**IN THE COURT OF COMMON PLEAS**
**FOR FRANKLIN COUNTY, OHIO**

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| **PRETERM-CLEVELAND, *et al.*,** | |
| *Plaintiffs*, | **Case No. 24 CV 002634** |
| | **Judge David C. Young** |
| **v.** | |
| **DAVE YOST, *et al.*,** | |
| *Defendants.* | |

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**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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In November 2023, shortly after the U.S. Supreme Court in *Dobbs* overturned *Roe v. Wade*, the People of Ohio, acting directly through a voter-approved initiative, passed an amendment to the Ohio Constitution with the purpose of restoring the pre-*Dobbs* legal regime restricting abortion regulation pursuant to the tests established in *Roe* and *Planned Parenthood v. Casey*. In particular voters chose to restore the pre-*Dobbs* result that invalidated Ohio's 2019 law prohibiting most abortions, absent certain exceptions, after a fetal heartbeat was detected—around six weeks after conception. "All political power is inherent in the people." Oh. Const. Art. I, § 2. Accordingly, as the State has made clear in separate ongoing litigation, the State cannot, and should not, oppose Plaintiffs' challenge to that specific law.

But in this case, Plaintiffs seek to expand the Amendment beyond its true scope and intent—beyond what Ohio voters approved. Plaintiffs, along with other pending abortion-related cases, seek to commandeer the Amendment for their own purposes, essentially claiming in the aggregate that the Amendment bars all laws that touch on abortion—and even some laws that have

nothing to do with abortion or anything else the Amendment mentions. Just as it is the State Government's duty to respect the will of the People by conceding the invalidity of a statutory provision that conflicts with the current language of the Ohio Constitution, it is also the State Government's duty to respect the will of the People by defending statutory provisions that the Amendment does not invalidate against meritless attack. Against such overreach, the State will stand fast.

Here, Plaintiffs fail to establish, as they must, any of the factors that would entitle them to a preliminary injunction blocking the laws challenged in this case (the waiting period provision, in person provision, informed consent provision, or heartbeat check provision).

First, the Plaintiffs have no chance of success on the merits, because they lack standing to challenge them, and in any event, all of these laws have been upheld under the very pre-*Dobbs* legal regime that the Amendment was passed to reinstate. These two fundamental flaws with Plaintiffs' claims are all that are necessary to preclude a preliminary injunction. To be sure, their claims have additional flaws, even if the Court ignores these two, and the State reserves its right to defend these laws on further grounds as this litigation proceeds. But at this preliminary stage, these two fundamental flaws are more than sufficient to deny Plaintiffs' motion.

Second, none of the remaining preliminary-injunction factors save Plaintiffs' preliminary-injunction motion. These laws have been around for years, so the primary purpose of any preliminary injunction—preserving the status quo while litigation proceeds—has no application in this case. The balance of harms favors denial of a preliminary injunction as well.

Accordingly, the State respectfully requests that the Court deny Plaintiffs' motion for preliminary injunction.

## FACTUAL AND PROCEDURAL BACKGROUND

From 1834 until 1973, Ohio prohibited abortion. *See* Ohio Gen. Stat. §§111, 112 (1841); R.C. §2901.16 (1972). When the U.S. Supreme Court decided *Roe v. Wade*, Ohio was required to allow abortion procedures in its borders. 410 U.S. 113 (1973) (creating a federal right to abortion).

In 1991, the Ohio General Assembly passed, among other laws, an informed consent requirement and a waiting period, which together required that a woman seeking an abortion be given specific information at least 24 hours before her abortion. R.C. 2317.56. The law contained an exception from that requirement for medical emergencies, R.C. 2317.56(E), and created civil and disciplinary action for violations of the law's requirements and affirmative defenses in a civil action. R.C. 2317.56(H).

Then, in 1998, the General Assembly amended R.C. 2317.56 to require that a physician provide the informed consent information to the pregnant woman seeking an abortion "in person." *See* R.C. 2317.56(B)(1) (2005) ("in person requirement"). "The meeting need not occur at the facility where the abortion is to be performed or induced, and the physician involved in the meeting need not be affiliated with that facility or with the physician who is scheduled to perform or induce the abortion." *Id.*

In 2013, the General Assembly passed the Heartbeat Act, which required that, before an abortion, the "person who intends to perform or induce an abortion on a pregnant woman shall determine whether there is a detectable fetal heartbeat of the unborn human individual the pregnant woman is carrying," record certain findings in the woman's medical record, and give her opportunity to view or hear the heartbeat. R.C. 2919.191; R.C. 2919.192. The law also provided an exception in the event of a medical emergency, R.C. 2919.191(B)(1), and created both civil and disciplinary actions for failure to comply with the requirements of the section.

The Heartbeat Act imposed additional informed consent requirements on the doctors if a fetal heartbeat was detected: the doctor must inform the pregnant woman in writing of the fetal heartbeat, and "the statistical probability of bringing the unborn human individual possessing a fetal heartbeat to term based on the gestational age of the unborn human individual." R.C. 2919.192(A). The new enactment also made performing or inducing an abortion without providing the required information a first-degree misdemeanor for the first offense, and felony in the first degree for later violations of the law. These laws went into effect on September 29, 2013.

