood Southwest Ohio Region v. Ohio Dept. of Health*, Hamilton C.P. No. A 2100870, at 6 (Jan. 31, 2022) ("*Planned Parenthood Southwest Ohio II*") (recognizing the "breadth of the Ohio Constitution's guarantees of bodily autonomy, privacy, and freedom of choice in health care").

The text of the provision specifically supports this view. The Due Course of Law Clause affirmatively guarantees "remedy by due course of law" to "every person, for an injury done him in his land, goods, *person*, or reputation." (Emphasis added.) Ohio Constitution, Article I, Section 16. As one Ohio court observed in parsing this language, "[d]eprivation of reproductive autonomy falls squarely within the meaning of an injury done to one's person under the Ohio Constitution." *Planned Parenthood Southwest Ohio I* at 10. Indeed, protection from injuries to one's "person" necessarily includes the right to bodily integrity, which in turn encompasses the right to terminate a pregnancy. *See Preterm Cleveland v. Voinovich*, 89 Ohio App.3d 684, 712, 627 N.E.2d 570 (10th Dist.1993) (Petree, J., concurring in part and dissenting in part) (noting the "tremendous demands and the innate risks of reproduction" in finding that "regulation of abortion inherently impacts on a right to bodily integrity"). Given the significant physical impacts and health risks of pregnancy, there is no doubt that the forced continuation of

pregnancy infringes on a woman's right to bodily integrity. *See, e.g.*, *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 653 (Miss.1998) ("Protected within the right of autonomous bodily integrity is an implicit right to have an abortion."); *Commt. to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 274-275 (Cal.1981) ("[F]or a woman, the constitutional right of choice is essential to her ability to retain personal control over her own body."); *Women of the State of Minnesota by Doe v. Gomez*, 542 N.W.2d 17, 27 (Minn.1995) (explaining that "a woman's decision between childbirth and abortion . . . is of such great import that it governs whether the woman will undergo extreme physical and psychological changes and whether she will create lifelong attachments and responsibilities"); *Hodes & Nauser, MDS, P.A. v. Schmidt*, 440 P.3d 461, 484 (Kan.2019) ("[A]bortion laws do not merely restrict a particular action; they can impose an obligation on an unwilling woman to carry out a long-term course of conduct that will impact her health and alter her life. Pregnancy often brings discomfort and pain and, for some, can bring serious illness and even death."); *Planned Parenthood of Michigan v. Attorney General of the State of Michigan*, 22-000044-MM, Opinion & Order at 21 (Mich.Ct. of Claims May 17, 2022) ("Pregnancy implicates bodily integrity because even for the healthiest women it carries consequential medical risks. Pregnant women face the prospect of developing conditions that may result in death, or may forever transform their health, such as blood clots and hypertensive disorders.").

b. The Ohio Constitution's Protection of the Right to Liberty and Health Care Freedom Reinforce the Fundamental Right to Abortion.

Other distinctive provisions in the Ohio Constitution, when considered together with Ohio's Due Course of Law Clause, further demonstrate the fundamental right to abortion under the Ohio Constitution. In particular, the Ohio Constitution contains an affirmative statement of

Ohioans' fundamental right to liberty that reaches beyond any provision of the federal Constitution. *See, e.g.*, *Preterm Cleveland*, 89 Ohio App.3d at 691, 627 N.E.2d 570. Article I, Section 1 of the Ohio Constitution provides that "[a]ll men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." While this section is not an independent source of self-executing protections, *see State v. Williams*, 88 Ohio St.3d 513, 524, 728 N.E.2d 342 (2000), it is a statement of fundamental rights that is given practical effect by other constitutional provisions, such as the Due Course of Law Clause, *see, e.g., Steele v. Hamilton Cty. Community Mental Health Bd*., 90 Ohio St.3d 176, 736 N.E.2d 10 (2000).

This Court has recognized that Article I, Section I encompasses Ohioans' liberty interests in "personal security, bodily integrity, and autonomy," which "are rights inherent in every individual." *Steele* at 180-181 (recognizing Ohioans' fundamental right to refuse medical treatment stemming from these "cherished liberties"). *See also id*. at 181 (citation omitted) (quoting *Schloendorff v. Soc. of New York Hospital*, 211 N.Y. 125, 129, 105 N.E. 92 (1914)) ("Our belief in the principle that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body,' is reflected in our decisions."). And the Court has long acknowledged the breadth of Article I, Section I's protections. Over a century before its decision in *Steele*, this Court held that Article I, Section I "embrace[s] the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare." *Palmer & Crawford v. Tingle*, 55 Ohio St. 423, 441, 45 N.E. 313 (1896). With this considerable history, and given the broad scope of the Ohio Constitution's liberty provision, it is not surprising that at least one Ohio

court of appeals has concluded that the right to an abortion is protected by the Ohio Constitution. *Preterm Cleveland*, 89 Ohio App.3d at 691, 627 N.E.2d 570 ("it would seem almost axiomatic that the right of a woman to choose whether to bear a child is a liberty" protected by the Ohio Constitution).

Moreover, Ohio courts have explained that Article I, Section 1 recognizes inherent and inalienable rights, and therefore provides broader protection for rights than the United States Constitution. *See* Ohio Constitution, Article I, Section 1 ("[a]ll men . . . have certain inalienable rights," including the right to "liberty"). In *Preterm Cleveland*, the Court concluded: "In that sense, the Ohio Constitution confers greater rights than are conferred by the United States Constitution[.]" *Id.* Other state courts analyzing similar constitutional liberty provisions have also held that the right to terminate a pregnancy falls under the umbrella of inherent and inalienable rights. *See, e.g.*, *Hodes & Nauser, MDS, P.A. v. Schmidt*, 309 Kan. 610, 646, 440 P.3d 461 (2019) ("At the core of the natural rights of liberty and the pursuit of happiness is the right of personal autonomy, which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination. This ability enables decision-making about issues that affect one's physical health, family formation, and family life."); *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 653, 654 (Miss.1998) ("The right to privacy, whether founded in common law or natural law, is constitutionally guaranteed under . . . the Mississippi Constitution," and "the state constitutional right to privacy includes an implied right to choose whether or not to have an abortion."); *Right to Choose v. Byrne*, 91 N.J. 287, 303, 306, 450 A.2d 925 (1982) (holding that the natural and inalienable rights enshrined in the state's constitution include the "right of privacy," which encompasses "the fundamental right of a woman to control her body and destiny" specifically "the choice to terminate a pregnancy").

