In the
Supreme Court of Ohio

State ex rel. Preterm-Cleveland, et al.	:	
	:	
Relators,	:	Case No. 2022-0803
	:	
v.	:	Original Action in Mandamus
	:	
David Yost, et al.	:	
	:	
Respondents	:	
	:	

RESPONDENTS' MOTION TO DISMISS

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RESPONDENTS' MOTION TO DISMISS

Respondents move this Court to dismiss the relators' Complaint for lack of subject-matter jurisdiction under Civ.R. 12(B)(1). A memorandum in support of the respondents' motion is attached.

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MEMORANDUM IN SUPPORT

The Court should dismiss the relators' purported mandamus action for lack of subject-matter jurisdiction. Although the relators claim to seek mandamus relief, they are in fact seeking a prohibitory injunction and a declaratory judgment—they want an order forbidding the respondents from enforcing the Heartbeat Act, along with a declaration that the Heartbeat Act is unconstitutional. The Court has no jurisdiction to consider that request. It lacks original jurisdiction to entertain requests for prohibitory injunctions. *State ex rel. Esarco v. Youngstown City Council*, 116 Ohio St. 3d 131, 2007-Ohio-5699 ¶11 (collecting cases); *State ex rel. Ohio Stands Up!, Inc. v. DeWine*, 2021-Ohio-4382 ¶12 (Kennedy, J., concurring in the judgment). The same goes for declaratory judgments. *State ex rel. Governor v. Taft*, 71 Ohio St. 3d 1, 3–4 (1994). The Court should therefore dismiss this case for lack of jurisdiction.

BACKGROUND

The Ohio General Assembly passed the Heartbeat Act—Senate Bill 23, or "S.B.23"—in 2019. The Act, which only recently went into effect, makes it a criminal offense 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." R.C. 2919.195(A). The law does not apply to women on whom abortions are performed—it regulates only those who perform abortions on others. R.C. 2919.198.

The Act contains two exceptions that allow for a physician, in the physician's reasonable medical judgment, to perform abortions after cardiac activity is found. The first applies when an abortion is necessary to prevent the patient's death. The second applies when there is "a serious risk of the substantial and irreversible impairment of a major bodily function." R.C. 2919.195(B). "'Serious risk of substantial and irreversible impairment of a major bodily function' means 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. 2919.16(K); *see* R.C. 2919.19(A)(12). That "includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes, may include, but is not limited to, diabetes and multiple sclerosis, and does not include a condition related to the woman's mental health." R.C. 2919.16(K). Another provision specifically allows the performance of abortions in the case of an ectopic pregnancy. R.C. 2919.191.

A violation of the Act is a fifth-degree felony, punishable by up to one year in prison and a fine of $2,500. R.C. 2919.195(A); R.C. 2929.14(A)(5), R.C.2929.18(A)(3)(e). In addition, the state medical board may limit, revoke, or suspend a physician's medical license based on a violation of the Act, see R.C. 4731.22(B)(10), or assess a forfeiture of up to $20,000 for each violation, R.C. 2919.1912(A). Money from such forfeitures is deposited in a foster-care and adoption-initiatives fund. R.C. 2919.1912(C). A patient also can initiate a civil action against a provider who violates the Act. R.C. 2919.199 (A)(1), (B)(1).

Before the Heartbeat Act took effect, parties challenged its constitutionality in federal court. They contended that the Act contradicted the Fourteenth Amendment to the United States Constitution as interpreted by *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The District Court agreed, and preliminarily enjoined the Act's enforcement. *Preterm-Cleveland v. Yost,* 394 F. Supp. 3d 796 (S.D. Ohio 2019). On March 3, 2021, the court issued an order staying the case pending the final disposition of all appeals and petitions for certiorari in *Preterm-Cleveland v. Himes*, No. 18-3329 (6th Cir.), and *Memphis Center for Reproductive Health v. Slatery*, No. 20-5969 (6th Cir.). *See Preterm-Cleveland v. Yost*, No. 19-cv-00360 MRB (S.D. Ohio Mar. 3, 2021).

On June 24, 2022, the United States Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, holding that the United States Constitution confers no right to abortion. 142 S. Ct. 2228, 2243, 2284 (2022). That same day, Ohio Attorney General Dave Yost filed an emergency motion to dissolve the preliminary injunction because the injunction rested entirely on the conclusion that the Heartbeat Act violated the right to an abortion recognized in *Roe* and *Casey*—the right that *Dobbs* abrogated. That court quickly vacated the injunction, and the Act went into effect.

Five days later, the relators filed this case.

LEGAL STANDARD

A court must dismiss a mandamus action under Civ.R. 12(B)(1) when it lacks subject-matter jurisdiction. *State ex rel. Duncan v. Am. Transmission Sys.*, 166 Ohio St. 3d 416,

2022-Ohio-323 ¶6. Mandamus is an "extraordinary remed[y], to be issued with great caution and discretion and only when the way is clear." *State ex rel. Taylor v. Glasser*, 50 Ohio St. 2d 165, 166 (1977).