Then in 2019, the General Assembly made changes to these existing statutes. R.C. 2919.191, R.C. 2919.192, and R.C. 2919.193 were renumbered to R.C. 2919.192, R.C. 2919.194, and R.C. 2919.198, respectively. Several parts of newly renumbered R.C. 2919.192 were deleted, including (B)(1), (E)–(H), and reorganized that stricken language to create R.C. 2919.193. The only addition to the prior scheme was to make the failure to check for a fetal heartbeat before performing an abortion a crime—a felony in the fifth degree. R.C. 2919.193(A).

The 17 statutes altered or enacted went into effect on July 11, 2019, but enforcement of the laws was preliminary enjoined in federal court as conflicting with the then-existing *Roe* and *Casey* abortion regime. *See Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796 (S.D. Ohio 2019). Then on June 24, 2022, the United States Supreme Court issued its opinion in *Dobbs*, holding that the United States Constitution confers no right to abortion. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022). Ohio Attorney General Dave Yost filed an emergency motion to dissolve the federal court's preliminary injunction, which was granted that same day.

In reaction to *Dobbs* and the Heartbeat law, a proposed Amendment to the Ohio Constitution aimed at restoring *Roe* was placed on the November 2023 ballot. Proponents claimed it would restore *Roe* and the legal status quo that existed before the Supreme Court's decision in

*Dobbs*. The Amendment passed, enshrining a right to previability abortion in the state constitution. *See* Ohio Const. art. I, §22(B). Plaintiffs filed this lawsuit almost five months later.

**LEGAL STANDARD**

Ohio Civil Rule 65(B) empowers courts to issue preliminary injunctions in only limited circumstances. A preliminary injunction is a form of injunctive relief. And an "injunction is an extraordinary remedy in equity where there is no adequate remedy available at law. It is not available as a right." *Garono v. State*, 37 Ohio St. 3d 171, 173 (1988). Given the extraordinary nature of this relief, courts must "take particular caution in granting injunctions, especially in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important works or control the action of another department of government." *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgmt. Dist.*, 73 Ohio St. 3d 590, 604 (1995) (quotations omitted). "The purpose of both a temporary restraining order and a preliminary injunction is to preserve the status quo of the parties pending a decision on the merits." *State ex rel. Kilgore v. City of Cincinnati*, 2012-Ohio-4406 ¶21 (1st Dist.) (quotations omitted).

"In determining whether to grant a temporary restraining order, a trial court must consider [1] whether the movant has a strong or substantial likelihood of success on the merits of his underlying claim, [2] whether the movant will be irreparably harmed if the order is not granted, [3] what injury to others will be caused by the granting of the motion, and [4] whether the public interest will be served by the granting of the motion." *Coleman v. Wilkinson*, 147 Ohio App.3d 357, 2002-Ohio-2021 ¶2. The same standard governs motions for preliminary injunctions. *Castillo-Sang v. Christ Hosp. Cardiovascular Assocs., LLC*, 2020-Ohio-6865 ¶16 (1st Dist.) (citing *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267–268 (1st Dist. 2000)).

If a plaintiff "d[oes] not prevail on one of the required elements," of this four-element test, the court "need not consider the remainder of the elements." *Intralot, Inc. v. Blair*, 2018-Ohio-

3873 ¶47 (10th Dist.); *see also Aero Fulfillment Servs., Inc. v. Tartar*, 2007-Ohio-174 ¶¶23, 41 (1st Dist.). Furthermore, the Ohio Supreme Court has cautioned that a court "cannot employ equitable principles to circumvent valid legislative enactments." *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.*, 69 Ohio St. 3d 521, 526, 1994-Ohio-330 (1994).

## ARGUMENT

### I. Plaintiffs Fail to Establish a Likelihood of Success on the Merits.

#### A. The Clinics lack standing to challenge these laws.

Six of the plaintiffs in this case are organizations that operate abortion clinics in Ohio, and the only other plaintiff is a physician who manages one of those clinics and performs abortions. The Amendment provides that "the State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against" a person or entity assisting an individual seeking an abortion. Ohio Const. art. I, §22(B). But only the physician Plaintiff must comply with the challenged statutes, and only she can be penalized for the violations of those laws. The Clinics, then, lack standing to challenge any of the specified statutes.

To have this Court hear their claims, the Clinics must show that they have "suffered or [are] threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury." *Preterm-Cleveland, Inc. v. Kasich*, 2018-Ohio-441 ¶21 (internal citations removed). But standing "is not dispensed in gross . . . [r]ather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.* at ¶30. Even in cases with more than one plaintiff, each plaintiff must prove individual standing as to each of their claims. *Estate of Mikulski v. Centerior Energy Corp.*, 2019-Ohio-983 ¶60 (8th Dist.) ("Individual standing is a threshold to all actions, including class actions.)