Article I, Sections 1 and 16 must also be read in light of Article I, Section 21 of the Ohio Constitution—the Health Care Freedom Amendment—which has no analogue in the United States Constitution. The Amendment, enacted in 2011 with overwhelming two-to-one support from Ohio voters, "[p]reserv[es] [Ohioans'] freedom to choose health care and health care coverage"—expressly providing for the protection of individual autonomy in medical decision-making. Ohio Constitution, Article I, Section 21. *See also* Ohio Secy of State, *State Issue 3: November 8, 2011 Official Results*, https://www.ohiosos.gov/elections/election-results-and-data/2011-elections-results/state-issue-3-november-8-2011/. When read together with the provisions discussed above, the Health Care Freedom Amendment further bolsters the emphasis on protection of liberty and personal autonomy, and reinforces that these protections extend to Ohioans' right to make decisions about their own bodies—including the fundamental right to make a decision as private and as central to a person's bodily integrity as the decision to have an abortion.

In keeping with the Ohio Constitution's broad protections for individual rights, personal autonomy, and health care freedom, this Court should join the many other courts that have confirmed state constitutional protections for abortion that are independent of any provision of the United States Constitution. *See, e.g., Women of the State of Minnesota*, 542 N.W.2d at 27 (holding that the right to privacy under the Minnesota constitution, which is grounded in "protecting the integrity of one's own body" and "protects only fundamental rights," "encompasses a woman's right to decide to terminate her pregnancy"); *Hodes*, 309 Kan. at 646, 440 P.3d 461 (holding the right to decide whether to continue a pregnancy falls under the natural right to personal autonomy guaranteed by the Kansas Constitution); *Pro-Choice Mississippi*, 716 So.2d at 653, 654 (concluding the Mississippi Constitution's right to privacy encompasses the

right to choose whether or not to have an abortion); *Right to Choose*, 91 N.J. at 303, 306, 450 A.2d 925 (holding the New Jersey Constitution protects the fundamental right to choose whether to have an abortion); *Armstrong v. State*, 989 P.2d 364, 377 (Mont.1999) (holding procreative autonomy is a fundamental right of individual privacy under the Montana Constitution); *Valley Hosp. Assn, Inc. v. Mat-Su Coal. For Choice*, 948 P.2d 963, 969 (Alaska 1997) (holding Alaska's express constitutional privacy provision encompasses reproductive rights); *In re T.W.*, 551 So.2d 1186, 1193 (Fla.1989) (holding that the Florida constitutional right to privacy encompasses a woman's right to terminate pregnancy); *Commt. to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 279, 172 Cal.Rptr. 866, 625 P.2d 779 (1981) (recognizing the right to procreative choice falls under the California constitutional right to privacy).

c. The State's Long History of Valuing Individual Liberties and Rejecting Governmental Intrusion into Personal Decisions Supports Interpreting the Constitution to Protect the Right to Abortion.

The history of the Ohio Constitution makes clear that individual liberties and limits on legislative power are core values at the heart of the Constitution, reinforcing that the text should be interpreted to protect the right to abortion. *See State v. Smith*, 162 Ohio St.3d 353, 2020-Ohio-4441, 165 N.E.3d 1123, ¶ 29 ("In construing our state Constitution, we look first to the text of the document as understood in light of our history and traditions."). Ohio's first Constitution, adopted in 1802, was "designed to protect individual rights" through "[b]oth the structure of the new government and the inclusion of a Bill of Rights." Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution*, 21 (2011). Despite these aims, several weaknesses in the 1802 Constitution soon became apparent. One major flaw was the lack of constraints on the General Assembly, which led to "many abuses" that caused public outrage and led to calls for a constitutional convention. *Id.* at 23-24, 27. *See also id.* at 35 ("Over the course of five decades

under the first constitution, . . . the people began to see the legislature as the source of many, if not most, of the problems of government, and the new constitution reflected this general distrust of legislative power."). Accordingly, the 1851 Constitution included numerous limitations on the legislature's power. *Id.* at 35. In addition, the 1851 Constitution was ultimately reordered to emphasize the importance of individual rights. Whereas the Bill of Rights was the final article in the 1802 Constitution, the drafters of the 1851 Constitution moved the Bill of Rights to Article I, indicating that individual liberties stood at the forefront of Ohio's government. *See id.* at 81. The Bill of Rights was adopted with little debate at the 1850-51 Constitutional Convention, underlining the broad support for the strong protection of individual rights. *See id.* at 38.

Interpreting the Ohio Bill of Rights to protect access to abortion comports with the strong protections for individual liberties and freedom from unjust governmental intrusion underlying the 1851 Constitution. The concept of liberty—which stood at the very core of the Bill of Rights and the Ohio Constitution itself—did not include a "carve out" excluding the right to abortion. Abortion was a common and widely accepted practice in Ohio throughout the 19th century, particularly up to the point of quickening. *See* James C. Mohr*, Abortion in America: The Origins and Evolution of National Policy*, 206-208 (1978) (discussing the findings in a report by a special committee of the Ohio legislature); Loren G. Stern, *Abortion: Reform and the Law*, 59 J. Criminal L. & Criminology 84, 84 fn.1 (1968) (defining quickening as "that stage of gestation, usually sixteen to twenty weeks after conception, when the woman feels the first fetal movement"). The prevalence of abortion in Ohio continued even after Ohio passed legislation in

1834 that made abortion before quickening a misdemeanor and abortion after quickening a "high misdemeanor." *See* Stern, *supra*, at 84 fn.1; Mohr, *supra*, at 206-208.[4]

Ohio's early abortion restrictions, which were repealed in 1974, *see* R.C. 2901.16, 1972 H 511, eff. 1-1-74, provide no insight into the contours of the Ohio Constitution's liberty protections at the time of its adoption or today, and present no barrier to finding that the Ohio Constitution protects the right to an abortion. The 1834 abortion regulations were likely intended as a health measure for what was, at that time, a risky procedure. *See Steinberg v. Brown*, 321 F.Supp. 741, 750 (N.D.Ohio 1970) (Green, J., dissenting) ("Virtually all the cases which have considered [the legality of abortion] recognize that when the abortion statutes were enacted the surgical procedure required in an abortion presented a substantial risk of death to the woman involved."); Bernstein, *supra*, at 1192-1195 (discussing the dangers of abortion prior to modern developments). Ohio's abortion regulations were passed as part of a bill regulating the general practice of medicine, with specific focus on safety concerns related to unsafe prescribing practices.[5] *See Steinberg*, 321 F.Supp. at 753 (Green, J., dissenting) (reviewing the history of Ohio's abortion laws). *See also* Mohr at 40 (asserting that the bill "demonstrated . . . that the

[4] Early Ohio law was also unusually permissive in that it declined to treat abortion at any stage as manslaughter, in contrast to other states that passed abortion laws around this time. *See Roe*, 410 U.S. at 138 (observing that New York's abortion statute, which was enacted in 1828 and "serve[d] as a model for early anti-abortion statutes," made abortion of an "unquickened fetus" a misdemeanor, but made abortion of a quickened fetus second-degree manslaughter).