ARGUMENT

This Court "lack[s] jurisdiction to consider the merits of mandamus actions challenging the constitutionality of new legislative enactments" if the mandamus action is really a "disguised action[] for declaratory judgment and prohibitory injunction." *State ex rel. United Auto., Aerospace & Agric. Implement Workers of Am. v. Ohio Bureau of Workers' Comp.*, 108 Ohio St. 3d 432, 2006-Ohio-1327 ¶43. The relators' case is precisely that sort of disguised action. The Court should therefore dismiss the case for lack of subject-matter jurisdiction.

A. This Court lacks jurisdiction to entertain the relators' request for a prohibitory injunction and a declaratory judgment.

1. "Subject-matter jurisdiction refers to the constitutional or statutory power of a court to adjudicate a particular class or type of case." *Corder v. Ohio Edison Co.*, 162 Ohio St. 3d 639, 2020-Ohio-5220 ¶14. "'A court's subject-matter jurisdiction is determined without regard to the rights of the individual parties involved in a particular case.'" *Id.* (quoting *Bank of Am., N.A. v. Kuchta*, 141 Ohio St. 3d 75, 2014-Ohio-4275 ¶19). "Instead, 'the focus is on whether the forum itself is competent to hear the controversy.'" *Id.* at ¶14 (quoting *State v. Harper*, 160 Ohio St. 3d 480, 2020-Ohio-2913 ¶23). In "the absence of subject-matter jurisdiction, a court lacks the authority to do anything but announce its

lack of jurisdiction and dismiss." *Pratts v. Hurley*, 102 Ohio St. 3d 81, 2004-Ohio-1980 ¶21.

This Court's original jurisdiction extends only to "quo warranto, mandamus, habeas corpus, prohibition, procedendo, any cause on review as may be necessary to its complete determination, and all matters relating to the practice of law, including the admission of persons to the practice of law and the discipline of persons so admitted." *ProgressOhio.org, Inc. v. Kasich*, 129 Ohio St. 3d 449, 2011-Ohio-4101 ¶2. This Court and the courts of appeal lack original jurisdiction over cases seeking prohibitory injunctions. *State ex rel. Chattams v. Pater*, 131 Ohio St. 3d 119, 2012-Ohio-55 ¶1; *Esarco*, 116 Ohio St. 3d 131 at ¶11 (collecting cases); *Ohio Stands Up!*, 2021-Ohio-4382 at ¶12 (Kennedy, J., concurring in the judgment). And "'if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus.'" *State ex rel. Ohio Civil Serv. Emps. Assn, Local 11 v. State Emp. Rels. Bd.*, 104 Ohio St. 3d 122, 2004-Ohio-6363 ¶11 (quoting *State ex rel. Grendell v. Davidson*, 86 Ohio St. 3d 629, 634 (1999)).

2. These principles require dismissing the case for lack of subject-matter jurisdiction, because what the relators actually seek is a prohibitory injunction and a declaratory judgment. The relators request: (1) "an immediate stay of enforcement of S.B. 23"; (2) an order, judgment, and/or writ from this Court "declaring S.B. 23 unconstitutional"; (3) a peremptory writ of mandamus "directing Respondents to … not enforce S.B. 23"; and (4) if the Court does not issue a peremptory writ, an alternative writ "directing

Respondents to . . . not enforce S.B. 23." Compl. ¶18; *see also id.* at 42 ("Prayer for Relief"). The first two requests for relief ask this Court to enjoin the Heartbeat Act and to declare it unconstitutional. In other words, the relators seek a prohibitory injunction and a declaratory judgment. The same goes for the relators' third and fourth requests for a "peremptory writ" or an "alternative writ." The relators make clear they seek an order from this Court directing the respondents to "not enforce S.B. 23." Compl. ¶18. Thus, the relators' third and fourth requests for relief also seek a prohibitory injunction.

Accordingly, this Court lacks subject-matter jurisdiction over the relators' purported mandamus action.

B. The relators cannot evade these clear jurisdictional limits by claiming to seek a *mandatory* injunction rather than a prohibitory injunction.

Any attempt to evade these principles would be unavailing.

1. The relators cannot create subject-matter jurisdiction by styling their mandamus action as a request for a mandatory injunction.

"The difference between [a mandatory injunction and a prohibitory injunction] is simple: 'a prohibitory injunction is used to prevent a future injury, but a mandatory injunction is used to remedy past injuries.'" *Gadell-Newton v. Husted*, 153 Ohio St. 3d 225, 2018-Ohio-1854 ¶10. "The court distinguishes between the two by examining the complaint to determine whether it actually seeks to prevent, rather than compel, official action." *Id*. (quotations omitted). A request to prevent official action qualifies as a prohibitory injunction; a request to compel action constitutes a mandatory injunction. *Id*.