In *Preterm-Cleveland v. Kasich,* Preterm, a plaintiff clinic (also a plaintiff in this case) filed a lawsuit challenging 2013 H.B. No. 59 on the grounds that "the Written Transfer Agreement Provisions (R.C. 3702.30, 3702.302 through 3702.308, and 3727.60), the Heartbeat Provisions (R.C. 2317.56, 2919.19 through 2919.193, and 4731.22), and the Parenting and Pregnancy Provisions (R.C. 5101.80, 5101.801, and 5101.804) violate the Ohio Constitution's single-subject clause." *Id.* ¶4 (emphasis added). The court held that Preterm could not be injured by the Heartbeat provisions because R.C. 2919.192 only applies to a person who performs or induces abortions, and "Preterm does not actually perform or induce abortions, so it cannot violate this statute." *Id.* at ¶26. The Court also found that R.C. 2919.191 could not injure Preterm "because it provides a possible civil action for the failure to satisfy its requirements, R.C. 2919.191(E), and it imposes duties only on persons who determine the presence or absence of a fetal heartbeat and who intend to and do perform or induce abortions, R.C. 2919.191(A) and (B)." *Id.* at ¶27. The Court concluded that Preterm lacked standing to challenge any of these statutes.

The original statutes considered in *Kaisch* and R.C. 2919.192, R.C. 2919.193, and R.C. 2919.194 are substantially the same today. The only differences are the additions of a criminal penalty for performing or inducing an abortion before checking for a fetal heartbeat and a requirement that the pregnant woman sign a form that she was provided the information required in R.C. 2919.194(A)(2). These amendments to the original law do not change the outcome here. *Kaisch* is controlling here. The Clinics lack standing to challenge the Heartbeat provisions. That analysis is equally conclusive as to R.C. 2317.56, which imposes certain informed consent requirements on the physician or the physician's agent, allowing civil and disciplinary actions only against the physician that performed or induced the abortion. R.C. 2317.56(G).

Because courts have no jurisdiction to enter relief for parties that lack standing to sue, see *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 918 n.6 (9th Cir. 2004), *Kaisch* bars the Court from awarding injunctive relief to the Plaintiff Clinics.

**B. The only remaining Plaintiff, Dr. Romanos, also lacks standing.**

The remaining Plaintiff, Dr. Romanos, also lacks standing and thus cannot succeed on her claims. No party in this case has asserted a claim based on the individual right to obtain an abortion created by the Amendment. Though the Amendment does create rights for both the individual woman and a person or entity that assists her in exercising her right, the Amendment does not address who can assert a violation of a right, so traditional standing principles apply. The general rule in Ohio is that "a litigant must assert its own rights, not the claims of third parties." *Util. Serv. Partners v. PUC*, 124 Ohio St. 3d 284, 2009-Ohio-6764 ¶49. "Third-party standing is not looked favorably upon, but it may be granted when a claimant (i) suffers its own injury in fact, (ii) possesses a sufficiently close relationship with the person who possesses the right, and (iii) shows some hindrance that stands in the way of the claimant seeking relief." *Id.* (cleaned up). Here, Plaintiffs have not even attempted to make this required showing for third-party standing, and she cannot proceed based on her own alleged harms.

**C. The Abortion Amendment was adopted to restore the pre-*Dobbs* legal regime, under which the challenged laws already have been upheld.**

Under settled Ohio Supreme Court precedent, courts consider the context of a constitutional amendment's enactment to determine the voters' intent and thus the amendment's meaning. Here, Ohio's Abortion Amendment was enacted in reaction to the U.S. Supreme Court's *Dobbs* decision, which overruled *Roe v. Wade* and *Planned Parenthood v. Casey* and held that the federal courts would no longer dictate abortion policy to the States. *Dobbs*, 142 S. Ct. 2228 (2022); *Roe*, 410 U.S. 113 (1973), *Casey*, 505 U.S. 833 (1992). This context shows that the Amendment was

meant to restore the pre-*Dobbs* legal regime—a regime that allowed and upheld Ohio's waiting period, in person, and informed consent provisions.

**1. Ohio courts ascertain a voter-approved constitutional provision's meaning by reviewing the text along with the voters understanding of the amendment.**

In reviewing any constitutional provision, the Ohio Supreme Court "consider[s] first the terms of the constitutional provision." *State v. Carswell*, 114 Ohio St. 3d 210, 2007-Ohio-3723 ¶11. The Court has described its textual review as "generally appl[ying] the same rules when construing the Constitution as it does when it construes a statutory provision, beginning with the plain language of the text, and considering how the words and phrases would be understood by the voters in their normal and ordinary usage." *City of Centerville v. Knab*, 162 Ohio St. 3d 623, 2020-Ohio-5219 ¶22 (internal citation omitted).

The Court has framed voter understanding both as voter "intent" and as "understanding." Both descriptions make sense: If the voters understood the meaning to be X, and approved it in light of that meaning, then it can also be said that they intended X. "[W]e consider how the language would have been understood by the voters who adopted the amendment." *Id.* "It is the duty of the court to ascertain and give effect to the intent of the people." *State ex rel. Sylvania Home Tel. Co. v. Richards*, 94 Ohio St. 287, 294 (1916). The Court "consider[s] how the words and phrases would be understood by the voters in their normal and ordinary usage." *Centerville*, 2020-Ohio-5219 ¶22.

As the Court explained recently in *Centerville* (in 2020), "in ascertaining the intent of the voters," the "inquiry must often include more than a mere analysis of the words found in the amendment." *Id.* "The purpose of the amendment and the history of its adoption may be pertinent in determining the meaning of the language used. When the language is unclear or of doubtful meaning, the court may review the history of the amendment and the circumstances surrounding

its adoption, the reason and necessity of the amendment, the goal the amendment seeks to achieve, and the remedy it seeks to provide to assist the court in its analysis." *Id.* (internal citations omitted).