[5] One provision of the bill made it an offense for "any physician, or other person, while in a state of intoxication to prescribe any poison, drug or medicine to another person, so as to endanger such latter person's life," and another made it an offense for "any physician, or person, to prescribe a drug or composition, the true nature and composition of which was unknown, on the representation that the same was a secret medicine." Act of Feb. 27, 1834, §§ 3, 4, Ohio Laws, at 20–21 (1834). The location of Ohio's first abortion regulations within this statutory scheme is logical in light of the prevalance of various ingestibles used as abortificants at the time, which raised safety concerns due to the risk of overdose. *See, e.g.*, Anita Bernstein, *Common Law Fundamentals of the Right to Abortion*, 63 Buff.L.Rev. 1141, 1193 (2015).

nation's early abortion laws were enacted by policymakers trying to control medical practices in the name of public safety"). This underlying justification for Ohio's early abortion restrictions demonstrates the irrelevance of the restrictions to present-day consideration of the constitutional question. The very real concerns about the safety of abortion in the 19th century do not apply to modern-day abortion, due to medical advances and "essential developments" in the "[k]nowledge of female reproductive anatomy, anesthetics, antibiotics, analgesics, clean running water, and dissemination of written data." *See* Anita Bernstein, *Common Law Fundamentals of the Right to Abortion*, 63 Buff.L.Rev. 1141, 1195 (2015). *See also Steinberg*, 321 F.Supp. at 753 (Green, J., dissenting). Additional motivations undergirding subsequent iterations of the 1834 law are similarly antiquated and irrelevant. *See, e.g. State v. Tippie*, 89 Ohio St. 35, 40, 105 N.E. 75 (1913) (one purpose of criminal abortion law is to "discourage secret immorality between the sexes and a vicious and craven custom amongst married pairs who wish to evade the responsibilities and burdens of rearing offspring"); Mohr at 207-208 (special committee of Ohio legislature advocating for more restrictive abortion laws cited concern that "native" Ohio women were having more abortions than immigrants, and argued restrictions were necessary lest Ohio's "broad and fertile prairies . . . be settled only by the children of aliens"). *See also* 3 Arthur Wallace Calhoun, *A Social History of the American Family from Colonial Times to the Present* 243 (1919) (citing concerns that prevalence of abortion "reduced the descendants of the Puritans in some localities to an insignificant minority").

D. S.B. 23 Violates the Fundamental Right to an Abortion.

S.B. 23 infringes upon the fundamental rights to bodily integrity and abortion by banning abortions beginning at approximately six weeks LMP. Laws implicating fundamental rights are subject to strict scrutiny and are permissible only if they are narrowly tailored to serve a

compelling state interest. *See Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 155. S.B. 23 neither advances a compelling interest nor is narrowly tailored. It is unconstitutional.

1. S.B. 23 Warrants Strict Scrutiny

S.B. 23 burdens a fundamental right and is, therefore, subject to strict scrutiny. *See Morris v. Savoy*, 61 Ohio St.3d 684, 705, 576 N.E.2d 765 (1991) (strict scrutiny applies to legislation that burdens a fundamental right under the Ohio Constitution) (Sweeney, J., concurring in part). S.B. 23 is a *ban* on women's ability to exercise their fundamental right to an abortion starting at approximately six weeks LMP—which is so early in pregnancy that many women do not even know they are pregnant. Because it imposes criminal penalties on doctors who provide constitutionally protected care, and bans Ohioans from accessing that care, S.B. 23 violates the fundamental right to abortion.

Abortion restrictions less burdensome than S.B 23's *ban* have been subject to strict scrutiny. *See Planned Parenthood Southwest Ohio I* at 8 (finding that strict scrutiny applied to a law restricting access to medication abortion); *Planned Parenthood Southwest Ohio II* at 9 (applying strict scrutiny to a law requiring cremation or interment of embryonic and fetal tissue after a procedural abortion). And most state courts that have found a right to abortion under their state's constitution have applied strict scrutiny to infringements of that right. *See, e.g.*, *Valley Hosp. Assn*, 948 P.2d at 969, 971 (finding no "compelling state interest" where policy generally prohibiting elective abortions was solely a matter of conscience); *Commt. to Defend Reproductive Rights*, 625 P.2d at 784, 793, 797 (finding state's interest in protecting a fetus is not compelling enough to justify impairment of "fundamental constitutional right to choose whether or not to bear a child"); *In re T.W.*, 551 So.2d at 1192-1194 (finding no compelling

interest to justify statute that interferes with woman's ability to decide whether to continue a pregnancy); *Women of the State of Minnesota*, 542 N.W.2d at 31-32 (finding state's asserted interest in preservation of human life and encouragement of childbirth not compelling enough to outweigh a woman's decision about whether to terminate a pregnancy without state interference); *Armstrong*, 989 P.2d at 380, 385 (finding legislature has "no interest, much less a compelling [interest]," in interfering with an individual's fundamental right to obtain a pre-viability abortion); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 17 (Tenn. 2000) (finding state has a compelling interest in maternal health from the beginning of pregnancy, but a prohibition on all second trimester abortions not performed in a hospital was not narrowly tailored to promote this interest); *Byrne*, 450 A.2d at 934, 937 (finding fundamental right to choose whether to have an abortion outweighs state's interest in protecting potential life); *Hodes*, 440 P.3d at 496 (holding "the strict scrutiny test best protects those natural rights that we today hold to be fundamental" and finding plaintiffs substantially likely to prevail on their claim that ban on common method of second trimester abortion failed that test); *New Mexico Right to Choose/NARAL v. Johnson*, 126 N.M. 788, 975 P.2d 841, 854 (1998) (holding a restriction on funding medically necessary abortions unconstitutional where the state failed to offer a compelling justification for treating men and women differently with respect to medical needs). *See also Hope Clinic for Women v. Flores*, 991 N.E.2d 745, 760, 765-767 (Ill.2013) (finding state due process clause protects abortion in a manner "equivalent" to the federal Constitution but applying strict scrutiny instead of federal undue burden standard); *Moe v. Secy of Administration & Fin.*, 382 Mass. 629, 654, 417 N.E.2d 387 (1981) (holding Massachusetts Declaration of Rights affords privacy rights with "no less protection" than the federal Constitution and finding strict scrutiny applicable). This Court should do the same.