In contrast to prohibitory injunctions (over which this Court lacks jurisdiction), this Court has original jurisdiction to entertain requests for mandatory injunctions. *Id*. at ¶13. "[A] writ of mandamus is in the nature of a mandatory injunction." *Duncan v. Am. Transmission Sys.*, 166 Ohio St. 3d 416, 2022-Ohio-323 ¶7. That is, the "purpose of mandamus is to *compel* the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." *Taylor*, 50 Ohio St. 2d at 166 (emphasis added).

The relators seek a prohibitory injunction, not a mandatory injunction, because they are suing to "prevent a future injury," not to "remedy past injuries"—to compel performance, not prevent it. *Gadell-Newton*, 153 Ohio St. 3d 225 at ¶10. Their briefing makes this abundantly clear. The relators filed an emergency motion requesting an immediate injunction of the Heartbeat Act, along with a purported mandamus action directing the respondents to "not enforce S.B. 23." Compl. ¶18. These requests are aimed at *preventing* alleged *future* injuries. Thus, the relators seek a prohibitory injunction, not a mandatory injunction.

The relators' few cited cases do not support a contrary holding. Take *State ex rel. Ethics First-You Decide Ohio PAC v. DeWine*, 147 Ohio St. 3d 373, 2016-Ohio-3144, the case on which the relators principally relied in seeking emergency relief. *See, e.g.*, Br. in Supp. 9. In that case, the Court determined that it had jurisdiction (but then dismissed the case for failure to state a claim) because the essence of the relators' mandamus complaint was to *compel* official action—not to enjoin a statute, as the relators here seek to do. The

relators in *Ethics First* sought to submit a single initiative petition to Ohio voters. 147 Ohio St. 3d 373 at ¶5. Because of a new amendment to the statute governing the initiative-petition process, the relators' petition was divided into three initiatives. *Id.* at ¶6. As a result, the Ohio Attorney General refused to submit the relators' original initiative petition as a single petition. *Id.* Not wanting their original petition split into three separate issues for voters' consideration, the relators filed a mandamus action to compel the Attorney General to file their petition as originally submitted. *See* Mandamus Complaint at 19, *State ex rel. Ethics First-You Decide Ohio PAC v. DeWine*, No. 2016-0464 (seeking to compel the Attorney General to "file with the Ohio Secretary of State a verified copy of the [relators'] proposed constitutional amendment as originally submitted by [the relators] . . . pursuant to R.C. § 3519.01(A), as it existed prior to enactment of H.B. 3"). To achieve this goal, the relators had to challenge the constitutionality of the new statutory amendment, while seeking an order compelling the filing of their original initiative petition. But their central goal was not enjoining a state statute—it was compelling an affirmative act.

Thus, *Ethics First* does not stand for the novel proposition that constitutional challenges to legislation automatically qualify as mandatory injunctions. Quite the contrary. This Court has made clear that it "lack[s] jurisdiction to consider the merits of mandamus actions challenging the constitutionality of new legislative enactments because they constitute disguised actions for declaratory judgment and prohibitory injunction." *United*

Auto., Aerospace & Agric. Implement Workers of Am., 108 Ohio St. 3d 432 at ¶43. *Ethics First* merely reaffirms that, "if a complaint seeks to *prevent* action, then it is injunctive in nature, and the court has no jurisdiction; if it seeks to *compel* action, then the court does have jurisdiction to provide relief in mandamus." 147 Ohio St. 3d 373 at ¶10.

Merely asserting that a mandamus complaint seeks a mandatory injunction does not make it so. To determine the true goals of a mandamus action, the Court "must examine [the relators'] complaint 'to see whether it actually seeks to prevent, rather than to compel, official action.'" *State ex rel. Satow v. Gausse-Milliken*, 98 Ohio St. 3d 479, 2003-Ohio-2074 ¶13 (quotation omitted). As explained above, the relators in *Ethics First* sought to *compel* the respondent to process their initiative petition under an old law, not simply to bar the respondent from processing that petition under a new law. In sharp contrast, the relators here seek solely to *prevent* the Heartbeat Act's enforcement. They do not seek to compel anything. Therefore, their purported mandamus action improperly seeks a prohibitory injunction.