In various cases, the Court has looked not only at ballot language, and at the official arguments for and against, but broadly at the terms of public debate. *Beaver Excavating Co. v. Testa*, 134 Ohio St. 3d 565, 2012-Ohio-5776 ¶¶19–21 (detailed look at official ballot arguments); *Centerville*, 2020-Ohio-5219 ¶30 (broader public debate). For example, in *Centerville*, the Court examined the "Marsy's Law" victim-rights amendment to determine if a municipal corporation could be a "person" and thus a crime victim with rights. The Court referred broadly to the "national victims'-rights movement" and the Marsy's Law national-effort website, and without further citation, said that "Ohio voters were told that Marsy's Law would" do certain things, but that "nothing surrounding the national Marsy's Law movement or the Ohio Marsy's Law initiative [] suggest[ed] that the voters understood and intended that a public corporation would be a victim." *Id.* at ¶30.

The Court has also shown special solicitude in trying to avoid invalidating statutes that were not plainly intended to be overridden. In *Carswell*, the Court examined whether the then-new Defense of Marriage Amendment (DOMA) invalidated a domestic-violence statute. That statute defined "domestic violence" to include violence against an unmarried victim "living as a spouse" in a household with the offender. R.C. 2919.25(F); *Carswell,* 2007-Ohio-3723 ¶3. DOMA barred not only same-sex marriage, but also prohibited "creating or recognizing a legal status for unmarried persons that 'intends to approximate the design, qualities, significance or effect of marriage.'" *Id.* at ¶11 (quoting Ohio Const. art. XV, §11, since invalidated by *Obergefell v. Hodges,* 576 U.S. 644 (2015)). The textual argument was straightforward: the statutory treatment of people

based on "living as a spouse" amounted to "creating or recognizing a legal status" that approximated marriage.

But the Court held that the statute survived, for several reasons. It stressed that the amendment did not explicitly "repeal" the statute, and that "repeals by implication are disfavored." *Carswell*, 2007-Ohio-3723 ¶8. It explained that it needed to preserve the statute unless it was "clearly incompatible and irreconcilable" with the amendment. It reviewed both the statutory and constitutional provisions, and the intent behind each, and found no such stark incompatibility, so it upheld the statute. *Id.* at ¶¶35–37.

The Court in these and other cases also looked at the caselaw defining the terms in the amendments, along with the caselaw dealing with the statutes alleged to be in conflict. Voters, just like legislators in other cases, are "presumed to have had in mind existing constitutional or statutory provisions and their judicial construction, touching the subject dealt with." *Carswell*, 2007-Ohio-3723 ¶6 (quotations omitted). The *Carswell* Court, for example, "proceed[ed] with the presumption, notwithstanding the absence of any empirical data to support it, that the drafters of the proposed constitutional amendment and the voters who approved it knew of the domestic-violence statute and that its purpose is the protection of persons from acts of domestic violence." *Id.*

**2. Voters approving the amendment were told that it restored the pre-*Dobbs* regime, while dissenting views about broader implications were dismissed.**

As explained above, the Ohio Supreme Court looks to voters' understanding of a constitutional provision adopted at the ballot box. To be sure, in some cases, that is straightforward, while in other cases, it is more complicated. At first blush, this case might seem a difficult one, as the debate over the Amendment's adoption included conflicting claims about what the Amendment meant or what it would actually do. However, a review of the debate shows a clear pattern: Voters were primarily told, by the dominant and successful voices, that the Amendment would restore the

status quo. By contrast, those who argued that the Amendment had broader effects—that is, opponents of adoption—were dismissed by many highly visible sources, and their views were even labeled as "false information." Thus, the dominant view carried the day.

For example, Ohio's League of Women Voters—long a big player in telling voters what ballot proposals mean—told Ohioans that the Amendment would restore the pre-*Dobbs* status quo. *See Facts on November's Issue 1*, League of Women Voters of Ohio, www.lwvohio.org/factsonnovembersissue1 (last accessed on 04/30/2024). For example, the League said that "a 'yes' vote supports amending the Ohio Constitution to restore the right to an abortion." *Id.* It said that if the amendment passed, "[a]bortion would go back to being legal up until viability of the fetus -- as it had been for nearly half a century since *Roe v. Wade*." *Id.* It even described the Amendment's legal standard as tracking *Roe*'s, saying the "amendment maintains the standard set by the 1973 Supreme Court decision *Roe v. Wade*, which prohibits abortion after viability" but otherwise allows them. *Id.* The League supplemented those points on its webpage with a summary sheet of information called "VOTE 411," using the phone number (411) signifying information. www.lwvohio.org/_files/ugd/82d68a_72b4751a8ef34eff997a6cc92b90c4b2.pdf. That summary listed "pros" and "cons" of the Amendment, naming as the first and second "pro" items that "[t]his amendment would restore the rights and protections for Ohioans that were eliminated by the U.S. Supreme Court's 2022 decision (*Dobbs v. Jackson Women's Health Organization*)" and that "[t]he amendment would restore rights and protections for Ohioans that were guaranteed in 1973 by a U.S. Supreme Court decision (*Roe v. Wade*)." *Id.*

Legal scholars interviewed by the media likewise spoke consistently of restoring the pre-*Dobbs* legal regime. For example, Ohio's Capital Journal interviewed Case Western Law School professor Atiba Ellis, described as a "[n]onpartisan legal expert" as well as a law professor. Ellis

said that "[t]he constitutional amendment would likely put us back into the status quo of the law before the US Supreme Court changed the configuration of things by overruling *Roe*." Morgan Trau, *What is Ohio Issue 1? We explain the proposed abortion rights amendment*, Ohio Capital Journal (Oct. 19, 2023), https://perma.cc/2D8J-VUHZ. Similarly, another law professor said that "[t]he amendment is almost identical to *Roe v. Wade*." Associated Press, *Ohio votes on abortion rights this fall. Misinformation about the proposal is spreading*, Spectrum News (Oct. 11, 2023), https://perma.cc/ZN7D-5789.