2. S.B. 23 Fails Strict Scrutiny.

To survive strict scrutiny, a law must be "narrowly tailored to serve a compelling state interest." *See, e.g., Rowitz v. McClain*, 2019-Ohio-5438, 138 N.E.3d 1241, ¶ 19 (10th Dist.). Strict scrutiny places a "heavy" burden of proof on the state. *Crowe v. Owens Corning Fiberglas*, 8th Dist. Cuyahoga No. 732206, 1998 WL 767622, *4 (Oct. 29, 1998), *aff'd*, 87 Ohio St.3d 204, 718 N.E.2d 923 (Mem) (1999).

Neither of the purported interests asserted in the text of the legislation (and in the federal litigation over S.B. 23)—an "interest in protecting the health of the woman" and an interest in protecting fetal life—can justify banning Ohioans from exercising their fundamental right to abortion starting as early as six weeks. *See* 2019 Am.Sub.S.B. No. 23, Section 3(G). *See also* Ohio Legislative Service Commission Bill Analysis, S.B. 23, at 7; Resp. to Mot. for Prelim. Inj., Dkt. #17, No. 1:19-cv-00360 (MRB) (S.D.Ohio) at 3, 8; Resp. to Mot. for J. on the Pleadings and Prelim. Inj., Dkt. #35, No. 1:19-cv-00360 (MRB) (S.D.Ohio) at 3, 14. The State cannot meet its heavy burden here because it does not have a compelling interest in preventing women from exercising the fundamental right to end a pregnancy at the earliest stages of pregnancy, as S.B. 23 does. Nor can it demonstrate that an outright ban is narrowly tailored.

a. S.B. 23 Does Not Protect Ohioans' Health.

Banning access to abortion starting at six weeks does nothing to protect women's health. Abortion is an extremely common and safe medical procedure. Nationwide, one in five pregnancies ends in abortion. *See* Rachel K. Jones et al., Guttmacher Inst., *Abortion Incidence and Service Availability in the United States, 2017*, 1, https://www.guttmacher.org/ sites/ default/files/report_pdf/abortion-incidence-service-availabilityus-2017.pdf (accessed June 28, 2022). About one in four American women will have an abortion by the age of 45. *See* Rachel

K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 Am.J.Pub.Health 1904, 1907 (2017). Complications from both medication and procedural abortion are extremely rare. *See* Natl. Academies of Sciences, Eng. & Medicine, *The Safety and Quality of Abortion Care in the United States*, 55, 60 (2018) (finding that complications from medication abortion occur in "no more than a fraction of a percent of patients" and that procedural abortions "rarely result in complications").

Denying access to abortion, however, affirmatively *harms* patient health. *See The Harms of Denying a Woman a Wanted Abortion–Findings from the Turnaway Study*, https://www.ansirh.org/sites/default/files/publications/files/the_harms_of_denying_a_woman_a_wanted_abortion_4-16-2020.pdf (accessed June 28, 2022) ("Women who were denied an abortion and gave birth reported more life-threatening complications like eclampsia and postpartum hemorrhage compared to those who received wanted abortions."); Amanda Jean Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, 58 Demography 6, 6 (2021) (estimating that banning abortion in the U.S. would lead to a 21 percent increase in the number of pregnancy-related deaths overall and a 33 percent increase among Black women). *See also supra* Section I.C; Verified Complaint ¶ 70 ("Even for someone who is otherwise healthy and has an uncomplicated pregnancy, carrying that pregnancy to term and giving birth poses serious medical risk and can have long term medical and physical consequences.").

By banning abortion before many women know they are pregnant, S.B. 23 forces women in need of abortion to decide from a range of terrible options. They can continue their pregnancies against their will, at continued risk to their physical and mental well-being. Indeed, forced pregnancy carries far greater risks to women's health. *See* Natl. Academies of Sciences,

Eng. & Medicine at 74 (observing that the risk of death associated with childbirth is nearly *thirteen* times higher than abortion, and every pregnancy-related complication is more common among those giving birth than among those having abortions); *see also* Verified Complaint ¶ 67. Even for someone who is otherwise healthy and has an uncomplicated pregnancy, carrying a pregnancy to term and giving birth poses serious medical risks and can have long-term physical consequences. *See id.* ¶ 70. These risks are greater for women with a medical condition caused or exacerbated by pregnancy. *See id.* ¶ 72.

When confronted with the potentially devastating consequences of a forced pregnancy, women may attempt to terminate their pregnancies themselves outside the medical system, which may carry additional risks. While safe and effective methods to induce abortion outside clinical settings with medication exist, attempts to access and use these abortion-inducing drugs, often from unlicensed sources, can put patients at serious risk. Others without the resources to access medically safe methods of self-managed abortion may resort to dangerous tactics to try to terminate an unwanted pregnancy, such as self-harm or ingesting poison. *See id.* ¶ 78.