2. To the extent the relators attempt to style their mandamus action as a request for an order that the respondents comply with *pre-existing* law, that attempt also fails. *See* Br. in Supp. 9. The relators claim they want an order requiring compliance with R.C. 2919.201. But there is nothing in that statute with which the respondents must "comply." While that statute prohibits abortion starting at 20 weeks post-fertilization, the Heartbeat Act goes further. An order requiring the respondents to "comply" with R.C. 2919.201 is

consistent with the respondents' simultaneously abiding by the Heartbeat Act. (And what would it even mean for *the respondents* to "comply" with a statute prohibiting conduct carried out by *the relators*?) So an order requiring compliance with R.C. 2919.201 does not get relators anything. What the relators want is an order *preventing* enforcement of the Heartbeat Act, not an order *requiring* enforcement of R.C. 2919.201. Verbal gymnastics cannot change that fact.

In addition to vastly overstating the holding of *Ethics First*, the relators lean heavily on *State ex rel. Zupancic v. Limbach*, 58 Ohio St. 3d 130, 133 (1991). *See* Br. in Supp. at 9, 11-13. But *Zupancic* does not help them. In that case, "the essence of [the relators'] request [was] for respondent to abide by a former statute." *Id*. Specifically, in *Zupancic*, the respondent *had to act* to take a certain action, and the mandamus sought would order her to act affirmatively under an old law rather than a new law. *Id.* at 133–34. As discussed above, that is not the case here—the relators want an order barring the respondents from enforcing the Heartbeat Act, not an order requiring compliance with a prior law.

In any event, *Zupancic* does not reflect the current state of this Court's jurisprudence. "[S]ince *Zupancic* was decided, the Supreme Court of Ohio has taken a significantly more narrow view of when an appellate court's mandamus jurisdiction may be invoked." *State ex rel. Ohio Apartment Ass'n v. Wilkins*, 2006-Ohio-6783 ¶10 (10th Dist.); *see, e.g.*, *United Auto., Aerospace & Agric. Implement Workers of Am.*, 108 Ohio St. 3d 432 at ¶43 (collecting cases). "This more narrow view of original jurisdiction has been

emphasized particularly where the relator's allegations indicate that the real goals of the mandamus action are declaratory judgment and a prohibitory injunction." *Wilkins*, 2006-Ohio-6783 at ¶10; *see also State ex rel. Int'l Heat & Frost Insulators & Asbestos Workers Local # 3 v. Court of Common Pleas*, 2006-Ohio-274 ¶9 (8th Dist.) (stating that "more recent decisions of the Supreme Court of Ohio suggest that the Supreme Court has reexamined the holding[] of … *Zupancic*").

3. Finally, *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Compensation*, 97 Ohio St. 3d 504, 2002-Ohio-6717, does not apply at all . The majority in that case did not even address subject-matter jurisdiction related to prohibitory injunctions, and instead began its legal analysis by considering whether the relators had standing. *See id.* at ¶10. Moreover, the relators' citations from *Ohio Bureau of Workers' Compensation* come from that case's discussion of public-rights standing—not any discussion of original jurisdiction or the requirements for mandamus, which are the issues presented here. *See* Br. in Supp. 9-10.

Contrary to the relators' suggestion, purported mandamus actions do not become proper simply because a party wishes to challenge the constitutionality of a statute. "'Constitutional challenges to legislation are generally resolved in an action in a common pleas court rather than in an extraordinary writ action.'" *State ex rel. Beane v. City of Dayton*, 112 Ohio St. 3d 553, 2007-Ohio-811 ¶32 (quoting *State ex rel. Satow v. Gausse-Milliken*, 98 Ohio St. 3d 479, 2003-Ohio-2074 ¶18); *see also Satow*, 98 Ohio St. 3d 479 at ¶22

(refusing to issue a writ of mandamus despite the fact that relators were challenging the constitutionality of 2002 Sub.H.B. No. 329). This Court has repeatedly made clear the "general rule" that this Court "lack[s] jurisdiction to consider the merits of mandamus actions challenging the constitutionality of new legislative enactments because they constitute disguised actions for declaratory judgment and prohibitory injunction." *United Auto., Aerospace & Agric. Implement Workers of Am..*, 108 Ohio St. 3d 432 at ¶43; *see, e.g.*, *Grendell*, 86 Ohio St. 3d at 635 (dismissing mandamus action challenging the constitutionality of state statute because it amounted to a request for declaratory judgment and prohibitory injunction preventing respondents from acting pursuant to the statute); *Taft*, 71 Ohio St. 3d at 3–4 (no jurisdiction to entertain request seeking declaration that 1994 Am.Sub.H.B. No. 20 was unconstitutional and prohibitory injunction to prevent respondent from filing the act); *State ex rel. Ohio Stands Up!, Inc.*, 2021-Ohio-4382 at ¶19 (Kennedy, J., concurring in the judgment) (reasoning that the Court lacked original jurisdiction where "the gravamen of the complaint here is to *prohibit* Governor DeWine's and Director Murnieks's actions").

* * *

In sum, mandamus is not the proper vehicle for this challenge, and this Court does not have jurisdiction to consider the relators' claims.

CONCLUSION

The Court should dismiss the relators' mandamus action.

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