Notably, such statements about restoring *Roe* were often paired with assertions that those who said the Amendment went further were not just mistaken but were sowing "misinformation." For example, an Associated Press article was entitled, "Ohio votes on abortion rights this fall. Misinformation about the proposal is spreading." *Id.* Under a subheading saying that "PROPOSED AMENDMENT SIMILAR TO *ROE V. WADE*," the article said that "[a]nti-abortion advocates have claimed the proposed measure would go further than *Roe v. Wade*, making it impossible to pass any abortion restrictions." *Id.* The article continued, "[b]ut legal experts say that is not true and that the amendment uses almost verbatim language from the now-overturned Supreme Court decision that had granted a constitutional right to abortion." *Id.* It then quoted Professor Cohen, above, reiterating that the Amendment restored the *Roe* standard.

The upshot of all these voices is this: the dominant understanding was that the Amendment would "restore Roe," and that warnings of broader effects were dismissed as overblown. To the extent the competing views conflicted, common sense suggests that courts should look to the winning side, not to dire warning from the losing side, as by definition, most Ohioans did not adopt the losing view. For the same reason, we often look to The Federalist Papers, written by the U.S.

Constitution's advocates, to understand the Constitution's meaning—we do not look to the opposition Anti-Federalists for the same insights.

Notably, Plaintiffs cite the Ohio Attorney General's legal analysis of the Amendment and its impact, but that analysis does not support the invalidation of the laws challenged here, for several reasons. First, that analysis specified that the laws challenged here would be challenged, with uncertain effects, saying that "[i]t is possible to foresee a court decision" invalidating these laws. *Issue 1 on the November 2023 Ballot: A legal analysis by the Ohio Attorney General*, https://perma.cc/TM6B-5FV7. Second, saying that the laws would be challenged, or even that courts might agree with challengers, does not mean that that would be the *proper* legal outcome, only that it might happen anyway. After all, the lesson of *Dobbs,* now that it is the law of the land, is that *Roe* was wrongly imposed for almost fifty years.

Finally, the Attorney General's analysis was published on October 5, 2023, before the final month of the fall campaign. So it did not have the benefit of the public discussion over the new law's meaning. Ohio law is well-settled on looking to the debate, but the Attorney General could not have cited the entire October wave of reassuring the public that no such broader effects arose from the Amendment, and that it was merely "restoring *Roe*" after all.

In sum, the best view of the Amendment is that it did just what voters were told: It restored the pre-*Dobbs* legal regime.

**3. The challenged laws survive under this restored pre-*Dobbs* regime.**

Each of the laws challenged in this case were also challenged as violating a woman's right to a pre-viability abortion and were held not to burden that right under the *Roe/Casey* regime. Since the Amendment was enacted to reinstitute *Roe/Casey's* protections as the governing law in Ohio, these laws remain valid under the Amendment. That is sufficient to deny Plaintiffs' motion, but for the additional reasons below, Plaintiffs are not entitled to any preliminary relief.

The original enactment of R.C. 2317.56's waiting period requirement has already survived constitutional scrutiny under the *Roe/Casey* regime. The law was challenged several months after it went into effect on the grounds that it violated both the Ohio and U.S. Constitutions. *Cleveland v. Voinovich*, Franklin C.P. No. 92CVH01-528, 1992 Ohio Misc. LEXIS 1 (May 27, 1992). The trial court declared §§ 2317.56(A)–(H) unconstitutional under the state and federal constitutions, and permanently enjoined the law. *Id.* The State appealed, and while the case was pending in the 10th District Court, the U.S. Supreme Court announced its decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The appellate court reversed the decision of the trial court because it was "unable to distinguish the Ohio statutes from the Pennsylvania statutes" that were upheld in *Casey*. *Preterm Cleveland v. Voinovich*, 89 Ohio App.3d 684, 696 (10th Dist. 1993). The court held that R.C. 2317.56(B) "does not directly regulate the right of a woman to have an abortion but, instead, places certain duties upon a physician and prohibits the physician from performing an abortion" unless certain information is provided to the pregnant woman at least 24 hours prior to the abortion. *Id.* at 695. Those duties do not prevent doctors from performing or inducing abortions, but the requirements ensure that the woman seeking an abortion is acting voluntarily after sufficient consideration of the required information the State deems necessary for proper informed consent for that procedure.