All of these risks are disproportionately felt by Black, Indigenous, and other women of color, who collectively make up over 60 percent of women obtaining abortions in Ohio, despite constituting roughly 20 percent of Ohio's population. *See supra* Section I.C; *see also* Ohio Dept. of Health, *Racial Disparities in Pregnancy-Associated Deaths in Ohio 2008 - 2016*, https://odh.ohio.gov/know-our-programs/pregnancy-associated-mortality-review/reports/racial-disparities (accessed June 28, 2022) (Black women in Ohio have a maternal mortality rate of 29.5 deaths per 100,000 births compared to 11.5 deaths per 100,000 births for white women). S.B. 23 would also have an outsized impact on low-income women. *See id.*

S.B. 23 is also not narrowly tailored. Narrow tailoring requires the government to adopt "the *least* restrictive means of achieving the [state's] compelling interest." (Emphasis added.) *Bartell v. Lohiser*, 215 F.3d 550, 558 (6th Cir.2000); *see also Crowe*, 8th Dist. Cuyahoga No. 73206, 1998 WL 767622, at *5 (finding that a statute did not withstand strict scrutiny where it was not "the least restrictive alternative necessary to effectuate the asserted goal of the legislation"). S.B. 23 is *highly* restrictive—barring access to abortions almost entirely. There are numerous alternative and less restrictive means that would actually protect the health of pregnant women. *See supra* Section I.A. For example, the State could provide pregnant women with access to regular reproductive and prenatal health care, promote prenatal care by expanding access to medical insurance, and/or provide financial assistance for prenatal vitamins and nutritious meals. Such measures would do far more to advance the health of pregnant women without depriving them of a fundamental right. *See* Emily E. Petersen et al., *Vital Signs: Pregnancy-Related Deaths, United States, 2011–2015, and Strategies for Prevention, 13 States, 2013–2017*, 68 Morbidity & Mortality Weekly Report 423 (May 10, 2019) (finding that frequent prenatal care can reduce maternal deaths by up to 60 percent).

b. There Is No Compelling State Interest in Potential Fetal Life at Six Weeks LMP; Nor Is the Ban Narrowly Tailored to Any Such Interest.

The State does not have a compelling State interest in protecting fetal life as early as five or six weeks LMP. Under this Court's test, the State bears the "heavy burden" of showing that its interest is compelling under strict scrutiny review, *In re Judicial Campaign Complaint Against O'Toole,* 141 Ohio St.3d 355, 2014-Ohio-4046, 24 N.E.3d 1114, ¶ 20, and numerous state courts—including courts in Ohio—have recognized that the state's interest in protecting fetal life is weaker earlier in the pregnancy, *see, e.g.*, *In re T.W.*, 551 So.2d at 1193 (recognizing

that under the Florida Constitution the state's interest in "the potentiality of life in the fetus" is less compelling early in pregnancy); *Commt. to Defend Reproductive Rights*, 625 P.2d at 795 ("[D]uring the first two trimesters of pregnancy, when the fetus is not viable, the state's interest in protecting the fetus is not of compelling character"). *See also Preterm Cleveland*, 89 Ohio App.3d at 692, 627 N.E.2d 570 (analyzing legislation regarding abortion under the Ohio Constitution and concluding that any state interest in protecting fetal life is not equally compelling at all points in pregnancy).[6] The State cannot justify a prohibition so early in the pregnancy, and certainly cannot establish that it is compelling.

Moreover, here, "the state is not merely proposing to protect a fetus from general harm, but rather is asserting an interest in protecting a fetus vis-a-vis the woman of whom the fetus is an integral part," and—as such—its interest "clashes head-on with the woman's own fundamental right of procreative choice." *Commt. to Defend Reproductive Rights*, 625 P.2d at 795. Put another way, an interest in protecting fetal life starting before many women *even know* they are pregnant is the functional equivalent of an interest in preventing nearly *all* abortion. Such a sweeping, all-consuming interest simply cannot be sufficient to satisfy the first prong of a rigorous test intended *to protect* a woman's fundamental right to make her own decisions about her body, her health, and her future. Indeed, were the State's interest in fetal life to be considered "compelling" starting as early as six weeks in pregnancy, the exception contemplated by strict scrutiny—that laws impinging on fundamental rights are permissible *only* where they are narrowly tailored to serve a compelling government interest—would risk swallowing the rule, and, with it, the right to abortion itself.

[6] Early abortion law in Ohio also adhered to this pattern, reflecting the widespread recognition—even in the mid-19th century—that the State's interest in protecting fetal life is weakest early in pregnancy. *See supra* Section II.C.2.c.

Even if the State's asserted interests were compelling, an outright *ban* on abortion beginning at six weeks LMP is plainly not narrowly tailored and thus cannot survive strict scrutiny. Just as providing better prenatal care provides a less restrictive alternative to protecting pregnant women's health, promoting such care—and providing other social and medical benefits—is a far less restrictive means of advancing the State's interest in protecting fetal life than banning abortion. Many women seek abortion because the physical, professional, economic, and personal burdens associated with carrying a pregnancy to term, giving birth, and parenting a child are immense. *See supra* Section I.C; *see also* Verified Complaint ¶ 78.

Childbirth is also expensive: in the United States, the average new mother *with* insurance will pay more than $4,500 out of pocket for her labor and delivery alone. *See* Michelle Moniz et al., *Out-Of-Pocket Spending for Maternity Care Among Women With Employer-Based Insurance*, 30 Health Affairs 1 (Jan. 2020). And the economic burden does not stop there: nationwide, new mothers' earnings drop after they give birth and they do not fully recover to pre-pregnancy earning levels. *See* Danielle H. Sandler & Nicole Szembrot, *New Mothers Experience Temporary Drop in Earnings*, https://www.census.gov/library/stories/2020/06/cost-of-motherhood-on-womens-employment-and-earnings.html (accessed June 28, 2022) (mothers who continue to work see earnings fall by an average of $1,861 in the first quarter after birth relative to earnings pre-pregnancy or in early pregnancy, and any earnings that are then regained are not "large enough to return women to their pre-birth earnings path"). *See also* Advancing New Standards in Reproductive Health, *The Harms of Denying a Woman a Wanted Abortion–Findings from the Turnaway Study*, https://www.ansirh.org/sites/default/files/publications/files/the_harms_of_denying_a_woman_a_wanted_abortion_4-16-2020.pdf (accessed June 28, 2022) (women who were denied abortions

experience increases in household poverty, lowered credit score, increased debt, and other economic hardships compared to those who are able to access abortion).

Indeed, forcing women to continue pregnancies when they lack access to the necessary support may actually *harm* fetal and newborn life. The U.S. Department of Health and Human Services has found that newborns whose mothers had no early prenatal care were five times more likely to die. *See* Office on Women's Health, U.S. Dept. of Health & Human Servs., *Prenatal Care*, https://www.womenshealth.gov/a-z-topics/prenatal-care (accessed June 28, 2022). Were the State to assist pregnant women and new parents in shouldering the costs of pregnancy, birth, and childcare, through better access to prenatal care, protections in the workplace, and better health care coverage, it could improve outcomes for pregnancy and parenthood, and thus further an interest in protecting fetal life—and the lives of children and their parents—without infringing on Ohioans' fundamental rights.

Accordingly, S.B. 23 fails strict scrutiny.

E. S.B. 23 Violates the Ohio Constitution's Equal Protection Guarantee.

Based on the foundational premise that "[a]ll political power is inherent in the people," the Ohio Constitution declares as a fundamental matter that "Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly." Ohio Constitution, Article I, Section 2. The broad language of Ohio's Equal Protection and Benefit Clause reflects an intentional decision to offer citizens more protection against government overreach than contemporaneous constitutions of other states and is more protective of individual rights on its face than the federal Equal Protection Clause it predates. The "language, history or

early understandings" of the Clause, *see Stolz*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, at ¶ 38 (Fischer, J., concurring), all make clear that Ohio's expansive Equal Protection and Benefit Clause precludes S.B. 23's near total ban on abortion.

Ohio's Equal Protection and Benefit Clause subjects legislation to strict scrutiny when a law "infringes upon a fundamental constitutional right or the rights of a suspect class." *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 64. S.B. 23 warrants strict scrutiny on both grounds, because it discriminates against women (a suspect class) by burdening their ability to exercise a fundamental right.

1. Ohio's Equal Protection and Benefit Clause Provides Expansive Protection for Individual Rights.

Differences between the text of Ohio's Equal Protection and Benefit Clause and other state constitutions effective at the time of its adoption illustrate the exceptionally broad nature of Ohio's equal protection guarantee. *See State ex rel. Thomas v. McGinty*, 2019-Ohio-5129, 137 N.E.3d 1278, ¶¶ 31-42 (8th Dist.), *aff'd*, 164 Ohio St.3d 167, 2020-Ohio-5452, 172 N.E.3d 824, ¶ 42 (looking to comparable provisions in other state constitutions to determine the meaning of a provision of the Ohio Bill of Rights). The Virginia Declaration of Rights and Pennsylvania Constitution, for example, were both enacted prior to Ohio's 1851 Constitution, and the Ohio Equal Protection and Benefit Clause was "patterned after" these states' equal protection guarantees. *See* Steinglass & Scarselli at 85. These states provide that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community." Virginia Decl. of Rights, Section 3 (1776); Pennsylvania Constitution of 1776, Article V. In deliberate contrast to the language used in Virginia and Pennsylvania, Ohio's Equal Protection and Benefit Clause makes clear that "[a]ll political power is inherent in the

people. Government is instituted for their equal protection and benefit[.]" Ohio Constitution, Article I, Section 2.

These distinctions matter. Significantly, only the Ohio Constitution expressly uses the word "equal." Moreover, where Virginia and Pennsylvania use the more aspirational language of "government is, or ought to be," the Ohio drafters adopted the assertive "*government is*." *Compare* Virginia Decl. of Rights (1776) and Pennsylvania Constitution of 1776 *with* Ohio Constitution, Article I, Section 2. *See also Stolz*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, at ¶ 32 (Fischer, J., concurring) (drawing this contrast between the Virginia Declaration of Rights and the Pennsylvania Constitution, and the Ohio Constitution). This latter change transformed mere "statement[s] of political philosophy" in the Virginia and Pennsylvania constitutions into an "explicit guarantee of equal protection" in the Ohio Constitution, Steinglass & Scarselli 85, which should be read to "specifically confer rights," *Stolz* at ¶ 32 (Fischer, J., concurring).

Differences between the text of the Ohio and federal Equal Protection Clauses also illustrate that the Ohio Constitution confers more expansive protections than its federal counterpart. The Fourteenth Amendment of the United States Constitution frames the right to equal protection as a check against government action: "*No State shall . . . deny* to any person within its jurisdiction the equal protection of the laws." (Emphasis added.) Fourteenth Amendment to the U.S. Constitution, Section 1. The Ohio Constitution, in contrast, frames equal protection as an affirmative mandate for the government: "Government *is instituted for* [the people's] equal protection and benefit[.]" (Emphasis added.) Ohio Constitution, Article 1, Section 2. The Ohio Constitution thus elevates equal protection to one of the "foundational reasons for the existence of state government," whereas the federal Constitution views it only as

a limitation on the government, focused (at least textually) on "proscriptions against taking or denying benefits." *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 2022-Ohio-65, 2022 WL 110261, ¶ 151 (Brunner, J., concurring).

Opinions of this Court are in accord, acknowledging that the Ohio Equal Protection and Benefit Clause provides greater protections than the federal Constitution. In *State v. Mole*, for example, this Court found that "the guarantees of equal protection in the Ohio Constitution independently forbid" certain conduct, exclusive of federal constitutional protections. 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 23. *Mole* noted that the Supreme Court "can and will interpret [the Ohio] Constitution to afford greater rights to [Ohio] citizens" since it is "not confined by the federal courts' interpretations of similar provisions in the federal Constitution." *Id.* at ¶ 21. This Court reaffirmed that principle soon afterward, holding that "the Equal Protection Clause of the Ohio Constitution is coextensive with, *or stronger than*, that of the federal Constitution." (Emphasis added.) *State v. Noling*, 149 Ohio St.3d 327, 2016-Ohio-8252, 75 N.E.3d 141, ¶ 11.

More recent opinions have continued to distinguish the Equal Protection and Benefit Clause from its federal counterpart, concluding that "the language of the equal-protection provision of the Ohio Constitution differs significantly from the language of the Equal Protection Clause of the Fourteenth Amendment." *Sherman v. Ohio Pub. Emps. Retirement Sys.*, 163 Ohio St.3d 258, 2020-Ohio-4960, 169 N.E.3d 602, ¶ 34 (Fischer, J., concurring). *See also id.* at ¶ 40 (DeWine, J., dissenting) ("The language of this provision differs in significant respects from the language of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and the two clauses have unique histories."). Indeed, earlier this year, a member of this Court reaffirmed that Ohio's Equal Protection and Benefit Clause is "broader than the

language of the Fourteenth Amendment." *League of Women Voters of Ohio*, 2022-Ohio-65, 2022 WL 110261, at ¶ 151 (Brunner, J., concurring).

2. S.B. 23 Is Subject To, And Fails, Strict Scrutiny Because It Discriminates Against Women, A Suspect Class.

a. Women Are a Suspect Class.