Plaintiffs say that "[w]hile, on paper, the waiting period requirement imposes a 24-hour delay between a patient's receipt of state-mandated information at their first appointment and their abortion, R.C. 2317.56, in practice, patients are often forced to wait much longer." But the fact that patients often wait longer than 24 hours is *not* because of the law, but rather is attributable to several factors outside of the State's control. Some of the delays are related to business decisions made by the Plaintiff Clinics. They admit as much in the example they provide in their Motion:

> For instance, WMCD and Preterm only provide certain procedural abortions in the morning due to the need for fasting with sedation and anesthesia and the need to monitor the patient after the procedure. Thus, if a patient presents for their first informed consent visit in the afternoon, they cannot return until at least two days later because the next available morning abortion appointment would be less than 24 hours later.

PI Mot. at 11, fn5. Nothing in the law limits Plaintiffs ability to provide procedural abortions in the afternoon, so any additional delay is attributable to Plaintiffs. They further say that women from other states seeking abortions at their clinic make it far more difficult for Ohioans to schedule appointments for abortions. Romanos Aff. §41.

Many of these same arguments were made against the waiting period law upheld in *Casey*:

> [T]he findings of fact . . . indicate that because of the distances many women must travel to reach an abortion provider, the practical effect will often be a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor. [I]n many instances this will increase the exposure of women seeking abortions to "the harassment and hostility of anti-abortion protestors demonstrating outside a clinic." As a result, . . . for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be "particularly burdensome."

505 U.S. at 885–886. Those arguments were unpersuasive in *Casey* and are equally unavailing here.

Like the waiting period requirement, the in-person requirement also already survived a constitutional challenge under the *Roe/Casey* regime. *See Cincinnati Women's Servs. v. Taft*, 468 F.3d 361, 372 (6th Cir. 2006). In that case, plaintiffs attempted to show the Ohio's in-person informed consent requirement burdened abortion rights by collecting what the court deemed "an impressive amount of data, akin to the data available in *Casey* on the issue of spousal notification." *Id.* Despite that substantial evidence, the court held that the in-person requirement did not create a substantial burden on an abused women's ability to obtain an abortion. *Id.* at 373 (citing *A Woman's Choice—East Side Women's Clinic v. Newman*, 305 F.3d 684, 699 (7th Cir. 2002) (Coffey,

J. concurring) ("[I]t is clear [from *Casey*] that a law which incidentally prevents 'some' [of the] women [for whom the abortion restriction will actually be a burden] from obtaining abortion passes constitutional muster.")). That determination was made considering the entire legal procedure at issue here (waiting period, informed consent, and in person requirements), and was nonetheless held to be valid and constitutional.

As for informed consent, Ohio women now have a constitutional right to make the decision to have an abortion, and the State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against . . . [a]n individual's *voluntary* exercise of this right." Art. I, § 22. But Ohio's informed consent requirement comports, rather than conflicts, with the Amendment because it ensures that every woman exercising her right to abortion does so voluntarily.

The Ohio Supreme Court has said that "voluntarily" means "[d]one by design or intention, intentional, proposed, intended, or not accidental. Intentionally and without coercion." *Rock v. Cabral*, 67 Ohio St. 3d 108, 111 n.2 (1993), quoting *Black's Law Dictionary* 1575 (6th ed.1990). The purpose of fully informing woman seeking abortion of all the required information is to ensure that she makes her choice voluntarily.

No one in Ohio, of sound mind and of the age of majority, can undergo any medical procedure without having first been provided certain information: "[t]he doctrine of informed consent is based on the theory that every competent human being has a right to determine what shall be done with his or her own body." *Ullmann v. Duffus*, 2005-Ohio-6060 ¶27 (10th Dist.) (citing *Siegel v. Mt. Sinai Hospital*, 62 Ohio App.2d 12 (1978)).

Dr. Romanos further asserts that "patients are also forced to receive state-mandated information that is not only irrelevant to their provision of informed consent, but also may be

distressing, stigmatizing, or even misleading." Romanos Aff. ¶13. She further claims that this information is biased, and even potentially harmful, distressing, and/or misleading." *Id.* at ¶70. She claims that the existence of a fetal heartbeat is medically irrelevant for patients choosing abortion. *Id.* Dr. Romanos also claims that the "state produced materials, which R.C. 2317.56 requires to be provided to patients at least 24 hours in advance of the abortion, presents information to patients in a misleading manner that is at best irrelevant, or worse potentially painful or traumatic information solely meant to shame them into not obtaining an abortion." Romanos Aff. ¶72.

Plaintiff's claim that "patients be informed of the existence of embryonic or fetal cardiac activity, offered an opportunity to see or hear it, and then provided with statistics on the probability of carrying to term based on gestational age are not necessary for informed consent and serve no medical purpose." PI Mot. at 20–21. That is simply not true. For example, the American College of Surgeon states that informed consent for surgical procedures should include discussion of "[t]he nature of the illness and the natural consequences of no treatment[,] the nature of the proposed operation,' and "alternative forms of treatment, including nonoperative ones." *Statements on Principles*, American College of Surgeons, (Apr. 12, 2016), https://perma.cc/JMG9-PXTM. While the "surgeon should listen carefully to understand the patient's feelings and wishes," those feelings and wishes do not excuse the surgeon from the requirement to "fully inform the patient about his or her illness and the proposed treatment." *Id.*

Equally untrue is Plaintiffs contention that these requirements are "discriminatory, as no other provider of medical care is subject to state-imposed penalties for failing to provide [required

information]."[1] First, Ohio common law has long had a cause of action for lack of informed consent in tort. *White v. Leimbach*, 131 Ohio St. 3d 21, 2011-Ohio-6238 ¶46. Second, the Ohio Medical Board may take disciplinary action against a physician for failing to obtain informed consent. *See* R.C. 4731.22(B)(6)*; see also Parks v. Ohio State Med. Bd.*, 2008-Ohio-3304 ¶3 (10th Dist.) (suspending a physician's license to practice medicine for six months). And finally, Plaintiffs insinuate that doctors who provide abortions are singled out for discriminatory treatment by requiring they provide information for consent that no other doctor is required to provide, but a far higher requirement is placed on the chief medical officer of an institution for persons with intellectual disabilities. R.C. 5123.86 ("the chief medical officer shall provide all information, including expected physical and medical consequences, necessary to enable any resident of an institution for persons with intellectual disabilities to give a fully informed, intelligent, and knowing consent"). But even if doctors that perform abortions are subject to legal requirements that the rest of the medical community is not, it is because "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980).

As the *Casey* decision explained, "at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so." *Casey,* 505 U.S. at 877. *Casey* noted that "there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman

[1] Plaintiffs' characterization of this information as "medically irrelevant and potentially harmful and misleading" to their patients is unsupported at best—and at worst, it is evidence that without these legal requirements, their patients would not be given any of the required information. That is why "certain medical groups' views regarding whether a particular mandated truthful disclosure is necessary for informed consent—is not the type of evidence deemed material by the Supreme Court in reviewing abortion-informed-consent statutes." *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 438 (6th Cir.2019).

seeking an abortion." 505 U.S. at 884. In reality, informed consent provides no obstacle at all to a woman seeking an abortion, or to a physician performing one.

Plaintiffs admit that "the overwhelming majority of Plaintiffs' patients arrive at the clinic already firm in their decision to end their pregnancy," PI Mot. at 10, and despite her objections to the challenged statutes, Dr. Romanos readily admits that it is her experience that "none of the Challenged Requirements make any difference for patients and their decision-making process." Romanos Aff. ¶36. While this admission would generally render inert Dr. Romanos' assertions of the grave harm the legally required information inflicts upon her patients, such assertions are irrelevant here because the only harm this Court can consider are those experienced by Dr. Romanos. But because she has failed to prove harm, the inquiry can end here.

Finally, the requirement to check for a fetal heartbeat before an abortion in no way acts to prevent any abortion, and indeed, Plaintiffs have long admitted that they easily complied with that law for years. The General Assembly's decision to include this as part of the informed consent requirements for an abortion procedure is a sound one: "the Supreme Court has explained that the effect of an abortion procedure on unborn life is relevant, if not *dispositive*" information for the patient's decision. *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 430 (emphasis added) (quoting *Casey,* 505 U.S. at 882). Checking for a fetal heartbeat not only confirms the pregnancy but also aids the woman seeking an abortion in fully understanding her condition as well as that of the unborn life she carries. "So '[t]o belabor the obvious and conceded point,' the disclosures of the heartbeat, sonogram, and its description "are the epitome of truthful, non-misleading information." *Id.* (quoting *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012)).

## II. Plaintiffs Fail to Establish the Remaining Factors Necessary for a Preliminary Injunction.

### A. Enjoining the waiting period, in person, and informed consent statutes would contravene rather than preserve the status quo.

"The primary goal of preliminary injunctive relief 'is to preserve the status quo pending final determination of the matter.'" *Thomson v. Ohio Dept. of Rehab. & Correction*, 2010-Ohio-416 ¶24 (10th Dist.) (citing *Ohio Urology, Inc. v. Poll* 72 Ohio App.3d 446, 454 (1991)); *Dunkelman v. Cincinnati Bengals, Inc.*, 158 Ohio App.3d 604, 2004 Ohio 6425 ¶45 (the "purpose of a preliminary injunction is to preserve the status quo of the parties pending a decision on the merits").

The statutes challenged by Plaintiffs here represent the status quo in Ohio: the waiting period and informed consent requirements have been the law for almost 33 years, the in-person requirement for 26 years, and the Heartbeat requirement for over a decade. Physicians who perform abortions have been required to comply with these laws for more than a decade, and Dr. Romanos admits she has complied with the various requirements of these laws in the decade since she became licensed to practice medicine in Ohio. Despite her personal objections to them, she does not claim that she violated any of these legal requirements, nor has she alleged to have been subjected to any of the enforcement actions provided in these statutes.

Because these statutes are the legal status quo, any order enjoining their enforcement would be improper because such an injunction would alter the decades-long status quo rather than preserving it. The 10th District recently vacated a similar injunction barring enforcement of a statute that was in effect for years because the order contravened the purpose of granting such preliminary relief. *City of Columbus v. State*, 2023-Ohio-2858 ¶53 (10th Dist.) ("because the trial court enjoined the State from enforcing [a statute] years after that statute became controlling law, the preliminary injunction instead contravened the status quo.") That court determined that in such

case, there exists "an adequate remedy at law—in the form of a permanent injunction against [the challenged law] or a declaration of its unconstitutionality following a trial on the merits—was available to the [plaintiff] when the preliminary injunction was issued, especially because the amended version of R.C. 9.68 has already been in effect for three and one-half years." *Id.* at ¶60. That same principal applies in this case, but with greater force: if a preliminary injunction contravenes the status quo to such an extent as to invalidate the injunction of a challenged statute that has been the controlling law for three and one-half years, how much more so would that be true for a statute that has been in effect for over thirty years?