The guarantees of Ohio's Equal Protection and Benefit Clause are enforced by subjecting laws that discriminate against "suspect classes" to strict scrutiny. *See Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 64. A suspect class "is one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 33, quoting *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

Because women have historically experienced the "purposeful unequal treatment" and relegation to "a position of political powerlessness" that defines suspect classes, *see Aalim* at ¶ 33, this Court has long recognized that sex or gender constitutes a suspect class. *See, e.g.*, *Adamsky v. Buckeye Loc. School Dist.*, 73 Ohio St.3d 360, 362, 1995-Ohio-298, 653 N.E.2d 212 ("[A]suspect class . . . has been traditionally defined as one involving race, national origin, religion, or sex."). *See also In re A.W.*, 5th Dist. Knox No. 15CA3, 2015-Ohio-3463, ¶ 23 ("Suspect classes include race, sex, religion, and national origin"), *aff'd in part*, *appeal dismissed in part on other grounds*, 147 Ohio St.3d 110, 2016-Ohio-5455, 60 N.E.3d 1264 (Mem), *reconsideration denied*, 147 Ohio St.3d 1414, 2016-Ohio-7455, 62 N.E.3d 186 (Table).

The Ohio Constitution categorically subjects laws that discriminate against suspect classes to strict scrutiny. *See Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶

64. *See also Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, at ¶ 31 ("When legislation infringes upon a fundamental constitutional right or the rights of a suspect class, strict scrutiny applies."); *Bd. of Edn. of City School Dist. of City of Cincinnati v. Walter*, 58 Ohio St.2d 368, 373-374, 390 N.E.2d 813 (1979) ("If the discrimination infringes upon a fundamental right [or discriminates against a suspect class], it becomes the subject of strict judicial scrutiny and will be upheld only upon a showing that it is justified by a compelling state interest. That is, once the existence of a fundamental right or a suspect class is shown to be involved, the state must assume the heavy burden of proving that the legislation is constitutional.").

b. S.B. 23 Discriminates Against Women.

S.B. 23 expressly targets "pregnant wom[e]n." *See, e.g.*, 2019 Am.Sub.S.B. No. 23, Section 1, amending R.C. 2919.192(A) (requiring "[a] person who intends to perform or induce an abortion on a pregnant woman" to determine "whether there is a detectable fetal heartbeat"); *id.*, Section 3(H) (asserting that "the pregnant woman" has a purported "valid interest in knowing the likelihood of the fetus surviving to full-term birth based upon the presence of cardiac activity"). It "is a provision regulating abortion services conducted on women." *Preterm Cleveland*, 89 Ohio App.3d at 714, 627 N.E.2d 570 (Petree, J., concurring in part and dissenting in part) (observing that abortion law's "special waiting periods, informed consent protections, and counseling mandates will never apply in like measure to a man getting a vasectomy or making other important reproductive decisions affecting society"); *Planned Parenthood Southwest Ohio I* at 9 (concluding that fetal tissue disposal law triggered strict scrutiny because it discriminates against women). The "express terms of [the] statute" thus target a suspect class and warrant strict scrutiny. *See Garner v. City of Cuyahoga Falls*, N.D.Ohio No. 5:07CV2099, 2008 WL 11377807, *7 (Jan. 29, 2008), *aff'd*, 311 F.Appx. 896 (6th Cir.2009) (citation omitted),

quoting *Sioux City Bridge Co. v. Dakota Cty.*, 260 U.S. 441, 445, 43 S.Ct. 190, 67 L.Ed. 340 (1923).

S.B. 23 also discriminates against women by subordinating them to men based on antiquated notions and stereotypes regarding women's roles as child-bearers and caregivers. The justification given in the text of S.B. 23—namely, that severely restricting abortion "protect[s] the health of the pregnant woman," *see* 2019 Am.Sub.S.B. No. 23, Section 3—is inextricably intertwined with other outdated justifications for early abortion bans. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan.L.Rev. 261, 280-323 (1992) (recounting how nineteenth-century doctors argued that banning abortion would protect fetal life, protect a woman's health, enforce wives' marital duties, and control the relative birthrates of "native" and immigrant populations, in order to preserve the demographic character of the nation). S.B. 23 perpetuates similar misguided and misogynistic stereotypes by stripping women of their autonomy, agency, and ability to make decisions about their bodies under the patronizing guise of "protecting" them. It also relies on erroneous medical claims, in line with those promoted by nineteenth century physicians who claimed that abortion would "insidiously undermine[]" women's reproductive organs, and "permanently incapacitate[] [women] for conception." *Id.* at 50. *See also* O.S. Phelps, *Criminal Abortion: Read Before the Calhoun County Medical Society*, 1 Detroit Lancet 725, 728 (1878) ("A woman who has an abortion 'destroys her health . . . [and] sooner or later comes upon the hands of the physician suffering with uterine disease.'"). In fact, childbirth is far more dangerous to women's health than is abortion. *See* Natl. Academies of Sciences, Eng. & Medicine 74 (finding that childbirth is nearly thirteen times more likely than abortion to result in death). S.B. 23 is premised upon the spurious assumption that abortion is

innately harmful to women—rather than allowing women to determine for themselves what risks they are willing to assume in the course of their medical care.

S.B. 23 also imposes an impermissible classification on the basis of sex by discriminating against "pregnant" women. The United States Supreme Court has made clear that certain laws regulating pregnancy are sex-based classifications that violate the federal Equal Protection Clause if, as here, they are rooted in subordinating sex-role stereotypes. The United States Supreme Court's landmark decision in *United States v. Virginia* held that the federal Constitution's guarantee of equal protection means that sex "classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women." 518 U.S. 515, 534, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996).

In *Nevada Dept. of Human Resources v. Hibbs*, the Supreme Court confirmed that Congress could enact the Family and Medical Leave Act to remedy and prevent inequality in the provision of family leave because, historically, "ideology about women's roles" had been used to justify discrimination against women particularly when they were "mothers or mothers-to-be." 538 U.S. 721, 736, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), quoting Joint Hearing 100, FMLA. *Hibbs* held that pregnancy-based regulations anchored in subordinating stereotypes about gender roles can violate the federal Equal Protection Clause. This Court should apply, at minimum, the conclusion compelled by *Virginia, Hibbs*, and common sense: that laws regulating pregnancy are sex-based classifications that will violate the equal protection clause unless they satisfy strict scrutiny analysis.

The United States Supreme Court's 1974 decision in *Geduldig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974), which, decades prior to *Virginia* and *Hibbs*, held that pregnancy discrimination is not a form of sex discrimination under the Fourteenth Amendment,

does not bind this Court. Indeed, other state supreme courts have soundly rejected *Gedulgig* and its reasoning. *See, e.g.*, *Wisconsin Tel. Co. v. Dept. of Industry, Labor & Human Relations*, 68 Wis.2d 345, 367, 228 N.W.2d 649 (1975) (concluding "*Geduldig* was decided solely based upon the Fourteenth Amendment" and therefore did not limit interpretations of Wisconsin's sex discrimination statute); *Anderson v. Upper Bucks Cty. Area Vocational Technical School*, 30 Pa.Commw. 103, 373 A.2d 126 (1977) (declining to follow *Geduldig*, holding that a disability plan's exclusion of pregnancy-related disabilities constituted sex discrimination in violation of state law); *Massachusetts Elec. Co. v. Massachusetts Comm. Against Discrimination*, 375 Mass. 160, 168, 375 N.E.2d 1192 (1978) (citing *Geduldig* dissent approvingly to support conclusion that "[t]he exclusion of pregnancy-related disabilities, a sex-based distinction, from a comprehensive disability plan constitutes discrimination"); *Colorado Civil Rights Comm. v. Travelers Ins. Co.*, 759 P.2d 1358, 1363 (Colo.1988) (finding that, under Colorado's constitution, "legislative classifications based exclusively on sexual status receive the closest judicial scrutiny").

While an Ohio Court of Appeals previously relied upon *Geduldig* in determining that an informed-consent statute was constitutional, that decision preceded both *Virginia* and *Hibbs*. *See Preterm Cleveland*, 89 Ohio App.3d at 700-701, 627 N.E.2d 570. Moreover, in a partial dissent to that decision, Judge Petree cautioned: "We should avoid uncritical acceptance of *Geduldig* in Ohio .... [I]t would be an entirely positive development in the law if we reject *Geduldig* analysis in the present context and treat abortion as a sexual equality issue." *Id.* at 713-714 (Petree, J., dissenting). This Court should heed Judge Petree's advice and follow the example set by numerous other state supreme courts to hold that pregnancy discrimination is sex discrimination.

S.B. 23 is rooted in impermissible, antiquated, and subordinating stereotypes about women and the roles pregnant women play in modern society, confining women to sex-based stereotypes against their will, in violation of the Equal Protection and Benefit Clause.

3. S.B. 23 Fails Strict Scrutiny.

For the reasons discussed above, S.B. 23 fails strict scrutiny. The State can identify no compelling interest served by the law, nor demonstrate that the statute is narrowly tailored to further any purported compelling interest. *See supra* Section II.D.2.

4. S.B. 23 Cannot Survive Intermediate Scrutiny.

As discussed above, the constitutional text dictates, and a long line of cases holds, that classifications based on sex and gender are subject to strict scrutiny. Although this Court has at times applied intermediate scrutiny to discriminatory classifications based on sex, *see State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, ¶ 13 (employing "heightened or intermediate scrutiny" to "a discriminatory classification based on sex"), doing so runs afoul of settled precedent that strict scrutiny applies to laws that discriminate against suspect classes. *See supra* Section II.E.2. To the extent prior decisions contemplate a lesser degree of scrutiny, the Court should clarify that laws discriminating against women are subject to strict scrutiny. Such a holding is necessary to give effect to the text and history of Ohio's unique Equal Protection and Benefit Clause. *See supra* Section II.E.1.

However, even if this Court were to apply intermediate scrutiny, S.B. 23 cannot stand. Intermediate scrutiny requires that "the classification be substantially related to an important governmental objective." *Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, at ¶ 13. The "substantially related" prong tests whether the legislation has been sufficiently tailored to the state's interest. *Cleveland v. McCardle*, 139 Ohio St.3d 414, 2014-Ohio-2140, 12 N.E.3d

1169, ¶¶ 13, 21; *State v. Weber*, 2019-Ohio-916, 132 N.E.3d 1140, ¶ 24, *aff'd*, 163 Ohio St.3d 125, 2020-Ohio-6832, 168 N.E.3d 468, *cert. denied*, 142 S.Ct. 91 (Mem), 211 L.Ed.2d 22 (2021).

For all the reasons discussed above, S.B. 23 is not substantially related to any important governmental objective. As an initial matter, S.B. 23 bears no relation to the purported interest of protecting the health of pregnant women. *See supra* Section II.D.2.a. A law that so clearly fails to advance a purported interest—and moreover, relies on the "baggage of sexual stereotypes" as described above—is not "substantially related" to that interest. *See Cintron v. Nader*, 8th Dist. Cuyahoga No. 39564, 1980 WL 354341, *7 (June 26, 1980) (gender classification was not substantially related to any "important" goals in part because it relied on "the baggage of sexual stereotypes"); *Crawford Cty. Child Support Enforcement Agency v. Sprague*, 3rd Dist. Crawford No. 3-97-13, 1997 WL 746770, *4 (Dec. 5, 1997) (statute that undermined the state's purported interest was not substantially related to that interest).

Further, the State's claimed interest in protecting fetal life at six weeks is not a sufficiently "important government objective." As described *supra* Section II.D.2.b, a generalized interest in protecting "fetal life" is not sufficient, and in any case, state and federal courts have consistently held that the State's interest in protecting fetal life is weaker earlier in pregnancy. Under intermediate scrutiny review, when a law places a significant burden on a constitutional right—as S.B. 23 does—the State has an increased burden to demonstrate the importance of its interest. *See State v. Wheatley*, 2018-Ohio-464, 94 N.E.3d 578, ¶ 16 (4th Dist.), quoting *Tyler v. Hillsdale Cty. Sheriff's Dept.*, 837 F.3d 678, 685-686 (6th Cir.2016) ("[T]he government bears the burden of justifying the constitutionality of the law under a heightened form of scrutiny."). The State simply cannot meet that burden here.

Finally, S.B. 23 is not substantially related to the State's purported interest in protecting fetal life. There are obvious non-restrictive alternatives to advance the State's purported interest in protecting fetal life at six weeks, and thus the State cannot meet its burden under intermediate scrutiny review. *See supra* Section II.D.2.b.

III. CONCLUSION

For the foregoing reasons, Relators respectfully request that the Court grant Relators' Verified Complaint for the issuance of a writ of mandamus.

Dated: June 29, 2022.

Respectfully submitted,

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