This Court should preserve the status quo and deny Plaintiff's Motion for Preliminary Injunction.

**B. Plaintiffs fail to establish that they have been irreparably harmed.**

"'Irreparable harm' is an injury for which, after its occurrence, there could be no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete." *City of Columbus,* 2023-Ohio-2858 ¶19. "A showing of irreparable harm requires proof of actual irreparable harm or the existence of an actual threat of such injury." *Id.*

Plaintiffs' motion claims that their patients have been irreparably harmed by the challenged laws, both for the violation of their constitutional right to an abortion and from harms to their physical and mental health. But they cannot assert the rights of their patients here, nor can they use their patients' purported injury as a substitute for their own irreparable injury. Plaintiffs' do claim that they "have suffered and will continue to suffer the emotional and moral distress that arises form being forced to act contrary to the standard of care, evidence-based medical practice, and their ethical duties, and the ensuing loss of patient trust." Noticeably absent is any assertion that these harms constitute irreparable harm. PI Mot. at 34. But since the Clinics lack standing, only Dr. Romanos' claims are relevant here.

Dr. Romanos claims these statutes harm her in a variety of ways in her affidavit: "it can be deeply upsetting as a provider to force my patient to remain pregnant" and being "not able to use my best medical judgment," ¶77; "delayed care and the provision of irrelevant, and potentially distressing or misleading information prevents me from providing the best care possible," "impacts her ability to develop a trusting relationship and rapport," and "forces me to act as a mouthpiece for the state," ¶78; and "creates obstacles to establishing trust with my patients and is devastating for me as a physician," ¶79. She nowhere asserts that these "harms" meet the legal standard of irreparable harm. Dr. Romanos not only failed to allege that she has been irreparably harmed, she failed to prove she was irreparably harmed by clear and convincing evidence.

But none of these claims demonstrate irreparable harm, and, in a very similar case, *EMW Women's Surgical Ctr., P.S.C. v Beshear*, 920 F.3d 421, the Sixth Circuit rejected similar arguments related to: interferences with the Doctor-Patient relationship (436-40), ideological speech (434-36); providing information regarding pregnancy and the fetus and the standard of care (429-432); and emotional effects on patients (440-44). Dr. Romanos has not proven through clear and convincing evidence that the information required for informed consent under Ohio's laws is misleading, or that she is harmed by it.

But fatal to her motion is her failure to demonstrate imminence. *City of Columbus,* 2023-Ohio-2858 ¶52 ("a movant's failure to show it is facing imminent and irreparable harm can, by itself, justify the denial of injunctive relief without consideration of the other three factors."). Absent any showing imminent harm, such an extraordinary remedy is unjustified "when adequate relief can otherwise be granted—e.g., permanent injunction or declaratory relief, as also sought by the [Plaintiff] here—at the close of litigation and following a trial on the merits." *Id.* at ¶51.

Though the Amendment was passed in November, Plaintiffs waited months to file this case. And even now, Plaintiffs have largely relied on their patients' harm irrespective of any imminent need for extraordinary relief. Without standing, the Clinics cannot challenge these laws, and without harm, Dr. Romanos cannot obtain any preliminary relief from this Court.

**C. Others will be harmed if the Court enjoins these health and safety laws.**

If these laws are enjoined, the risk to Dr. Romanos' patients is obvious. Based on her position that information about the presence of a fetal heartbeat for women seeking abortion, it is unlikely Dr. Romanos will inform her patients about any of the information required by the State. And because the U.S. Supreme Court has said that "the effect of an abortion procedure on unborn life is 'relevant, if not dispositive' information for the patient's decision,'" we can conclude that woman who choose to have an abortion without fully understanding the realities of both her condition and the abortion procedure will suffer harm if these laws are enjoined. *See Casey,* 505 U.S. at 882. And States always suffer irreparable harm when their constitutionally permissible laws are enjoined. *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020) (*per curiam*). Enjoining these laws, having been the law in Ohio for decade and already determined to be constitutionally permissible, will thus harm the State.

**D. A preliminary injunction of the challenged laws will harm the public.**

Before entering a TRO or preliminary injunction, a court must assess two other factors: "what injury to others will be caused by the granting of the motion, and whether the public interest will be served by the granting of the motion." *Coleman*, 2002-Ohio-2021 ¶2. For private parties, those two factors can vary. But when it comes to enjoining the enforcement of State laws, however, those two factors overlap and even merge: harm to the State *is* harm to the public interest, because the General Assembly is democratically elected to represent the public interest of the State as a whole.

Courts have often noted that injunctions against duly enacted laws are a harm to the government and thus to the public interest. *Abbott v. Perez*, 585 U.S. 579, 602 & n.17 (2018); *see Maryland v. King*, 567 U.S. 1301, 1303 (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (per curiam). Whenever a state is "enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *King*, 567 U.S. at 1303 (Roberts, C.J., in chambers).

Enjoining the provisions that protect pregnant patients would irreparably harm the public interest.

## CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' Motion for Preliminary Injunction.

Respectfully Submitted,

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I certify the foregoing was submitted for filing on May 1, 2024, via the Court's electronic filing system, which will cause the following to be served.

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